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NAVIGATING FOREIGN DIRECT INVESTMENT REGULATION IN M&A

Why foreign direct investment regulation matters for M&A

Foreign direct investment (FDI) regulation has become an increasingly critical piece of the regulatory jigsaw for M&A in recent years, against the backdrop of a proliferation of FDI screening regimes globally. Political anxieties about the impact of FDI and a global trend towards increased protectionist rhetoric have been accelerated by the Covid-19 pandemic, heightened geopolitical tensions and concerns around supply chain security. This has resulted in many existing FDI regimes being expanded and a significant number of new ones being adopted.

This presents additional hurdles and uncertainties to navigate in the execution of cross-border M&A, with potential impacts for both the deal timetable and deal certainty: most FDI regimes prohibit completion of notifiable transactions pending clearance, and whilst the vast majority of deals will ultimately be cleared, the risk of a transaction being blocked or only cleared subject to remedies needs to be taken seriously.

These hurdles are often exacerbated by a very broad approach to defining "national security", combined with a lack of transparency in decision-making that can make it difficult for investors to understand how the review process will play out in practice and to gauge potential execution risk for a particular transaction.

In a fast-moving regulatory landscape, our global FDI team offers integrated cross-border capability and extensive experience of formulating coordinated strategies and dealing with FDI agencies around the world to secure global FDI clearances and successful completion. We also work closely with our investment treaty experts when structuring transactions to maximise available treaty protections against regulatory change and government action.

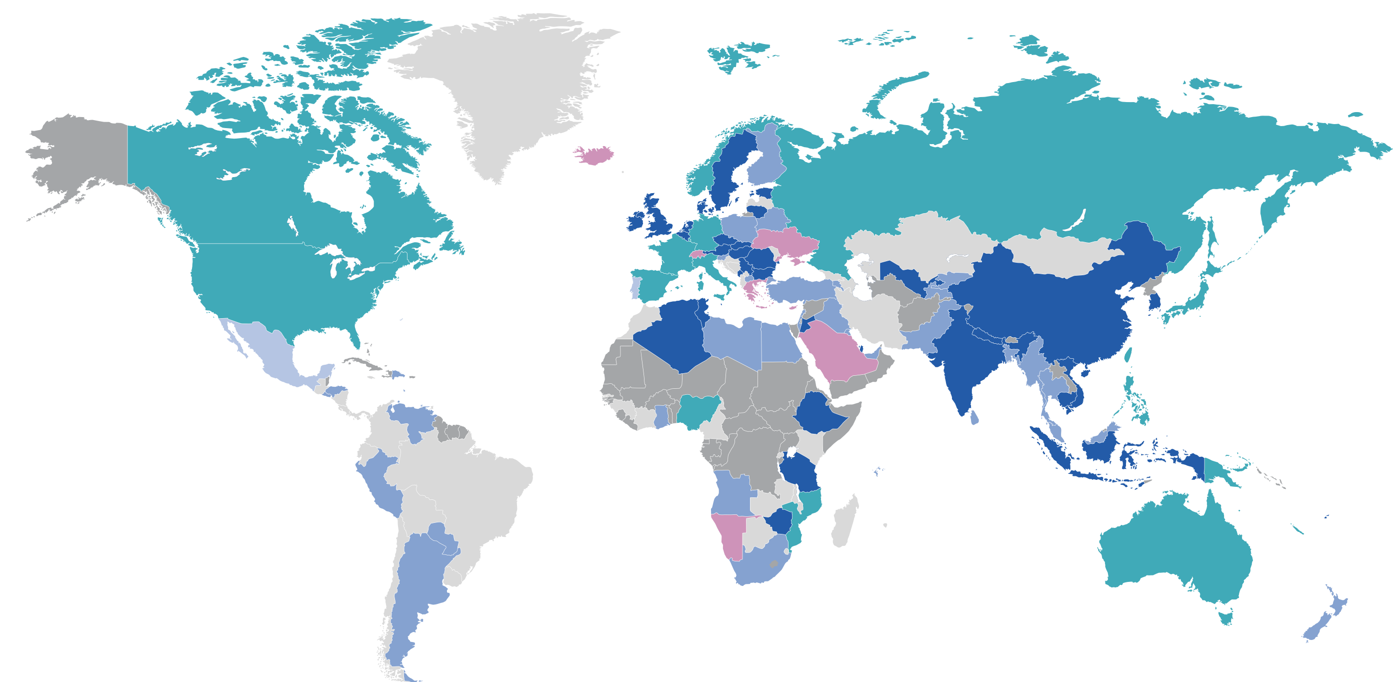
> It is now more important than ever before that deal parties and their advisers consider early in the transaction planning process what investment screening issues may arise, how these might be addressed, and whether they may ultimately threaten the viability of the transaction."
>
> **(Veronica Roberts, Global Foreign Direct Investment Group Lead)**

Widespread proliferation of FDI regimes in recent years

The past five years have seen a proliferation of FDI screening regimes globally, as countries around the world have responded to heightened geopolitical tensions, the impact of the Covid-19 pandemic and concerns around supply chain security.

