The Evolving Global Foreign Direct Investment and National Security Review Landscape

May 2024

Dechert LLP

Table of contents

Executive Summary

The global national security and foreign direct investment ("FDI") review landscape continues to evolve. There are more than 50 investment screening regimes, and over 100 jurisdictions now have some form of investment screening rules. New FDI regimes continue to be implemented (see the chapters on Belgium and Singapore), FDI regimes implemented in recent years are maturing, and the United States and its allies are coordinating with respect to FDI strategy while impacted jurisdictions are developing countermeasures.

As FDI regimes proliferate and mature around the globe, governments are taking an ever-more expansive view of the concept of "national security," to include more than military and defense interests. In many cases, "national security" now extends to advanced technology, data, critical infrastructure communications assets and critical supply chains. As investment thresholds are reduced and definitions of key terms like "investment" and "control" are broadened, FDI reviews are now easier to trigger than before.

The United States and its allies are also increasingly cooperating to restrict certain types of investment, such as Chinese investment in critical technology and investments that would impact critical supply chains, including with respect to semiconductor chips and related technologies. Additionally, countries continue to engage in "friend-shoring," making supply chains more resilient by moving production to friendly countries – with the added consequence that foreign investment of this sort will be less likely to raise concern among local regulators.

In addition, outbound investment screening is almost here (see the chapters on the European Union ("EU") and the United States). The United States in particular is moving ahead with establishing an outbound investment review mechanism, even if in its initial form it will apply only to certain sectors of the economy and only to certain destination countries. As currently envisioned, the U.S. outbound review mechanism will review and potentially prohibit certain outbound investments by U.S. investors to protect U.S. national security and safeguard U.S. supply chains from certain countries such as Russia and China. Although China, Taiwan and South Korea have forms of outbound investment review mechanisms, once established in the United States, the U.S. outbound investment review mechanism will be the first of its kind to be adopted by a

major Western economy and could have potential ripple effects with other governments considering similar mechanisms (such as the EU).

FDI regulations often cast a wide net: there are multiple FDI regimes that feature a broad jurisdictional nexus, such that even relatively small transactions may be captured as well as investments involving limited governance and control rights. As regimes expand in scope, outcomes are becoming increasingly uncertain. Both buyers and sellers can undertake due diligence to evaluate potential national security regimes that are implicated by proposed transactions and take steps to mitigate potential risks voluntarily before presenting transactions to regulators. Such steps can help parties obtain regulatory approvals and clearances on their preferred timeline and reduce the risk that their transactions become cautionary tales.

Dealmakers should monitor these developments as they may meaningfully impact the ability to deploy capital and close transactions. Now more than ever before, dealmakers would be wise to evaluate FDI screening risks early in the transaction process, giving careful consideration to the risks and threats posed by investors and targets, and to deploy strategies to manage potential risks. In the following sections, we contextualize current trends in a focused set of jurisdictions to assist cross-border dealmakers with understanding the headwinds and assessing how best to manage FDI-related considerations from the start of the transaction process so as to avoid impediments to closing.

Dechert regularly advises foreign and domestic entities through the FDI review process, helping them determine if they should bring a transaction before regulators, consider the political and policy considerations that may arise, assemble the required information for a filing, and then (as necessary) negotiate with the review body in a manner that minimizes both delay and the imposition of conditions that might threaten the transaction. Dechert lawyers are closely monitoring the status of outbound investment reviews and stand ready to assist clients with such reviews once they are implemented.

Australia

Key Considerations

- Changes to the Foreign Investment Review Board ("FIRB") FDI regime have expanded FIRB's jurisdiction in recent years.
- Most recently, in July 2023, the Register of Foreign Ownership of Australian Assets ("Register") was implemented to record foreign interests in Australian land, entities, businesses, and assets.
- These changes add complexity to the FIRB review process and reinforce the importance of considering FIRB implications early on for investment targets with an Australian presence.
- Private equity funds with non-Australian investor participants should also consider whether they would be characterized as Foreign Government Investors ("FGIs"), and whether an exemption to being characterized as an FGI (or to the specific action contemplated) could apply. Almost every transaction involving an FGI will require FIRB approval.

FDI Regime Overview

FIRB is the governmental agency tasked with reviewing FDI investment proposals and making recommendations to the Australian federal Treasurer about the proposed investment. The Treasurer will then issue a "no objection notification," which is colloquially called a "FIRB approval" if the proposed investment passes muster.

The last substantive update to Australia's foreign investment regime occurred in January 2021 – the Australian government expanded FIRB's jurisdiction to protect economic sectors deemed essential to its national security. Interestingly, there has been a downward trend in both the number of FDI applications reviewed by FIRB, and their value, since the legislative changes were implemented (see FIRB's most recent quarterly report here).

Pursuant to the Foreign Acquisitions and Takeovers Act 1975 (Cth) and the Foreign Acquisitions and Takeovers Regulation 2015 (collectively, "FATA"), non-Australian persons must notify FIRB of proposed acquisitions of interests in Australia that involve:

- Agribusiness or agricultural land;
- A "substantial interest" (i.e., an interest of 20% or more) in an Australian entity with an enterprise value of AUD 330 million or more;[1] and/or
- Australian land holdings (other than agricultural land).

