EUROPEAN UNION
DELEGATION OF THE EUROPEAN UNION TO AUSTRALIA

Ambassador

Canberra, 31 August 2020

JL/CK

Subject: Consultation on the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*

The Delegation of the European Union to Australia presents its compliments to the Australian Government, and thanks the Treasury for this opportunity to participate in the consultation process on the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*, and hereby presents its comments on the exposure draft of this Bill.

The European Union (EU) has long been an important trade partner with, and major investor in; Australia, and ongoing negotiations towards an ambitious free trade agreement (FTA) will only serve to strengthen this relationship. The EU is therefore keenly interested in this review of Australia's foreign investment framework.

While the EU supports Australia's sovereign right to protect its national security, including in its foreign investment policy, this must be balanced with the need for legal clarity and investor certainty, and any new screening measures should not unnecessarily impede the flow of investment. We therefore welcome some of the proposed measures designed to streamline less-sensitive investments under the new framework. However, we also note that under the proposed new framework, the scope of screening may extend to some lower-value investments in emerging technology sectors. For these investments, excessive monetary and administrative costs could act as a deterrent, therefore any fee structure should take into account any potential unintended consequences.

Further, several EU companies have noted delays as a result of the emergency investment screening measures introduced by the Treasurer in response to the financial volatility brought about by the COVID-19 crisis. While the EU understands that these measures may be necessary from a national security and public order perspective, we look forward to the rapid implementation of the new investment framework which will replace these temporary changes, and hope that the FIRB will be provided with adequate resourcing to ensure that it is able to handle any increased workload it may face as a result of the reforms.

For clarity, the EU's comments are based on the structure of the Explanatory Memorandum accompanying the various pieces of draft legislation. Noting that a further tranche of draft legislation will be published later this year, we look forward to the opportunity to comment as further details are made available.

The Delegation of the European Union to Australia would once again like to thank the Treasury for the opportunity to comment on this matter, and renews to the Australian Government the assurances of its highest consideration.

Yours sincerely,

Michael Pulch

DELEGATION OF THE EUROPEAN UNION TO AUSTRALIA
18 Arkana Street, Yarralumla ACT Australia: Tel: (02) 6271 2777; Fax: (02) 6273 4445;
Email: delegation-australia@eeas.europa.eu

The European Union's Submission to the Australian Treasury: Comments and Questions on the Explanatory Memorandum to the Exposure Draft of the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020*

1.3 The amendments provide a new national security test which"…[i.a.]… "allows a significant action that has not been notified and certain actions not otherwise captured under the FATA to be 'called in' for screening on national security grounds

1.6 In order to avoid overlap between the two tests, wherever the broader national interest test would apply to a particular action, only that test is used in an assessment. This is because national security is already a relevant factor that the Government considers when assessing the national interest.

1.8 When exercising various powers under the FATA, the Treasurer considers whether the action is 'not contrary to the national interest' (the national interest test). The national interest test is not defined in the legislation but indicative criteria are set out in guidance material.

1.16 These actions involve a foreign person acquiring an interest in national security land or a direct interest in a national security business, or starting a national security business.

1.35 A notifiable national security action is an action that is by its nature so likely to give rise to a national security concern that regardless of its size or value it requires review by the Treasurer.

1.42 National security businesses are endeavours that if disrupted or carried out in a particular way may create national security risks. This means that national security risks may arise if national security businesses are controlled or influenced by persons acting not in Australia's interests. For this reason it is important to enable the Treasurer to be able to review investments in such businesses by foreign investors.

1.43 Generally, national security businesses are involved in or connected with critical infrastructure, defence, or the national intelligence community or their supply chains. Because of the broad range of factors that can contribute to national security concerns and the wide range of potentially significant enterprises, the definition includes activities that are not usually considered to be businesses. An endeavour may be a national security business as long as it is carried on wholly or partly in Australia, regardless of whether it is carried on in anticipation of profit or gain and regardless of whether it is carried on by the Commonwealth, a State, a Territory, a local governing body, or an entity wholly owned by them.