Over 30 countries have introduced new screening regimes for foreign investment, particularly in Europe where the EU FDI Regulation that became applicable in October 2020 has resulted in the vast majority of EU Member States now having screening mechanisms in place, with the remaining Member States all in the process of adopting regulation. A new regime has also been introduced in the UK, where the National Security and Investment (NSI) regime entered into force in January 2022 and quickly established itself as one of the most active regimes in the world, with around 900 notifications per year and a steady stream of final orders imposing conditions on transactions or – in a small number of cases – prohibiting them entirely. In addition, the vast majority of countries that already had an FDI screening regime in place have taken steps to expand those regimes further, for example by lowering notification thresholds and/or expanding the scope of sectors covered. This includes significant changes to the FDI screening regimes in the United States, Australia, New Zealand, Japan, Canada and India, as well as many existing European regimes such as those of France and Germany.

As illustrated by the map below, this means that it is now more important than ever to consider the potential application of FDI regulation at the outset of any cross-border M&A (and indeed in some cases even where there is no cross-border element – for example, the new UK regime applies to acquisitions involving UK investors as well as non-UK investors).



- New FDI regime introduced in the last 5 years
- Existing FDI regime expanded in the last 5 years
- Introduction of an FDI regime expected/under consideration
- FDI regime in place but unchanged in the last 5 years
- Countries which otherwise regulate foreign investment (eg sector-specific regulation)
- No FDI regime in place

Typical features of FDI regimes

Mandatory and suspensory notification obligations combined with broad call-in powers

- Mandatory and suspensory notification obligations – at least in certain sectors – are becoming the norm, even in regimes historically based largely on voluntary notification such as Germany and the US.
- At the same time, notification thresholds are being lowered (usually based on shareholding or voting rights, more rarely on turnover), as seen in France, Italy and Japan.
- Activities of the target are usually key to determining whether a mandatory notification obligation is triggered – detailed due diligence is required at the outset.
- Even where mandatory notification obligations are not triggered, broad call-in powers in many jurisdictions may mean that a voluntary notification needs to be considered.
- Call-in powers are often exercisable when lower control thresholds are met – for example "material influence" in the UK (which may be deemed to exist in relation to a low shareholding, potentially even below 15%).

Wide scope of application – including minority stakes and internal re-organisations

- FDI screening regimes typically cover acquisitions of minority stakes – sometimes even as low as 10% – as well as potentially small increases in existing stakes where specified thresholds are crossed.
- Some regimes also catch internal re-organisations – including the UK and Italy – even where it is clear that no national security concerns are likely to arise.

Very broad concept of "national security"

- Increasingly wide interpretation of "national security" means that the typical list of sectors covered by FDI screening regimes is now very broad.
- It extends far beyond defence/military technologies – typically including critical infrastructure (including energy and communications), advanced technologies and data, healthcare and – in some jurisdictions – even areas such as food security.
- The precise definition of sensitive sectors can also vary considerably between jurisdictions – detailed consideration of the relevant legislation needs to feed into due diligence questions.

Two-stage review process – majority cleared at Phase 1 but real possibility of prohibition/ remedies

- Most jurisdictions use a two-stage review process, with the majority of transactions cleared at the first stage, but some transactions subject to an in-depth second stage review.
- Ultimate outcome may be an unconditional clearance, conditional clearance (ie subject to remedies) or an outright prohibition/divestment order.
- Even where unconditional clearance is expected to be obtained at the end of the first stage of review, the process still needs to be factored into the deal timetable.

Remedies tailored to individual case but certain trends emerging

- Remedies will be determined on a case-by-case basis, usually with significantly less negotiation than tends to be seen in the merger control context.
- There is no standard "shopping list", but certain common themes in approach to remedies can be identified.
- Where national security concerns are identified, FDI agencies will often impose restrictions on information flows and appointment of board members/key staff, or require appointment of a Government observer to the board.
- Requirements may also be imposed in respect of relevant company policies/ contracts, notification of future acquisitions or transfer of assets, or maintenance of R&D and manufacturing capabilities in the target's jurisdiction.

Significant sanctions for non-compliance

- Non-compliance with FDI regulation risks significant sanctions.
- These can include the transaction being voidable – or even deemed automatically void in some jurisdictions (including the UK).
- Other sanctions can include financial and even criminal penalties.

Lack of transparency in decision-making

- Many FDI regimes are described as a "black box" when it comes to decision-making – compared to merger control regimes, the process tends to be very opaque.
- Some jurisdictions (such as the UK) have recently started to take steps to improve transparency for investors, but in practice this remains a key issue.
- Very limited information is made available publicly, so working with advisors with extensive experience of FDI filings and obtaining clearance is key to anticipating likely issues.
- Even information shared with the parties is likely to be restricted – in practice it can sometimes be difficult to know what the national security concerns are and how best to seek to mitigate them.