When reviewing a potential investment, FIRB will consider the transaction's impact on competition, the economy, the community and national security, as well as the character of the investor.

Key aspects of the FATA include:

1. **The adoption of a mandatory review requirement for acquisitions of interests of any size in a "national security business" and/or "national security land" regardless of their value (i.e., US$0 threshold).**

Under the FATA, the definition of "national security business" includes the following types of businesses:

- Critical defense or intelligence goods or services;
- Critical infrastructure;
- Sensitive information (about defense and/or intelligence personnel); and
- Telecommunications.

These categories cover broad swaths of the Australian economy. The definition of "critical infrastructure" was also expanded to encompass the following critical infrastructure sectors:

- Communications;
- Data storage and processing;
- Defense;
- Energy;
- Food and grocery;
- Financial services and markets;
- Health care and medical;
- Higher education and research;
- Space technology;
- Transportation; and
- Water and sewerage.

It is important to note that the Treasurer retains "call in powers." Certain national security actions or other actions for which FIRB approval was <u>not sought</u> can be "called in" for review by the

1 Thresholds are indexed on each January 1. Different thresholds apply to the type of business (sensitive or not sensitive) and the identity of the investor (e.g., investors from free trade agreement partners benefit from higher thresholds).

Treasurer for a period of up to 10 years *after* the action was taken, if the Treasurer thinks that such actions pose national security concerns. It is therefore advisable to consider whether a FIRB application should be made if there is any grey area.

Additionally, the Treasurer can re-review actions that previously were approved by FIRB (post-January 1, 2021) to determine whether a national security risk exists if there has been a material change in circumstance, or material misstatement or omission, in the FIRB application.

2. Timing Considerations: Extension of the 30 days review period up to 90 days at the discretion of FIRB or the Australian government more broadly.

Once an application for review has been submitted, FIRB has 30 days to determine whether approval will be granted. FIRB can extend the review timeline for a few reasons, including if additional information is required by FIRB.

FIRB can extend the review timeline if it so chooses, and extensions are routine. When considering transaction timing, parties should take a conservative approach in estimating the length of FIRB reviews. This is especially important to consider if filing with FIRB at the end of the calendar year or nearing a federal election (as there will be a standstill period prior to the election of the new federal government).

3. Certain investors will be subject to US$0 thresholds, meaning FIRB approval will always be required. The most important of these is FGIs.

FGIs include (i) foreign governments, (ii) separate government entities (e.g., public pension funds, endowment funds, state-owned enterprises, sovereign wealth funds, and their portfolio companies) and (iii) corporations, trustees of a unit trust or general partners of a limited partnership in which:

- FGIs from <u>one country have a 20% or greater</u> collective interest in the investor; or
- FGIs from <u>more than one country have a 40% or greater</u> collective interest in the investor.

As a result, a few investment funds, in particular private equity funds, will be FGIs if their investors/limited partners include FGIs. FGIs are typically subject to a US$0 monetary value threshold, which means that FIRB approval will generally be required for any investments in Australian land or entities.

There is an FGI exemption for investment funds that are FGIs where certain ‘passive investor criteria’ are met (i.e., individual investors are not able to influence investment decisions or the management of any investments of the fund, no individual investor has an interest in the fund other than as a limited partner and the fund is a pooled investment vehicle). Such passive investor FGIs can also apply for exemption certificates. However, exemption certificates are typically granted for a limited period of time and for a particular purpose. FIRB guidance states that applications for exemption certificates, as with other FIRB approval applications, will be assessed on a case-by-case basis.

4. Whether the new Register will be a deterrent, or simply the cost of doing business, remains to be seen.

The new Register joins the other registers of Australian water interests, agricultural land and residential land which investors must report under. Investors will need to report certain interests in Australian land, entities, business and assets. Investors will need a specific myGovID account to make the report, and the report is made through an interface with the Australian Taxation Office.

The time period to report is typically 30 days after the applicable interest has been acquired, and the requirement to report generally applies to acquisitions made after July 1, 2023.

Notably, if an investor becomes a foreign person (and therefore becomes subject to the FDI regime) while holding relevant Australian interests or carrying on a national security business, reporting under the Register will need to be made, regardless of when the interests were acquired, or the business started.

Failure to make a timely report on the Register can incur a significant penalty which is accrued daily: currently AUD 78,250. The penalty is indexed annually, on July 1.

Recent Filings Data

In recent years, FIRB has rejected only a few proposed acquisitions; in practice, applicants will withdraw their applications rather than wait to receive a rejection. Based on data available from the 2022-2023 review period, FIRB approved 1,310 applications (760 of which were approved without conditions). 149 applications were withdrawn.

The value of approved applications was halved in 2022-23 compared with the prior year. Reasons for this have not been suggested by FIRB.

The United States remained the largest source country, lodging the greatest number of FIRB applications in 2022-23 (for investments other than residential real estate). Canada and Singapore took second and third place, respectively.