1.64 The Treasurer has a new power to review actions that have been taken or that are proposed to be taken if the Treasurer considers that the action may pose a national security risk.

Comments and questions

- In light of the fact that a legislated definition of the "national interest" currently does not exist, and that this is only provided for in regulatory guidance, will "national security" or "national security business" be clearly defined in the new legislation, rather than in norms and practice? We believe a clear definition and clarification of "sensitive national security business" would allow limiting the risk of unintentional non-compliance (in particular for small business).
- The risk approach and burden of proof used in the national security test to identify what might be considered a threat to national security appears unclear. Will this concept be clearly defined in the new legislation?
- With reference to the screening thresholds, is the Australian Government considering using this reform opportunity to align the Australian screening mechanism with article 9 of the OECD Codes of Liberalization ("Codes") with regard to non-discrimination among Codes' Adherents?

1.28 If these requirements are satisfied, the Treasurer may impose conditions, or vary or revoke any conditions that have been imposed, and may make orders prohibiting an action or requiring the undoing of a part or whole of an action (including, as a last resort, requiring divestment).

1.73 If the Treasurer reviews an action using the call-in power the Treasurer must give a written notice to the person who proposes to take the action or who has taken the action, of the review. Once the Treasurer has issued the notice, the Treasurer has 30 days to issue a no objection notification (including with conditions) or issue an order requiring the disposal of the investment or prohibiting the investment, depending on whether the action has been taken or not.

1.74 This 30 day timeframe leverages the existing 'decision period' in the FATA. This means that the timeframe may be extended at the request of the foreign person. Consistent with other changes being made in this package the decision period can also be extended at the Treasurer's discretion to no longer than 90 days.

1.79. […]Where an action has been taken, if the action was to acquire a direct interest in an entity or Australian business, the Treasurer may make an order directing the person who acquired the interest to dispose of the interest within a specified period to one or more persons who are not associates of the person.

1.86 The Bill introduces a new division that gives the Treasurer powers to impose conditions, vary existing conditions, or, as a last resort, force the divestment of any realised investment which was subject to the FATA where national security concerns are identified.

1.87 The Treasurer must conduct a national security review of an action before using the last resort power. The foreign person is able to seek merits review of the outcome of the review.

1.89 The Bill limits the circumstances in which the Treasurer may exercise the last resort power by specifying that the Treasurer may only review actions if the Treasurer is satisfied that particular conditions are met.

1.101 If, after reviewing an action, the Treasurer considers that a national security risk exists, the Treasurer must give the person notice of this and of the reasons for considering this

1.102 This notice may be redacted in part or in full on grounds of national security.

1.126 If the last resort power is available to the Treasurer it may be used to revoke, vary or impose new conditions in a no objection notification that was given to a person about an action.

1.127 The last resort power (when available) may also be used to impose conditions by notice on actions that do not have an existing no objection notification that can be amended. Such notices may themselves be varied.

1.130 The Treasurer's last resort power is only available for actions that were notified to the Treasurer (or taken, if they were not notified) on or after 1 January 2020.

Comments and questions

- What avenues of appeal would exist in the national security review process, in the case that the Treasurer imposes a condition using this last resort power? Will the possibility be provided to investors to revise and adapt their proposals to meet any concerns raised by the FIRB?
- How much of the evidence used in the national security review processes will be made available to the potential investor, in case the investor wishes to appeal?
- What safeguards will exist to prevent the Treasurer from arbitrarily conducting a national security review on commercial, rather than genuine national security grounds?
- What safeguards will exist to prevent the Treasurer from requiring divestment for reasons other than national security reasons, and without justifying such national security reasons (for example, for the sole purpose of nationalising a privately-held asset)?

- The new call-in power provides the Treasurer with the ability to "call-in" an investment for screening if circumstances change; e.g. an investment may be approved because it does not pose a national security risk, but circumstances change to cause it to pose a security risk after investment approval. The definition of "national security business" also includes critical infrastructure. Would there be the possibility that a company that constructs and owns infrastructure (fully or jointly) would, at a later date, be forced to divest from infrastructure that it constructed? Given the illiquid market for large infrastructure investments, are there any safeguards against the possibility that such a forced sale of large infrastructure asset may incur significant losses for foreign investors?

