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Is It Justified for China to Restrict Takeover by Foreign Investors?

For more information,
please contact:



Fei Guoping
Senior Partner,
feiguoping@longandfield.com

By Fei Guoping

Upon the promulgation of the regulation permitting foreign investors to invest in PRC listed companies, leading players in several sectors were immediately acquired by foreign investors. The so called Three Must standard regulating foreign takeovers of domestic enterprises startled the domestic market. Ironically, overseas acquisition by Chinese enterprises encountered hurdles time and again, most recently China International Marine Containers (Group) Ltd. (CIMC). CIMC's takeover of a Dutch company is now under review by the EU's competition commission. CNOOC and China Minmetals Cop. were confronted with this kind of review earlier. A senior official of the central government, the former director general of the National Bureau of Statistics Li Deshui, proposed that any malicious takeover aimed at creating a monopoly should be addressed firmly. These words appear to be the government's positive response to the calls of this society's conservative population, while the society is undergoing a fierce debate. Bearing in mind that the enactment of the Property Law is postponed again recently due to the same conservative comments, it is prudent to predict that the foreign takeover policy is likely to slip to the left wing.

Review Regime, Requisite?

The different treatment faced by Chinese companies and their foreign counterparts in terms of overseas acquisition has aroused strong nationalism in China, leading to an increasingly popular demand for the restriction on foreign investors' when taking over of Chinese companies. The issue has received wide spread media coverage, with examples such as "Lucky" and "MAXAM" repeatedly appearing in newspapers, magazines and websites. It is highly possible that the unlimited use of "National Economic Security" will cause a negative impact on foreign takeover policies or even the overall foreign investment policies. Hence, we should take the fierce debate that has raged so far seriously.

China's economic growth has never been more dependent on the foreign investors, and this trend is set to continue. In 2005, foreign investment and exports contributed a huge portion to the growth of China's GDP. It is not

unnecessary to worry about the whole control of domestic industries by foreign investors. It is always the case that a well established Chinese brand will be replaced by a foreign one after a domestic enterprise has been acquired by foreign investors. Further, the management experiences, technology, and capital of the acquired enterprise are all controlled by those foreign investors. Those who care about China's national industry can't help but worrying about external involvement. In the United States, the problem of outsourcing was once at the center of public debate. It is the same ordinary outsourcing that caused the current fierce debate and reflection on foreign takeovers in China. In China, we are now, ironically, outsourcing our core competence, brand, management experience and technology to those foreign investors

If the management experience, innovative technology, brand and capital brought by foreign investors into China can't be modeled or absorbed by the domestic enterprises and these domestic enterprises lose their cutting edge in the domestic market, the inherent character of floating of foreign capitals surely will result in uncertainty for the domestic economy, In other words this is the real threat to national economic security.

In fact, it is common for authorities in developed countries' to review the takeover of domestic enterprises by foreign investors. Although there are antitrust provisions scattered in China's several laws and regulations, these provisions are never rigidly adhered to. It is evident that the Chinese government is more preoccupied with the advantages brought by foreign capital. Technically, there is no permanent review regime dedicated to the practice of antitrust and transnational acquisition review. This leads to obstacles in implementation of the existing antitrust provisions. Significantly the government's awareness of national economic security is still the same as that in the era of the planned economy. However, this ongoing debate makes it possible that the relevant authorities will pay more attention to the establishment and operation of a review regime.

Advancing Foreign Investment, while Against Monopoly

Commodities labeled made in China are found everywhere in the world. However, there is still huge room for improvement in Chinese enterprises' profitability, their international competence, and their ability to utilize the existing resources. Improvement in these areas are badly needed if Chinese enterprises are to be able to compete globally, it is a fallacy to become preoccupied solely with the debate on unstoppable foreign takeovers. China's outdated financial and tax system do more harm to economy than foreign takeovers. The authorities should reform the current system to facilitate industrial reconstruction. Foreign takeovers are not blame, if the difficulties faced by Chinese enterprises while raising finance are not

removed and Chinese enterprises still lack core competence in the aforementioned areas, Chinese enterprises are doomed to decline in the process of globalization.

Those who suggest restricting foreign takeovers are inclined to be ardent at separating foreign investors from domestic ones, the malicious from the bona fide transactions, the short term investment from long term investment, and also speculation from investment. The real intention behind those separations is questionable, and it is far from certain that the development of Chinese enterprises will be harmed. Antitrust is more than opposition against acquisitions by foreign investors. It opposes all kinds of monopolies. Reviewing takeovers by foreign investors, for the purpose of national economic security, does not necessarily mean all foreign acquisition should undergo these review procedures. It is not a contradiction to encourage foreign takeovers with an ongoing review of national economic security at hand.

For the moment, it is of the up most importance to define “national economic security” accurately, and make it practical and operable. We should avoid going to extremes while preventing threats to the national economic security. Proposals contained in a report, Proposals on Establishing National Economic Security Regime, put forward by China's Non-government Chamber are a step in the right direction. These proposals include: (1).promoting the enactment of Antitrust Law and the basic legal framework concerning national economic security; (2).establishment of a regime regarding settlement and prediction of national economic security affairs; (3).legal framework concerning protection of outbound investment; and (4).service providers' compulsory participation in these transaction. Additionally, it is a particularly practical proposal to establish a national economic security consultation committee on foreign acquisitions, consisting of non-governmental representatives as well as other civil organizations.

(This article was originally written in Chinese. The English version is translated by Roy Zhu)

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