Recent Enforcement Trends

Review of FIRB data for the 2023-24 review period indicates that Chinese investment in Australia continues its steep decline for investments that are not residential real estate (even though China is one of Australia's largest trading partners). However, applications from each investment source country have been trending downwards since 2021-22.

Given the potential civil penalties (up to the lesser of (i) AUD 555 million and (ii) AUD 1.1 million for an individual or AUD 11.1 million for a corporation *plus* an amount derived from the value of the action taken) and criminal penalties ((i) up to 10 years imprisonment or (ii) a financial penalty of AUD 3.33 million for an individual or AUD 33.3 million for a corporation) that may apply for failure to seek approval for an action that requires FIRB approval, taking certain actions that approval was not received for, or breaching conditions imposed on an approval, it is important that parties consider whether FIRB review should be pursued in connection with a potential transaction. Parties must also be aware that if the FIRB imposes mitigation conditions with respect to the potential transaction, a failure to comply with or an attempt to contravene such conditions can also result in the imposition of civil or criminal penalties.

With the increase to civil and criminal penalties in the 2021 legislative changes, we expected to see increased enforcement action by FIRB for breaches of Australia's FDI regime. We also expected greater transparency from applicants regarding enforcement, as a condition of FIRB approval is typically complying with various reporting obligations post-closing of the transaction. However, data suggests that the incidence of non-compliance remains low, and non-compliance is generally due to failing to notify related referrals or reports. There were only three formal investigations in 2021-22 and two in 2022-23.

Outlook for 2024

Australia remains open for business, but with the changes to the FDI regime and significant expansion of FIRB's powers since 2021, the impact on foreign investment (including from certain countries) is only now being seen.

Parties should think through FIRB implications early on when considering an Australian investment target so that they are prepared to address potential substantive and/or timing-related obstacles.

Belgium

Key Considerations

- The Belgian foreign direct investment screening mechanism entered into force on July 1, 2023.
- The acquisition of either 10% or 25% of the voting rights by non-EU investors in certain sectors crucial to Belgium's public order, national security and strategic interests will be subject to ex ante screening by the Interfederal Screening Commission ("ISC"), a regulatory body representing all relevant levels of Belgian governments.
- Investments meeting the Belgian screening mechanism thresholds will need to account for the ISC review in deal documentation, although the actual timing and efficiency of the screening mechanism by the ISC remains to be tested.

FDI Regime Overview

On November 30, 2022, the federal and regional governments in Belgium agreed on the final text for a cooperation agreement among the various Belgian Regional governments to establish a single Belgian foreign direct investment screening mechanism (the "Cooperation Agreement"). The Cooperation Agreement was approved, and its content was enacted, by a Belgian Federal Law passed on February 14, 2023. The Belgian screening mechanism for foreign direct investments ("FDI Regime") entered into force on July 1, 2023.

Investments made after July 1, 2023, must be notified to the ISC under the new Belgian FDI Regime before completion if the following conditions are met.

First, the investment must be made by a non-EU investor. An investor is from outside the EU if it is an individual with its primary residence outside the EU. Alternatively, in the case of a legal entity: (i) the entity has its registered seat or main activities outside the EU or (i) one of its ultimate beneficial owners has his primary residence outside the EU. Legal entities include states, state agencies, public and private companies, associations and foundations.

Second, the investment must be a direct investment in a legal entity (a "Target") that is established or active in Belgium, or an investment in a non-Belgian legal entity that controls a company that has its registered seat or head office in Belgium.

Third, the investment must result in a direct or indirect, active or passive acquisition of:

- At least 25% of the voting rights in, and/or the acquisition of control over, a Target active in one of the following seven areas:
  - Critical infrastructure for energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities, and land and real estate crucial for the use of such infrastructure;
  - Technologies and raw materials that are essential to safety, including public health safety, defense and public order control, military equipment subject to the "Common Military List" and national control, dual-use items, artificial intelligence, semiconductors, robotics, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies and nanotechnologies;
  - The supply of critical inputs such as energy, raw materials and food;
  - Access to sensitive information (e.g., relating to Belgium's defense and strategic assets, personal data or the possibility to control such data);
  - Private security (e.g., monitoring and protection of persons and goods);
  - Freedom and pluralism of the media; or
  - Technologies that are of strategic importance in the biotech sector and whose turnover exceeds EUR 25 million in the year preceding the investment; or
- At least 10% of the voting rights in, and/or the acquisition of control over, a Target active in energy, defense (including dual-use products), cybersecurity and electronic communication, or digital infrastructure sectors and whose turnover was more than EUR 100 million in the year preceding the investment.

The Cooperation Agreement foresees that the Belgian governments may, by unanimous agreement, decrease the 25% threshold to 10%, or increase the 10% threshold to 25%.

Procedures

Investments that fall within the scope of the FDI Regime must be notified to the ISC. All notifications also are suspensory, i.e., the parties will not be able to close the transaction before obtaining approval. The Belgian FDI regime is thus both mandatory and suspensory for all investments that fall within the scope of the FDI Regime.

