



Sale of Lion Dairy and Drinks – not in Australia’s national interest

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By: Lyndon Masters | Alexander Samson

On Tuesday 25 August 2020, the Treasurer of Australia announced that the proposed sale of Lion Dairy and Drinks Pty Ltd (Lion Dairy) to China Mengniu Dairy Company Limited (China Mengniu) would not be within Australia’s “national interest”, effectively blocking the transaction.

Kirin Holding Co (Kirin) and China Mengniu entered into the transaction to sell Lion Dairy in November 2019, at a reported sale price of approximately AUD430 million. Kirin and China Mengniu have now terminated the transaction as a result of the Australian Treasurer’s announcement.

What is the National interest test?

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) enables the Australian Treasurer to prohibit foreign investment if deemed not to be within the national interest. However, it is presumed that all foreign investment is beneficial. Although “national interest” is not defined in the FATA, the Treasurer of Australia typically considers the following factors when considering whether a proposed foreign investment is within Australia’s national interest:

- National security;
- Competition;
- Other Australian government policies, including tax;
- Impact on the economy and the community; and
- The character of the foreign investor.

The details of how the Australia Treasurer reached the decision to block the transaction are not published. Similarly, applications to the Foreign Investment Review Board (FIRB) (and supporting content) are not publicly available.

Given the transaction is reported to have received approval from the Australian Competition and Consumer Commission early this year, it appears that the decision to block this transaction was based on the identity of the buyer, being a Chinese entity, and the fact that the acquisition was occurring in the sensitive sector of agriculture. In this respect, transactions in the agricultural sector have received significant attention and scrutiny by the Australian Government, over the past couple of years, with the Australian government maintaining a policy that this asset class is important to Australia’s national interest (including food security interests).

The decision to block this transaction follows on from a number of recent decisions that blocked other proposed transactions involving Chinese investors or buyers (for example, Hong Kong's Cheung Kong Infrastructure's proposal to buy gas distributor APA Group, CKI and China's State Grid Corporation proposal to buy half of NSW power distributor Ausgrid and China's Jangho Group unsolicited bid to acquire Healius), as well as the introduction of temporary changes made to the Australian FIRB regime on 29 March 2020 in response to Covid-19.

The temporary changes reduce all FIRB screening thresholds to AUD0, the effect of which is that the majority of foreign investments in Australia are now notifiable to FIRB. The temporary changes are described by FIRB as being a necessary measure to ensure that, normally viable Australia business which become distressed as a result of COVID-19, are not acquired by foreign interests without government oversight.

Further details of the temporary changes can be viewed [here](#).

What is the impact of this decision on foreign investors?

The trade relationship between China and Australia continues to be strained, as evidenced by the actions taken by China with Australian exports of coal, barley, beef and wine since 2019. Although every notification to FIRB is considered on its merits, until such time as diplomatic relations between China and Australia improve, we expect that Chinese proposals to invest in Australian businesses (particularly in the sensitive sectors of agriculture, technology/data, strategic infrastructure and energy and rare minerals) will continue to be subject to a high level of scrutiny by the Australian Treasurer.

With these factors in mind, Chinese investors should factor in to any investment decision the risk that the Australian Treasurer may ultimately block proposed investments in sensitive asset classes. We expect that this risk will become a relevant consideration to vendors looking to dispose of Australian assets, or Australian companies seeking foreign investment. The lack of perceived deal certainty with Chinese counterparties may result in Chinese bidders being passed over unless they already hold FIRB approval, even when their offer provides the best value.

Parties transacting with Chinese firms, in circumstances where FIRB approval is required, may also want to consider using non-refundable deposits and break fees to compensate them for the risk that the transaction may not proceed due to a failure to obtain FIRB clearance. Whether this is obtainable will depend upon the competitive tension in the relevant process. We would also be recommending early engagement with FIRB on any transaction that may involve foreign buyers, not just Chinese buyers. Throughout the COVID-19 period, we have found FIRB to be very receptive to early engagement and have been happy to provide early guidance about particular national interest issues and considerations with respect to particular transactions.

New FIRB regime

Foreign investors in Australia should be mindful that the Australian government has announced proposed changes to the existing FIRB regime, intended to replace the temporary changes introduced in response to COVID-19. The new regime is intended to come into effect in January 2021.

The amended FIRB regime, if it becomes law, will:

- Introduce a new “national security” test to require foreign investors to seek approval for acquisitions of direct interests (10% or more or which provides control) in a ‘sensitive national security business’ regardless of the value of the investment. This will exist alongside the “national interest” test.
- Introduce a new “call in” power enabling the Australian Treasurer to review foreign investments that raise national security risks before, during or after the investment.
- Introduce a new “last resort” power enabling the Australian Treasurer to reassess previously approved foreign investments where subsequent national security risks emerge.
- Introduce a new register of foreign ownership of Australian land, water, businesses and other assets to be administered by a Commonwealth body to be appointed by the Treasurer.

We will provide further updates on these proposed changes and their impacts on transaction processes and bidder risk, following confirmation of the proposed changes and new regime by the Australian government.

Further details can be viewed [here](#).

Please contact any of the authors or your usual DLA Piper contact if you would like to discuss any of the proposed amendments and how they could impact on foreign investment in Australia.

AUTHORS



Lyndon Masters

Partner

Brisbane | T: +61 7 3246 4000

lyndon.masters@dlapiper.com



Alexander Samson

Senior Associate

Brisbane | T: +61 7 3246 4000

alexander.samson@dlapiper.com