Generally country agnostic but geopolitical shifts tend to be reflected in FDI decision making

- Most FDI screening regimes are officially country agnostic, but in practice investment from certain countries – in particular China – tends to come under greater scrutiny.
- Some jurisdictions – such as the US – adopt a "white list" approach, exempting investment from certain jurisdictions from mandatory notification obligations.

Impact of FDI regulation for M&A: Key current themes

Chinese investment heavily scrutinised – but not the only focus

The majority of prohibition/divestment decisions issued by FDI authorities in recent years have involved Chinese investment, and given current geopolitical trends it seems likely that Chinese investment will continue to be more heavily scrutinised.

However, in our experience, approval for Chinese investment is still possible in certain cases – including unconditional clearance. Much will turn on the individual circumstances of the deal and the perceived risk associated with the specific acquirer, the sensitivity of the target company's activities, and the level of control being acquired.

Factors which can improve the prospects of clearance include, for example, acquiring only a minority stake, or structuring the acquisition as a consortium bid or as an indirect investment as a Limited Partner in an acquiring investment fund (provided that no special rights, such as a right to receive more detailed information on the investee company, are granted). It may also be helpful to consider potential remedies upfront and explore how these can be "baked in" to the deal – for example agreeing restrictions on information flows or commitments to maintain supply or R&D in the jurisdiction of the target.

Moreover, it is important to recognise that FDI agencies are not solely focussed on China: investment from other jurisdictions is also coming under increased scrutiny, including for example the Middle East and countries like the US and Canada. The latest annual reports issued by CFIUS, Germany's BMWK and the UK Investment Security Unit (covering 2023/2023-24) all confirm this trend, with at least 90% of reviewed transactions involving non-Chinese purchasers.

This widening focus also flows through to in-depth investigations and – albeit to a lesser extent – to the imposition of conditions on clearance or even prohibition. For example, almost 40% of acquisitions subject to an in-depth investigation under the UK NSI regime in 2023-24 involved investment associated with the UK, and just over 20% involved investment associated with the US. When it comes to conditional clearances, we have seen remedies being imposed in recent transactions involving acquirers from the Middle East, the US and Australia. Under the UK investment screening regime we have even seen an example of conditions being imposed in relation to investment in a UK company by a UK investor (*Epiris/Sepura*). Whilst prohibition decisions have tended to involve Chinese investment, there are also high-profile examples of non-Chinese investment being prohibited, for example two transactions involving US acquirers prohibited under the French FDI regime (*Flowserve/Velan* and *Teledyne/Photonis*).

This means that the potential impact of FDI regulation needs to be actively considered at the outset of any cross-border deal, even if there are no obvious "red flags" in terms of potential national security risks associated with the acquirer.

Examples of prohibition of Chinese investment

- *Yuxio Fund/Northern Minerals* (Australia, Feb 2023) – the Singapore-registered but Chinese-linked Yuxio Fund was prohibited from increasing its stake in Australian critical minerals company Northern Minerals from 9.81% to 19.9%.
- *MineOne/real estate operated as a cryptocurrency mining facility* (US, May 2024) – under the first prohibition order issued by US President Biden, MineOne Partners Limited (ultimately majority owned by Chinese nationals) was prohibited from purchasing and required to divest certain real estate operated as a cryptocurrency mining facility that was located within one mile of Francis E. Warren Air Force Base (a strategic missile base in Wyoming, US).

Examples of unconditional clearance of Chinese investment

- *Shanghai Decent Investment Group Co/Nickel Industries Limited* (Australia, July 2023) – unconditional approval of a share placement which increased Shanghai Decent Investment Group's shareholding in Nickel Industries Limited to 28.09%.
- *Shanghai Sierchi Enterprise Management Partnership /Flusso* (UK, Jan 2023) – unconditional approval of the acquisition by a Chinese-owned SPV of a British semiconductor company previously spun out of Cambridge University's Department of Engineering.

Examples of prohibition of non-Chinese investment

- *Flowserve/Velan* (France, October 2023) – prohibition of the acquisition by a US acquirer of a Canadian company with two French subsidiaries involved in manufacture and supply of valves for French nuclear submarines and nuclear reactors. This was the second public veto of an acquisition by a US investor under the French FDI regime, following *Teledyne/Photonis* in December 2020.
- *L1TFM Holdings UK/Upp Corporation* (UK, December 2022) – prohibition of the acquisition of a UK regional broadband provider by an investment group ultimately backed by sanctioned Russian oligarchs. An appeal against this decision was heard by the UK High Court in July 2024 but judgment has not yet been given.

Examples of conditional clearance of non-Chinese investment

- *Transdigm/Iceman Holdco* (UK, February 2024) – acquisition by a publicly listed US aerospace manufacturing company of a US company with UK subsidiaries involved in R&D and manufacture of atomic clocks in the UK. National security concerns were identified in relation to the continued effective operation of critical national infrastructure. These concerns were addressed by remedies requiring the acquirer to keep research, development and manufacturing capabilities in relation to atomic clocks in the UK.
- *Bain Capital/ITP Aero* (Spain, August 2022) – the acquisition of a Spanish aerospace company by US private equity firm Bain was cleared subject to guarantees offered by Bain to ensure protection of industrial and defence interests, including commitment to a project intended to make ITP Aero a global aeronautics and defence sector leader in Europe and globally. The authorisation of the transaction was also subject to reserving up to 27.5% of the shares for the formation of a consortium of Spanish industrial companies and institutions, in which the Basque government was also expected to participate.