Notification and Preliminary Review

Notifications for qualifying investments need to be submitted to the ISC, composed of nine representatives from the three Belgian governments (federal, regional and community authorities). There is no filing fee to be paid to the ISC.

The ISC will first proceed with a preliminary review to assess whether the notification is complete and may also request – or in certain circumstances will be obliged to request – advice from different parts of government.

The preliminary review phase itself is not subject to any time limitation.

Assessment Phase

Once the ISC informs the parties that the notification is considered complete, the ISC's Secretariat officially confirms this to the foreign investor and the assessment phase starts. The ISC has 30 calendar days to coordinate the assessment. In case the ISC deems it necessary to request additional information, the 30-day period will be suspended until all information has been received. Each Belgian government that is geographically concerned by the investment will conduct its own assessment coordinated by the ISC.

An investment will be (deemed to be) approved and can be implemented if (i) no threats to the public order, national security or strategic interests are identified or (ii) no decision is taken by the ISC within the 30-day period.

However, if one of the examining governments identifies concrete evidence that such a threat exists, it may request the ISC to proceed with an in-depth screening procedure. Such decision cannot be appealed.

Screening Phase

The screening phase, which involves a more concrete risk assessment of the contemplated investment, will take at least 28 calendar days, but is likely to be extended (e.g., in case of an oral hearing, remedies or exceptional circumstances relating to the complexity of the case). Notably, requests for information and remedy negotiations suspend statutory timelines.

Following the commencement of the screening procedure, any Belgian government considering whether the investment poses a threat may produce a draft opinion which will be provided to the non-EU investor for comment.

The competent members of the ISC should each, within a term of 20 calendar days after opening of the screening phase, provide a draft advice to the minister that they represent.

If the draft advice of one of the competent members appears to be negative, the other competent members will be informed, and the draft advice will be communicated to the foreign investor and the Target. The latter will have the opportunity both to consult the file kept by the ISC and to submit comments in writing within 10 calendar days after consulting the file. Within 10 calendar days after receiving such comments, the ISC may organize an oral hearing.

If one of the relevant Belgian governments proposes to approve the transaction subject to corrective measures and/or commitments (e.g., modifications to the structure of the proposed transaction, increased governance and compliance requirements, requirements related to the exchange of sensitive information, security clearance of directors, reporting to Belgian authorities, protection of sensitive technologies/know-how/source codes held by the Target, continuity of supply of sensitive products or services, divestments, etc.), the ISC will enter into negotiations with the non-EU investor with a view to addressing such measures and commitments and their implementation.

The negotiations regarding the corrective measures will suspend the 20-day term for one month, with the possibility of further one-month extensions for as long as the negotiations last.

Each relevant minister must take a provisional decision whether to reject or approve the investment, possibly subject to commitments, which will lead to one of the following joint decisions by the ISC:

- A <u>prohibition</u> if one of the competent ministers has issued a negative preliminary decision (supported, at federal level, by a deliberation of the federal council of ministers) and a non-remediable impact has been identified following specific advice from ISC members; or
- A <u>clearance or conditional clearance</u> (subject to a binding agreement by the investor on the remedies imposed and negotiated by the ISC) in all other cases.

Considering the lack of a clear calendar for the screening phase, the various possibilities to extend the timeframes that are identified, and the relative lack of practice to date under this new regime, it is for the moment almost impossible to estimate the duration of an FDI screening.

Appeal

A non-EU investor can seek annulment of a prohibition decision by lodging an appeal with the Market Court (a specific section of the Court of Appeals in Brussels). The appeal does not suspend the contested decision. If the Market Court annuls the decision, the case will be sent back to the ISC. It is unclear whether third parties also can appeal the final decision of the ISC, and if so, whether they can do so before the Market Court.

Sanctions

In case of non-compliance with the FDI Regime, administrative fines (up to 10% of the proposed investment in most circumstances, and up to 30% in certain circumstances) can be imposed.

The ISC also has the power to start an *ex officio* investigation if it considers the non-EU investor failed to notify a transaction which falls within the scope of the Cooperation Agreement.

The power of the Flemish government to annul or suspend any operation resulting in a foreign investor acquiring control or decision-making power in government agencies or certain legal entities entrusted with missions of public interest, if such would threaten the strategic interests of the Flemish Region or the Flemish Community (*ex post* control), will continue to apply in parallel with the federal FDI Regime, although such power may become less relevant in practice.

Outlook for 2024

Potential buyers considering investments in Belgian targets active in relevant strategic sectors must evaluate whether the mandatory filing regime covers the transaction. If so, the parties must suspend closing until the ISC clears the transaction. Transacting parties must therefore consider how the FDI Regime affects transaction timelines, deal completion risk and allocation of risk in the deal documentation.

This could ultimately lead to higher costs and possible delays, which will have to be considered in M&A negotiations. This is further reinforced by potential uncertainties as to the scope of the notification thresholds and the ultimate duration of the screening process.