1.50 The critical limitation in the categories includes both goods, technology and services that are vital to advancing or enhancing Australia's national security and goods, technology and services that may be detrimental to Australia's national security if not available or if misused

1.54 The requirement that goods or technology be related to protecting Australia's national security is broad and includes both inputs without which Australian activities may be interrupted with adverse consequences for national security and goods, services or technology that, while not essential for Australia's activities, could cause harm to Australia's national security if accessed by others.

Comments and questions

- How does the definition of "goods…that may be detrimental to Australia's national security if not available or if misused" relate to energy and raw materials? What limits are there to the scope of energy and raw materials that are considered "critical" (for reference: 2016 Defence Industry Policy Statement, Defence Industrial Capability Plan, and the Defence and Strategic Goods List)
- Can the Treasurer specify to whom the investor must dispose of the asset? If so, what safeguards (if any) exist to ensure the price paid for that asset is a fair, market-based price?

1.83 A regulation making power is also included to limit the time period in which the Treasurer may start a review with reference to when the action was taken.

2.46 The Treasurer is given the power to extend or further extend the decision period under subsection 77(5) of the FATA by up to 90 days. This power is limited so that the total period by which the Treasurer can extend the decision period is 90 days. However, multiple extensions may be made to reach the maximum 90 days.

2.47 The Treasurer must provide a reason(s) to the applicant for the extension

2.49 Generally, sensitive or significant applications which require in-depth analysis and expert input from consultation partners cannot be considered within 30 days. The new power is intended to provide for the efficient processing of sensitive or significant applications by allowing sufficient time for the Treasurer to consider the expert input that informs these applications. For such cases, a longer decision period is required to allow consultation partners sufficient time to provide their input including where they are developing bespoke conditions.

Comments and questions

- What safeguards are available to ensure the Treasurer cannot suspend a business deal by ordering a review, for reasons other than genuine national security concerns?
- What are the risks that the Treasurer, having the power to extend decisions by up to 90 days, may affect investor certainty? In light of the potential harm that delays in considering the application would cause (*e.g.* insolvency risk, loss of jobs), could an 'emergency' pathway be

considered, especially where substantial time and effort have already been expended towards completion of investments in expectation that they would not require FIRB approval?

- With respect to the Treasure's discretion to extend the decision period up to 90 days for complex or sensitive decisions, will further information and explanations on the reason underlying such extension be provided to foreign investors to the greatest extent possible?

3.68 A person must notify the Treasurer where there is a change of control of the entity or business to which the significant action relates, or where the person ceases to have a direct interest in the Australian entity or a part of their interest in Australian land.

3.69 A person must give a notice to the Treasurer, if the regulations made for the purposes of section 44 specify that a notice is required for one or more situations about the relevant significant action, and those situations cease to exist. If the significant action relates to acquiring an interest of at least a certain percentage in the entity or business and the person ceases to hold an interest of at least that percentage in the entity or business, they are required to notify that action. This notification requirement also extends to acquiring an interest in securities of an entity. A notification requirement applies to foreign government investors where they cease to have a direct interest in the entity or business, or a tenement. Where the significant action was a starting of an Australian business, the foreign government investors need to notify when they cease to carry on that business.

3.70 A person has 30 days after the relevant action has been taken to notify the Treasurer and comply with the notification requirement. The notice must contain relevant details such as describing the action that has been taken and the date when the action was taken. The regulations may specify any additional content requirements for the notice. The notice must be made in the manner approved by the Secretary under section 135 of the FATA

Comments and questions

- We believe these new notification obligations could potentially cause an unmanageable administrative burden for investors, especially SMEs. Will additional resources, in terms of technology and office personnel, be adequately allocated to fully reflect the future higher number of applications and ensure a prompt and timely consideration of new applications, in particular to allow decisions to be made within the 30-day deadline? Given the significance of the EU as an investment partner, is there the possibility that dedicated staff and resources could be allocated for European foreign investment to facilitate inbound investment from the region?