Examples of conditional clearance of Chinese investment

- *China National Tire & Rubber Corporation Ltd/Pirelli* (Italy, June 2023) – conditions were imposed under the Italian FDI regime on renewal of the Pirelli shareholder agreement, involving China National Tire & Rubber Corporation (part of the Chinese state-owned group held by Sinochem) as well as Marco Polo International Italy S.r.l., Camfin S.p.A. and Marco Tronchetti Provera & C. S.p.A. The remedies limited the governance rights and the information made available to an existing Chinese state-owned shareholder.
- *University of Liverpool/Pinggao Group Ltd* (UK, June 2024) – conditions were imposed on a joint venture between the University of Liverpool and the Pinggao Group establishing a research institute focussed on collaborative research in energy and power technologies. The conditions included establishment of an Insider Threat Stakeholder Group to ensure protection of wider research and IP held by the University of Liverpool, overseen by a Chair with UK Security Vetting clearance.

Spotlight on major FDI regimes around the world

UK

The UK's National Security and Investment (NSI) regime has quickly become one of the most active regimes in the world since it entered into force on 4 January 2022, with almost around 900 notifications a year. The vast majority (over 95% in 2023-24) are cleared within the initial 30-working day review period, but a number of transactions have been prohibited (mainly involving Chinese investors) or only permitted to proceed subject to conditions (including transactions involving investors from "friendly" countries such as the US, as well as UK investors). Mandatory notification applies to certain transactions involving a target company engaged in specified activities in the UK in one or more of 17 sensitive sectors. In addition, the Government has wide call-in powers which can apply to a broader range of transactions in any sector, with only limited UK-nexus required (and voluntary notifications are increasingly common as a result). In April 2024 the Government confirmed plans for pro-business changes to the regime in light of feedback from stakeholders, including amending some of the sector definitions. The precise scope and timeframe for such reforms is unclear following the election of a new Government in July 2024.

United States

Mitigation, monitoring, and enforcement remain watchwords for CFIUS. Per its (unclassified) 2023 annual report, approximately 21% of the covered transactions reviewed by CFIUS in 2023 resulted in a mitigation agreement (ie, CFIUS required undertakings to address certain national security concerns as a condition to clearance). This is on par with 2022, but substantially more (in CFIUS terms) than five years earlier, where around 13% of 2018 reviews required mitigation agreements to clear. CFIUS continues to expand its monitoring of mitigation compliance, and in 2023 and to date in 2024, CFIUS instituted various enforcement actions and ultimately issued six civil monetary penalties for violations of mitigation agreements among other infractions, with fines ranging from $100,000 to a record $60 million fine related to data breaches that per CFIUS resulted in harm to US national security. With these fines, CFIUS has issued three times more penalties in 2023/2024 than it imposed over its past 50 years. These actions did not involve any regulatory changes, but it is apparent that CFIUS has prioritised its monitoring and enforcement function as part of its mandate to protect US national security and to deter conduct that in its view could compromise that security.

France

For several years now, France ranks as one the most attractive countries in Europe for foreign investments. In principle, financial relations between France and other countries are free from restrictions. Nevertheless, France places particular emphasis on ensuring that foreign investments do not compromise fundamental national interests in terms of defence, security, and public order. As early as 1966, France set up a foreign investment control mechanism, which has since been strengthened several times. Recent years have been marked by the Covid-19 pandemic and intense economic, diplomatic, and military tensions. As a result, since 1 January 2024, France has adapted and strengthened its legal control system, broadening the scope of foreign investment operations. To respond more effectively to technological challenges, the scope of control has been extended to include the critical raw materials sector. Branches of foreign legal entities based in France are also now subject to control. Finally, the threshold for triggering control has been definitively lowered to 10% of voting rights in listed French companies for non-European investors.

Spain

Royal Decree 571/2023 expanding the former FDI regulation in Spain was formally approved on 4 July 2023, and entered into force on 1 September 2023. This consolidated and granted legal status to certain criteria that had already been implicitly or explicitly applied by the Spanish FDI agency (including their inclusion in the foreign investment questionnaire that must be completed when submitting any query or application for authorisation).

This Royal Decree also addresses various other matters, including: (i) the definition of foreign investment, excluding internal restructurings and increases in shareholdings exceeding 10% that do not entail a change of control; (ii) the definition of the investor in certain cases, in particular in respect of fund management companies, collective investment institutions, and the criterion of beneficial ownership for EU and EFTA investors; (iii) the delineation of affected strategic sectors; (iv) exemptions from the requirement for authorisation of certain investments (eg due to the turnover of the acquired company, the temporary nature of the transaction, or the specific object of the Spanish company to be acquired); and (v) procedural modifications, establishing that FDI queries must be resolved within 30 days and complete authorisation processes within 3 months (previously 6 months).