China

Key Considerations

- China has introduced several national security driven regulations over the last decade, including a revamped foreign investment regime, a foreign investment screening body, and a list mechanism pursuant to which non-Chinese individuals and entities can be restricted or prohibited from investing in China.
- Under the foreign investment regime, a screening body has broad authority to review both direct and indirect investment activities by non-Chinese investors, including for investments in "important" industries such as energy, infrastructure and critical technology.
- The 2020 Unreliable Entity List ("UEL") illustrates China's ongoing willingness and ability to target specific actors seen to be endangering Chinese sovereignty or development interests, potentially through compliance with non-Chinese law (e.g., economic sanctions).
- The Chinese Securities Regulatory Commission further clarified its national security oversight role in respect of overseas fundraising, including public listings, by domestic enterprises in new trial measures.
- Non-Chinese investors should continue to anticipate a complex regulatory landscape for investments in China.

FDI Regime Overview

China has introduced several national security-driven regulations over the course of the last decade, including several recent measures with respect to non-Chinese investment.

In 2020, a revamped Foreign Investment Law ("FIL") was implemented to overhaul China's foreign investment regime. The FIL anticipated the Measures on National Security Review of Foreign Investments ("Review Measures") and established a new foreign investment screening body in China effective from January 18, 2021, the Authority of the Security Review of Foreign Investments ("Security Review Authority" or "SRA") that is led jointly by two of the country's preeminent regulators: the National Development and Reform Commission and the Ministry of Commerce ("MOFCOM").

In addition to the Review Measures, MOFCOM also promulgated the Provisions of the Unreliable Entity List ("UEL Provisions") on September 19, 2020, under which non-Chinese individuals and entities so designated may be restricted or prohibited from investing in China.

While these measures directly focus on foreign investment related to China and its interests, it may be helpful to consider them alongside a fuller complement of recent national security-driven measures encompassing cybersecurity, data privacy and data security, anti-foreign sanctions, antimonopoly, export controls, public listing rules and more. For example, in August 2022, the Cybersecurity Administration of China promulgated clarifying guidance, with measures effective September 1, 2022, with respect to the circumstances triggering a security assessment by authorities of any cross-border transfer of data by certain operators collecting or processing data in the country. We discuss the Review Measures and UEL Provisions in more detail below.

Review Measures – Scope of Application

The SRA has broad authority to review both direct and indirect investment activities by non-Chinese investors. Filings with the SRA are required for non-Chinese investments:

- In, or in close physical proximity to, industries associated with the military and national security; and
- Where "actual control" is obtained over entities (existing or newly established) in industries designated as "important," including agricultural products, energy and resources, infrastructure, transportation services, equipment manufacturing, information technology, internet products and services, financial services, "critical" technologies, cultural products and services, and "other important fields." "Actual control" refers to (i) holding more than 50% of a target's equity; (ii) holding less than 50% of a target's equity, but with significant voting rights; and (iii) "other circumstances" allowing a non-Chinese investor to have a significant impact on the business decision-making, personnel, finance and technology of the enterprise. Both the "other important fields" prong of the targeted industries test and the "other circumstances" prong of the actual control test offer the authorities a wide scope of discretion.

Notably, investments in listed companies impacting national security are also subject to review by the China Securities Regulatory Commission ("CSRC") in conjunction with the SRA (and regulators have recently released draft national security-driven measures in respect of offshore fundraising and public listings). The Review Measures call for CSRC to develop specific measures with the SRA to review such investments. On February 17, 2023, CSRC issued the Trial Measures for the Administration of Overseas Issuance and Listing of Securities by Domestic Enterprises ("Overseas Listing Trial Measures"), which stipulates that under the record filing system, domestic enterprises listed overseas also need to undergo security reviews under certain circumstances and must accept supervision by CSRC and relevant competent departments of the State Council (e.g., those managing the SRA).

Review Measures – Procedures & Outcomes

SRA filings undergo a multi-stage review with both defined and undefined review stages:

- **Preliminary Consultation (no set timing).** Parties can consult the SRA, but we understand consultation will not result in the issuance of any opinion (formal or informal). The preliminary consultation can inform non-Chinese investors whether they need to make a filing with SRA.
- **Preparation of Required Application Materials (no set timing).** If a filing is deemed required, parties must prepare and submit a declaration form, investment plan, statement on national security impact and any other materials required by the SRA. The SRA will not publicize the existence of a filing, and materials submitted in connection with a filing will be kept confidential.
- **Initial Decision (15 business days).** Within 15 business days, a preliminary decision will be made by the SRA as to whether it is necessary to conduct a national security review of the investment. The security review consists of a general review and a special review. If the SRA decides that no security review is required, the parties may move forward with the investment. If not, the parties proceed to the general review.
- **General Review (30 business days).** A general review will be completed by the SRA within 30 business days of the initial decision to conduct a national security review. During a review, the SRA may interview the parties and issue requests for information. The investment will be cleared if it is deemed to not affect national security, otherwise the SRA will notify the parties in writing of a decision to initiate a special review process.
- **Special Review (60 business days, extendable).** The special review must be completed within 60 business days and may result in either (i) clearance of the investment, (ii) prohibition of the investment or (iii) conditional approval of the investment. Required conditions will be implemented under the supervision of the SRA and relevant local level authorities. These authorities will also be empowered to conduct on-site inspections to verify compliance. Under special circumstances, this 60 working-day review period may be extended by the SRA. Moreover, the SRA may request additional materials from filing parties, and the time taken to provide those materials will not be factored into the statutory review period timeline. The parties may at any time during the review period modify or cancel the proposed investment. If amended, the review period will be recalculated from the date when the SRA receives the revised investment plan from the filing parties. While this issue is not addressed explicitly in the new measures, it is anticipated that decisions of the SRA will be released only to transaction parties and will not be made public. If an approval is conditional, the parties will need to implement the investment according to that plan and may need to retract any actions taken prior to approval. The SRA has the power to extend this 60 business-day period for a discretionary length of time.