3.77 If the Treasurer is satisfied that the composition of the group of senior officers of a corporation is contrary to the national interest, the Treasurer can give a direction to address or prevent this by ensuring that specified persons (including foreign persons who are not Australian citizens) cease to be, or do not become senior officers of the corporation. The Treasurer can give a direction to maintain a specified proportion of senior officers of specified kind (such as foreign persons) in a corporation.

Comments and questions

- Would this measure be compatible with treaty obligations (i.e. under FTAs) preventing the government from interfering with the composition of senior officers/boards of management of private companies?
- In the event that a direction is given for specified persons to cease to be senior officers, how will it be ensured that there will be a minimum transition period allowing the corporation to appeal or find suitable replacements?

4.11 The Bill requires that a foreign person must register certain events. The events that must be registered are:

- *acquiring or ceasing to hold an interest in land or water;*
- *acquiring or ceasing to hold an interest an Australian business, agribusiness or entity;*
- *becoming or ceasing to be a foreign person while holding an interest in an Australian entity; and*
- *an event that relates to a no objection notification or exemption certificate.*

Comments and questions

- It is unclear whether this notification obligation relating to "an interest" has the same meaning as "significant interest" in the current definition (i.e. exceeding a certain monetary threshold), or whether these obligations would apply to any interest, in which case even small changes in ownership interest might trigger these obligations, potentially creating an unnecessary administrative burden, particularly for SMEs.

5.4 The amendments establish new fees. A fee is payable for a notifiable national security action and for a reviewable national security action that has either been notified by the Treasurer or notified to the Treasurer.

5.16 The reforms give the Treasurer new powers where there are national security risks. The acquisition of certain interests is defined as a notifiable national security action and these must be notified to the Treasurer. The amendment ensures that fees are payable where a person notifies of a notifiable national security action.

5.17 Under the new national security test, the Treasurer may review certain actions that are not otherwise captured under the FATA or are significant actions but not notifiable if the Treasurer considers that the action may pose a national security concern. The amendments provide that a fee is payable when the Treasurer provides a notice that the action poses a national security concern. The fee is payable before the end of the 30 days after the Treasurer gives the notice. A fee is also payable if the person notifies the Treasurer of a reviewable national security action (voluntarily notification).

5.18 As fees are payable as part of the new national security test, the simplified outline of section 112 is amended to reflect that a fee is payable for giving a notice relating to a notifiable national security action.

5.13 The amendments make clear that the regulations can prescribe a $0 amount if necessary. For example, some actions under the FATA may not attract a fee.

5.21 Section 46 of the FATA is amended to clarify that a notifiable action does not have to be a proposed action. The change clarifies that a fee can be charged for retrospective actions that are both significant and notifiable actions.

Comments and questions

- Under the current definition, significant actions have a monetary threshold, which means they are of relatively high value. As a result, any fees currently comprise a relatively low administrative cost. However, in the case of low-value national security actions, which will be notifiable under the proposed changes, fees may be large in proportion to the value of the investment, possibly dissuading foreign investment. This is especially true of SMEs and start-ups in high-tech, innovative sectors which may be considered national security risks (for example, encryption and cybersecurity technology). Will the Australian Government consider the possibility of a waiver or reduction of fees under specific circumstances such as (i) with respect to small business; (ii) in case applications only arise as a direct result of the more expansive framework; or (iii) in the event of any future removal of monetary thresholds?

- It seems that the new framework would capture all investments relating to national security, including emerging technologies such as encryption and cybersecurity. This would also apply to starting a company or commencing activities in this sector. We believe that imposing a significant monetary and administrative cost could dissuade innovative SMEs from investing or pursuing activities in this sector?
- We believe the development of a "Trusted Partner Certificate" would be welcomed in order to enable investors with a track record of successful and transparent investments to benefit from an expedited pathway and ad hoc service within FIRB. Such tool could be co-designed in collaboration and dialogue with relevant stakeholders and industry bodies.