For a more detailed overview of FDI regimes in these jurisdictions – and many more – please contact us to request your copy of our interactive country-by-country guide summarising FDI/public interest control processes and trends in key jurisdictions, designed to assist investors in considering potential deal hotspots. You can view a teaser of the guide here. Please email FDIPublications@hsf.com to receive your full copy.

EU

The EU FDI Regulation became fully operational on 11 October 2020 and established a framework for pan-EU cooperation on FDI screening. This framework allows Member States and the European Commission to exchange information and provide comments on FDI cases. However, the Regulation does not mandate FDI screening at the EU level nor does it require Member States to implement or maintain FDI screening mechanisms. Instead, it provides common criteria and standards that such mechanisms should adhere to.

According to the latest report on the implementation of the FDI Regulation, published on 19 October 2023, the majority of cases formally screened by Member States in 2022 (86%) were authorised with conditions. Only 9% required approvals with conditions, and a mere 1% were blocked. At the EU level, 17 Member States submitted a total of 423 notifications, with the majority (81%) of these cases being closed within 15 calendar days.

On 24 January 2024, the Commission proposed a new framework to repeal and replace the existing FDI Regulation. This proposed regime would mandate FDI screening in all Member States, establish minimum requirements for the sectors covered, extend screening to investments by EU companies ultimately controlled from outside the EU, and include various amendments aimed at improving efficiency.

Germany

German FDI regulation has been significantly tightened in recent years. The Federal Ministry of Economics and Climate Protection (BMWK) reviews both the direct and indirect acquisition of a domestic company. A distinction is made between the cross-sectoral and the sector-specific investment review. The cross-sectoral review procedure generally applies if a non-EU or non-EFTA state acquires shares of a domestic company. Certain sectors trigger a mandatory cross-sectoral filing (eg critical infrastructure, IT medical products or critical raw materials), while in further cases the government has a call-in right. The sector-specific review procedure covers acquisitions in the fields of defence and certain IT-technology by a foreign investor (explicitly including EU investors). Compared to 2021 and 2022, the number of review procedures opened in 2023 fell from 306 to 257. Simultaneously, the number of EU notifications rose from 240 to 280. From 2024, the BMWK charges fees for FDI filings, with the specific amount depending on the complexity of the case. Further, the German government plans to implement new legislation (Investment Protection Act), adding further particularly security-relevant sectors and broadening the scope of investment control.

Italy

Over the last few years there has been a dramatic increase in the number of transactions notified to the Italian Government – from 83 filings in 2019 to 727 in 2023. This is due to the broadening of the scope of application of the Italian FDI regime, first following the Covid-19 crisis and subsequently in light of geopolitical developments. However, the official figure of 727 filings made in 2023 includes 150 pre-notifications, a tool which was introduced at the end of 2022 and simplified the overall procedures to downsize the transactions subject to formal notification.

Despite the large number of filings – reflecting the wide scope of the regime – a prohibition decision was ultimately only reached in three cases in 2023, out of 33 transactions in which the Government imposed conditions. It is also worth noting that in 310 notified cases the Government declared that the law was not applicable. On the one hand, this shows a cautionary approach of investors with respect to the Italian FDI regime – given the extremely severe sanctions associated with a failure to notify – but on the other hand also illustrates that the interpretation of the various pieces of legislation is not clear-cut (this is exacerbated by the fact that the Government no longer publishes all the decisions but only a brief summary of those where a veto or conditions have been imposed).

Australia

Australia's foreign investment framework has been in place since the 1970s, and as such is one of the world's more longstanding and developed FDI regimes. It is generally known as the FIRB regime, with the Foreign Investment Review Board (or FIRB) being the non-statutory body which advises the Government on Australia's foreign investment policy and its administration. The regime is broad in scope and has both mandatory and voluntary notification components. It regulates acquisitions of interests in entities and businesses, as well as interests in land and mining (and similar) tenements. Mandatory notification is not confined to specific sectors but is generally subject to minimum investment percentages and financial thresholds. However, the requirements flex according to perceived sensitivity: in particular, investments in any sector by entities with material foreign government ownership, and all investments in particular sectors (such as media or a range of areas regarded as 'national security businesses') attract lower percentage investment thresholds and usually a $0 financial threshold. Applications attract fees, which are scaled by transaction size and can be substantial. Processing timeframes tend to be 30-60 days for more straightforward applications, but can extend to several months for matters attracting higher levels of scrutiny and involving extensive inter-agency consultation. The Government has announced its intention to streamline the assessment of lower risk proposals to improve processing times.

Practical guidance for investors: Planning for risks and opportunities

FDI and public interest considerations should form a core part of regulatory strategy alongside antitrust/merger control, with upfront consideration of potential investment screening issues and how to minimize the risk of intervention threatening the viability of the deal.

Anticipate potential concerns

In some cases the political sensitivity of a transaction will be obvious; for example, transactions involving military or dual-use products or critical infrastructure.