The Review Measures became effective as of January 18, 2021, and data regarding SRA filings has not been made public.

Unreliable Entity List – Scope of Application

MOFCOM has stated that the UEL is not intended to target any specific country or entity. However, compliance with foreign sanctions against Chinese individuals or entities (or partners) or cooperation with foreign governmental investigations may be important factors in being designated to the UEL.

A non-Chinese entity may be listed on the UEL where it:

- Endangers the national sovereignty, national security or development interests of China; or
- Suspends normal transactions with or discriminates against Chinese entities in violation of normal market transaction principles and causes serious harm to the legitimate rights and interests of Chinese entities.

On February 16, 2023, MOFCOM added Lockheed Martin Corporation and Raytheon Missiles & Defense to the UEL. Both entities have been fined and are prohibited from being involved in any import or export activities in relation to China or from making new investments in China. In addition, Lockheed Martin and Raytheon senior management personnel are prohibited from entering China and any work permits or visas have been canceled or will be denied.

Unreliable Entity List – Review Procedures & Penalties

The UEL is to be overseen by a Working Mechanism body within MOFCOM and authorized to investigate the actions of a non-Chinese entity based on the following factors:

- The degree of danger to the national sovereignty, security or development interests of China;
- The degree of damage to the legitimate rights and interests of Chinese enterprises, other organizations or individuals;
- Whether it is in compliance with internationally accepted commercial and trade rules; and
- Other factors.

Designated entities or individuals may face one or more of the following:

- Restriction or prohibition on trading and investing in China;
- Restriction or revocation of work permits or residence authorization;
- Imposition of monetary fines according to the severity of the circumstances; and
- Other penalties or measures at the discretion of the Working Mechanism.

The Working Mechanism will announce entities designated to the UEL, including risk alerts related to doing business with such entities. Announcements may also provide for curing periods during which the designated entity may take corrective action and the foregoing punitive measures will not be imposed.

Designated entities may apply to the Working Mechanism for removal from the UEL. In addition, the UEL Provisions allow for Chinese entities and individuals to apply for special exemptions where it is necessary for the Chinese applicant to transact with a designated entity. The Chinese party may continue to transact with the designated entity pursuant to the terms and conditions of an issued approval.

The general impression in China is that the Chinese government's purpose in applying the UEL is in response to sanctions imposed by foreign governments.

Outlook for 2024

China has issued a raft of sweeping measures over the course of the last several years that will significantly impact non-Chinese investors and the Chinese market. These have developed against the backdrop of Beijing's long-term policy goals of moving up the technology ladder through industrial policy and rebalancing its economy through increased domestic consumption and self-reliance (e.g., "Dual Circulation").

These policies aim to advance the economy while weathering an external environment increasingly perceived to be hostile and avoiding being trapped as a middle-income country. Increased urgency has been added to this trend against the backdrop of Beijing's "no limits" alliance with Moscow and growing diplomatic confidence. The country's emerging foreign investment regime is a part of Beijing's broader economic strategy and overall drive to exert national security-based controls over private actors, whether foreign or domestic.

For instance, authorities released the Overseas Listing Trial Measures on February 17, 2023, following earlier draft measures regarding offshore fundraising (collectively, "Overseas Listing Rules"). Dovetailing with the Review Measures, the Overseas Listing Rules strengthen the regulation of Chinese companies to be listed abroad, including in Hong Kong, and for the first time over indirect listings using offshore holding companies as listing vehicles (e.g., variable interest entities). Beijing continues to expand national security rationalized protections while further liberalizing the negative lists to court non-Chinese investment in strategic sectors. In the Review Measures, we find the country's first truly substantive national security-based foreign investment screening process, while the UEL Provisions illustrate Beijing's increased willingness to impose countervailing pressure against parallel measures coming out of Washington and Brussels.

At the same time, the Chinese government reemphasized the importance of non-Chinese investment to the country and therefore is expected to remain judicious with its use of restrictive measures such as the UEL, particularly in sectors deemed significant to the national interest.

On August 13, 2023, the Chinese government released *the Opinions of the State Council on Further Optimizing the Foreign Investment Environment and Intensifying Efforts to Attract Foreign Investment* (also being referred to as the "24 FDI Guidelines"), which emphasizes the need to attract non-Chinese investment in key research and technological fields and enables non-Chinese-invested entities to develop and provide products and services within China. On September 28, 2023, the Chinese government also issued draft rules seeking public comments on establishing a "fast track" for qualified non-Chinese-invested companies for the cross-border transfer of data. The recently released amendment to the Company Law, which will come into effect on July 1, 2024, further emphasizes the equal treatment of non-Chinese-invested enterprises and domestic enterprises.

European Union

Key Considerations

- While there is no standalone FDI screening at the European Union ("EU") level, the European Commission (the "Commission") continues to push for a more harmonized approach to FDI screening among EU Member States.
- Investors face a patchwork of EU Member State FDI regimes; essentially all Member States now have FDI screening regimes or are in the process of introducing them. At present, these regimes are not aligned, but the Commission is focused on driving coordination and convergence.
- Statistics for 2022, the most recent year for which data has been published, show a clear trend towards screening more cases formally, but Member States continue to intervene in a small proportion of cases. Similarly, conditional clearances have materially decreased, with Member States reporting that only 9% of screened cases were authorized with conditions or mitigating measures.
- The Commission recently published a package aimed at bolstering the EU's economic security, including a proposal for a reform of the existing EU foreign investment review screening framework ("The Proposed Regulation"). The proposal requires Member States to enact a national FDI screening regime and expands and harmonizes FDI rules in the EU. The reform is not likely to enter into force before 2027.
- The Commission announced a plan to assess whether outbound investments from EU could pose a risk to European security, specifically in relation to key future technologies like semiconductors and artificial intelligence. The Commission is expected to publish its findings and potential options for regulation in Autumn 2025.

FDI Regime Overview

The EU FDI Regulation (the "Regulation"), which entered into force on October 11, 2020, created a mechanism for coordinating national screening of inward investments by non-EU buyers, while giving the Commission an important new central advisory role.

The enactment of the Regulation coincided with the second wave of the COVID-19 pandemic, which led multiple Member States to enhance existing FDI screening regimes and/or implement new mechanisms. The recent geo-political turmoil has almost certainly reinforced the emphasis on screening inbound FDI. These developments need to be placed in their wider policy context, notably the EU Industrial Strategy launched at the behest of Member States (with the Franco-German axis leading the charge) following the Commission's veto of the Siemens/Alstom merger. In particular, Member States have pushed to protect the EU's industrial base. This feeds into the wider EU policy objective of achieving "open strategic autonomy" – a concept that "emphasizes the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values."

In turn, investors need to navigate a patchwork of Member State FDI regimes which may complicate transaction planning and potentially lengthen transaction timelines. The Commission appears to be acutely aware of the need to achieve some degree of procedural and substantive convergence across the EU bloc. Indeed, it seems to have already set its sights on increased centralization of EU FDI enforcement.

Although the Regulation itself does not require Member States to screen FDI, the Commission has actively encouraged Member States to set up such regimes and make use of the existing rules, to impede opportunistic buyouts of strategic European assets in the difficult economic circumstances resulting from the COVID-19 pandemic. Essentially all EU Member States now have FDI screening regimes in place or are in the process of introducing them.

When the Regulation entered into force, the existing Member States' systems varied widely in their scope and level of enforcement and countries did not coordinate their approaches, even where a given investment affected multiple countries. The Regulation tries to address this patchwork by specifying several characteristics which existing and new screening regulations and mechanisms must meet. It sets out a non-exhaustive list of sensitive sectors Member States may wish to target in their FDI regimes, such as aerospace, artificial intelligence communications, defense, energy, financial, media, semiconductors and transport. The Regulation also provides guidance on the types of factors Member States may consider in their determination of whether an investment is likely to affect security or public order. These include an investor's links to non-EU governments, involvement in activities affecting security or public order, and the risk it may be engaged in criminal or illegal activities.

One of the key features of the Regulation is its introduction of a coordination mechanism. This has been achieved through two channels: (i) the facilitation of information sharing between Member States including information on active cases; and (ii) a cooperation mechanism for the Commission and third-party Member States to provide their views and opinions to the Member State(s) screening the FDI.

Although the Commission and Member States are able to intervene in ongoing FDI reviews by providing an opinion, this has no binding effect on the reviewing Member State. However, Member States must take account – and in certain circumstances the "utmost account" – of the Commission's opinion. This is the case for targets that receive significant EU funding or operate critical infrastructure (transport, energy and telecoms), produce critical technologies (artificial intelligence, robotics and semiconductors) or manufacture inputs needed for security or public order (cybersecurity, satellite, navigation, earth observation and defense). Nevertheless, different Member States could in theory adopt inconsistent decisions when screening a single transaction.

Recent Filing Data

On October 19, 2023, the Commission issued its Third Annual Report under Article 5(4) of the FDI Screening Regulation, together with a Staff Working Document. The Report compiles screening statistics from Member States covering the 2022 calendar and describes emerging developments in national screening mechanisms.

Member States reported 1,444 requests for authorization and ex-officio cases in 2022. The statistics show that investors and their advisers continue to tread carefully as they familiarize themselves with nascent and expanding FDI regimes, as still 45% of notifications received by Member States were subject to no formal screening. This was either because the investments fell outside the scope of the FDI regime or were readily seen to pose no apparent threat to security or public order.