However, deal parties should think more broadly when considering whether an acquisition may be politically contested. The concept of "national security" continues to be stretched, and broader "public interest" concerns may also come into play if the deal involves extensive rationalisation or consolidation plans.

Be aware of increased risks of non-notified transactions being called-in for review

Many FDI agencies now proactively monitor market intelligence and initiate investigations into non-notified transactions (particularly in the UK and US). Where mandatory notification obligations are not triggered, we are seeing a corresponding increase in voluntary notifications in the interests of obtaining legal certainty before completion.

A non-notified transaction may also be called-in post-completion, and there have been a number of cases resulting in post-completion divestment orders. It is important to be aware that many FDI regimes have lengthy "look back" periods – for example, in the UK the call-in power may be exercised at any time up to 6 months after the Secretary of State becomes aware of the transaction, provided this is within 5 years of completion (and this limit does not apply to missed mandatory filings). In the US, CFIUS' power to commence an investigation into a non-notified transaction is in principle not limited in time.

Allocate FDI risks in deal documentation

This should include not just the use of tailored FDI conditions precedent and warranties, but also consideration of matters such as reverse termination fees and factoring the potential review timetable into the longstop date.

Consideration should also be given to addressing risks that an acquirer may change their ownership during the course of an FDI review process, or after clearance has been obtained but prior to completion.

Consider ways to minimise the risk of intervention upfront

It may be possible to reduce FDI risk through careful structuring of a transaction – for example, only acquiring a minority shareholding, or investing indirectly as a Limited Partner or via a consortium of acquirers. Deal structuring should also seek to maximise available investment treaty protections against regulatory change and government action (see box opposite).

Deal parties should also consider possible remedies upfront, and whether these could be "baked-in" to the deal. These could be behavioural, such as restrictions on information sharing/site access or restrictions on appointment of board members/key staff, or structural, such as divestments.

Be prepared for lack of transparency and political nature of the process

It is common for the FDI review process to operate as a "black box", with limited information shared with deal parties during the review process. Working with advisors with extensive experience of FDI filings and obtaining clearance is key to anticipating likely issues and maximising engagement during the review process.

Political disapproval for a transaction can have a powerful chilling effect on acquirers and can spook wavering sellers and empower reluctant ones, resulting in deals being abandoned even if there is no formal prohibition decision.

Assume that FDI agencies will liaise behind the scenes

Co-ordination between FDI agencies – both formal and informal – is becoming more common. Within the EU there is a formal co-operation mechanism between national FDI agencies and the European Commission via the EU FDI Regulation, but other agencies including in the UK and US are also increasingly sharing information. Some FDI agencies also have information sharing agreements with merger control authorities.

This means that it is vital to take a global and coordinated approach to assessing national security considerations and securing any necessary FDI clearances.

Investment treaties: Top tips for maximising protection

Investment treaties are agreements between countries that aim to support and safeguard investments made by individuals from one country in the territory of another country. These treaties provide protections that can help manage risks related to changes in regulations and government actions. They also allow investors to initiate private arbitration against the host country to enforce these protections.

When planning a transaction, investors should check if there is a suitable investment treaty between their home country and the host country where the investment will take place. If there is no or insufficient treaty protection, investors should consider structuring their investment through a corporate entity based in a third country that has a more favourable treaty with the host country. This can be done by using an existing subsidiary or creating a special purpose vehicle. The choice of the third country is influenced by the investment treaty, as well as other factors such as tax considerations.

Outlook for the future

Continued expansion of FDI regimes and adoption of new ones

We expect to see continued expansion of existing FDI regimes, with more sectors being deemed "critical" or "sensitive", especially in respect of emerging technologies, and potentially further lowering of notification thresholds.

We also anticipate the adoption of additional new regimes, both in the EU and elsewhere.

Proposed new EU FDI Regulation

In January 2024 the European Commission published a draft new EU FDI Regulation. If implemented in its current form, the new Regulation would make foreign investment screening mandatory in all Member States (rather than simply encouraging the adoption of a screening regime). It would also extend the scope of screening to investment by EU companies ultimately controlled from outside the EU (addressing the 2023 *Xella* judgment of the European Court of Justice).

EU Member States would also be encouraged to cover screening of greenfield investments that create a lasting and direct link between a foreign investor and the EU in their national FDI screening regimes (including for example electric vehicle battery factories).

Move towards "small garden, high fence" approach

It is anticipated that we may see more jurisdictions moving towards the "small garden, high fence" approach espoused by the UK and US governments.

This entails very rigorous review for a small number of transactions that genuinely pose national security concerns, whilst minimising the impact for the vast majority of transactions.

Influence of broader geopolitical considerations

The influence of broader geopolitical considerations will remain and the effect of that is difficult to predict. Current geopolitical trends suggest that Chinese investment will remain heavily scrutinised, as well as investment from Russia.

Proposed regulation of outbound investment

The introduction of screening regimes for outbound investment has become a "hot topic" on the regulatory horizon, led by developments in the US. Outbound investment controls are aimed at preventing leakage of technology and know-how to third countries and can be viewed as a complement to controls on the export of goods, technology and services.

United States: On August 9, 2023, President Biden issued an Executive Order declaring a "national emergency" to address the "threat" posed by countries of concern (essentially, China) seeking to exploit "sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries." The Executive Order directed the US Treasury to issue regulations to prohibit or require notification of certain US investments in Chinese companies which produce technologies and products raising US national security concerns, including advanced semiconductors and microelectronics, quantum information technologies and certain artificial intelligence applications. Implementing regulations were issued by the US Treasury on 28 October 2024, following a public consultation on a draft version of the regulations issued on 21 June 2024. The new regime will take effect on 2 January 2025. A wide range of transactions will fall within scope, including indirect investments, alongside a broad definition of "US persons" that will result in the new regime having extra-territorial effects.

Germany: On 13 July 2023 the German government published its "Strategy on China". Echoing the EU's policy that China is simultaneously a partner, competitor and systemic rival, the German government has stated that it will constructively engage in the EU consultation process for an outbound investment initiative, whilst also conducting its own analysis of the matter, including by liaising with industry stakeholders and global partners. In September 2023 the German Federal Ministry of Economics and Climate Protection (BMWK) further acknowledged that outbound investments might represent an element critical for national security and should be considered in the forthcoming amendment of German FDI legislation.

UK: On 21 May 2024 the UK government published updated guidance on the application of the UK's National Security and Investment regime that included an expanded section on how the existing regime can apply to scenarios involving outward direct investment where the acquisition leads to a party gaining control over a qualifying entity or asset that is outside the UK but the relevant UK-nexus criteria are met. There are currently no proposals for a separate outbound investment screening regime in the UK, although this is subject to further consideration by the Department for Business and Trade.

EU: On 24 January 2024 the European Commission published a White Paper on outbound investments and launched a multi-stage process to identify potential security risks linked to EU investment in third countries. Following an initial consultation phase that closed in April 2024, the European Commission has now embarked on a monitoring phase based on a recommendation to EU Member States asking them to monitor or review a range of activities linked to outbound investments. Member States will subsequently be invited to conduct a risk assessment, which will feed in to a joint assessment and debate between the European Commission and Member States in order to identify possible targeted and proportionate policy responses in Autumn 2025.

How we can help: Integrated global capability and extensive experience

Our global FDI team (drawn from our Competition, Regulation and Trade, Mergers & Acquisitions and Dispute Resolution practices) has extensive experience in formulating and implementing coordinated strategies to secure global FDI clearances and successful completion, taking this ever-changing landscape into account.

Our integrated team submits FDI filings regularly and is therefore very close to day-to-day developments and regional nuances in FDI regimes. Our team has also been very closely involved in detailed discussions about the scope of newly developed FDI regimes (in the UK, the EU and beyond). In addition, we work together with our investment treaty experts when structuring transactions to maximise available treaty protections against regulatory change and government action.

Proactive approach to the process

- Making FDI filings is more than "form-filling" or "tick the box" exercises – our deep experience means that we can help to identify the pertinent issues in advance and ensure that filings include the relevant context to help navigate the process as smoothly as possible.
- Unconditional clearance is always the goal, but if FDI agencies do have national security concerns, offering up appropriate remedies proactively can assist with securing clearances.
- We have extensive experience negotiating and agreeing bespoke remedies in FDI (and merger control) cases across the globe, in those cases where remedies are needed.

Extensive experience dealing with FDI agencies

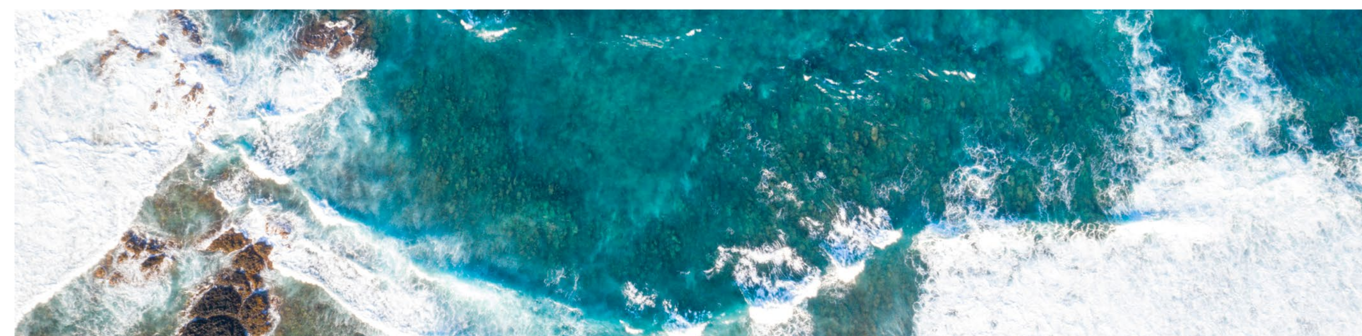
- We regularly deal with FDI agencies around the world and have an excellent track record securing FDI clearances: we understand how the FDI agencies process and consider cases in practice and can help to "open the black box" of often very opaque regimes.
- In many countries (including the UK, EU and beyond), we have been very closely involved in the design/update of the FDI regime, taking part in consultation exercises and governmental reviews and briefings.
- FDI agencies liaise with different stakeholders in different countries during the review process: we have experience navigating these different processes.

A global approach is key

- Some FDI agencies have formal mechanisms for liaising with each other and sharing information eg the Five Eyes and the European FDI network.
- Other FDI agencies liaise with each other informally behind the scenes on specific cases (and sometimes also with merger control authorities).
- This means that a consistent global approach and strategy is required for multiple FDI filings – our global team works seamlessly on cases involving multiple filings.

Highlights from our recent experience

- **Altran Technologies**, a multinational provider of engineering and R&D services, on CFIUS issues and securing CFIUS clearance of Altran's sale to Capgemini
- **Bharti Group** on its acquisition of the satellite company OneWeb jointly with the UK government, including obtaining merger and FDI clearances, and subsequent investments by SoftBank, Eutelsat and Hanwha, and for **OneWeb** and **Bharti Group** on OneWeb's combination with Eutelsat including a number of merger and FDI processes
- **Altra Industrial Motion Corp.** on its acquisition by Regal Rexnord, advising on the FDI aspects of the transaction and securing FDI clearances in seven countries
- **Certares** on the merger control and FDI aspects of its €300m equity investment in Avia Solutions Group
- **Reaction Engines** on the UK National Security and Investment conditional clearance for an investment by UAE venture capital firm Tawazun Strategic Development Fund (SDF)
- **Sichuan Development Holding Co Limited** on the NSI conditional clearance of its acquisition of Ligeance Aerospace Technology Co. Ltd.
- **An interested party** on the NSI conditional clearance of the acquisition of Electricity North West Limited by Redrock Investment Limited
- **Rheinmetall AG** on the CFIUS and other FDI aspects of its acquisition of Expal Systems S.A
- **Sydney Aviation Alliance** on its acquisition of Sydney Airport, the largest takeover in Australian history, including its successful FIRB application
- An **international investor** in relation to a phase 2 FDI investigation by the German ministry for economic affairs with involvement by the Ministry for Economic Affairs German Ministry of Defence
- A consortium of investors (including **QIC, GIP, Borealis, Future Fund, Chinese Investment Corporation, CalPERS and National Pension Service of Korea**) on its acquisition of a 50-year lease of the Port of Melbourne from the Victorian Government, including its successful FIRB application
- A **Chinese Civil Engineering and Construction Company** on securing FDI clearance for its acquisition of the parent company of six PPP infrastructures projects in Spain
- **Incitec Pivot Limited** on the FDI aspects of its acquisition of Explinvest, the holding company of Titanobel group, a French commercial explosives manufacturer and distributor, as well as obtaining FDI approval in France
- **Corlieve Therapeutics**, a biotech company that specialises in R&D for gene therapies, on the FDI aspects of its acquisition by UniQuure
- A **Chinese investor** in relation to acquiring an international aircraft fueling company and regulatory and FDI issues
- **Ant Group** on its pre-IPO investment into online marketplace PT Bukalapak.com Tbk, and subsequently on Bukalapak.com's IPO and related FDI issues
- Securing CFIUS clearance for **CSLI**, a South Korean language translation software provider, in connection with its acquisition of Systran SA
- **Hiscox** on the sale of its Southeast Asian insurance business, Direct Asia, to Ignite Thailand Holdings, the parent company of online insurer Roojai
- **Canal+ International SAS** on its acquisition of shares in Viu International Limited in Asia, the Middle East and South Africa
- An **Indonesian coffee chain** on the first-ever F&B unicorn in Southeast Asia, on its business expansion in Thailand
- **Amentum** on some merger control and FDI aspects of its proposed agreement to merge with Jacobs' Critical Mission Solutions and Cyber and Intelligence Businesses
- **Sosteneo SGR** on the FDI aspects related to the acquisition from ENEL Italia of 49% of the share capital of Enel Libra Flexsys Srl, a company specialised in the development and management of a portfolio of battery energy storage projects
- **GIC** on the merger control and FDI aspects of its acquisition of an interest in the telco infrastructure service provider CETIN Group
- **Engie** on the competition and FDI aspects of the disposal of the Equans business including securing NSI clearance
- **Stonepeak** on the merger control and FDI aspects of its acquisition of an interest in Cellnex subsidiaries in Sweden and Denmark
- **InterGen** on the competition and FDI aspects of the disposal of its electricity generation business including securing NSI clearance
- **Lumibird**, the European leader in laser technologies, on the FDI aspects of the cross-border acquisition of the "Convergent Photonics Business" from Prima Industrie



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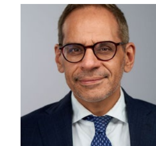

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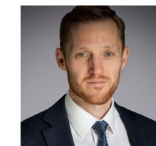

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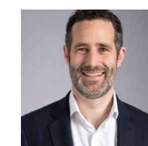

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