Member States approved 95% of the transactions they reviewed with 86% cleared unconditionally. Conditional clearances (with conditions or mitigating measures) materially decreased from 23% of screened cases in 2021 to only 9% in 2022, marking an even lower proportion than in 2020. A further 1% of cases were blocked and 4% withdrawn by the parties.

> The high proportion of clearances remains consistent with the stated position of the EU that the bloc remains open to FDI and that interventions are expected to be limited to a very small proportion of transactions that are likely to pose a threat to security or public order.

423 notifications (slightly more than the 414 in 2021) were submitted to the Commission via the cooperation mechanism. Notifications were made by 17 Member States (as compared to 13 in 2021), with Austria, Denmark, France, Germany, Italy and Spain accounting for more than 90% of those notifications. 81% of the cases (as compared to 86% in 2021) were closed by the Commission in Phase 1 (within 15 calendar days of receipt of a notification). Of the remaining 19% of cases, 11% proceeded to Phase 2 (35 days of receipt of a notification) and were subject to additional information requests from the notifying Member State; 8% of the cases were ongoing at the time the EU FDI Report was being finalized. In terms of sector focus, the Phase II reviews were primarily focused on manufacturing (59%), information and communication technologies (23%) and transport and storage (8%). As for the country of origin, investors from the U.S., the UK, China, Japan, Cayman Islands, and Canada accounted for the majority of cases notified to the Commission. Moreover, the statistics also show that the Commission has remained consistent with its a relatively light-touch approach in its advisory role: similarly to 2021 a confidential opinion was issued in less than 3% of the cases notified by Member States.

Interplay with EU Merger Regulation

In certain situations, the interplay between the FDI screening in the EU and the EU Merger Regulation ("EUMR") may give rise to uncertainty. While the Commission has exclusive jurisdiction over transactions that are notifiable under the EUMR, Article 21(4) of the EUMR recognizes that Member States may take appropriate measures to protect interests other than competition, provided the measures are compatible with "general principles and other provisions" of EU law (so-called "legitimate interests").

However, Member State FDI interventions may go beyond the "legitimate interests" capable of recognition under the EUMR. Certain national regimes are notably broad. For example, in Hungary, where the law may apply to wholesale and retail, or in France, where the regime applies to agriculture, fishing and forestry. In addition, there are multiple EU Member States (including France and Poland, among others) in which the acquisition of equity interests in a publicly listed company beyond a given threshold automatically qualifies for review, irrespective of the sector in which it is active.

These issues were recently brought to the forefront when the Commission found that Hungary's decision to invoke its FDI screening rules to veto the acquisition of the Hungarian subsidiaries of Aegon by Vienna Insurance Group AG Wiener Versicherung Gruppe (VIG) contravened Article 21 EUMR. The transaction, which was notifiable under EUMR, involved the acquisition of the Hungarian, Polish, Romanian and Turkish entities of Aegon, a Dutch multinational insurance group, by VIG, an Austria-headquartered international insurance group. The transaction was cleared unconditionally by the Commission under merger control rules in phase I, but the Hungarian government blocked the acquisition of the Hungarian entities a few months prior to the adoption of the clearance decision claiming it was harmful to Hungary's legitimate interests.

Following the opening of an investigation in October 2021, the Commission concluded that there were reasonable doubts as to how a transaction between two EU businesses could "pose a threat to a fundamental interest of society." Accordingly, Hungary's failure to communicate the veto to the Commission prior to its implementation was found to be in breach of Article 21 of the EUMR. This effectively confirmed the formal position that Member States are required to notify measures intended to protect legitimate interests which are not explicitly recognized by the EUMR. The Commission's decision carried with it the threat of infringement proceedings if Hungary failed to withdraw its veto. Hungary withdrew its veto, but it was ultimately able to negotiate the acquisition of a 45% interest in the Hungarian business of VIG via the state holding company Corvinus.

This example calls into question the legality of Member State FDI rules which protect interests outside of the recognized categories of "legitimate interests." It also suggests that further interventions by the Commission may be required to resolve future conflicts. This means that investors face potentially significant delays in completing their transactions if similar EU-Member State stand-offs arise.

Reform Proposal for EU FDI Regulation

In June 2023, the Commission and the High Representative for Foreign and Security Policy adopted a Joint Communication on a European Economic Security Strategy that aims at strengthening the EU's economic security against the background of the current geopolitical tensions and the profound technological shifts economies are experiencing worldwide. The Strategy identified four risk categories to be addressed as a matter of priority: (i) resilience of supply chains; (ii) physical and cyber-security of critical infrastructure; (iii) technology security and technology leakage; and (iv) weaponization of economic dependencies or economic coercion.

As part of the rollout of the new Strategy, the Commission recently published the Economic Security Package, which includes a proposal for reform of the EU FDI Regulation. The proposal builds on the Commission's experience gathered via the cooperation mechanism and on the extensive evaluation of the functioning of the EU FDI Regulation. The key changes include:

- **Mandating all Member States to introduce FDI screening regimes.** At the time of writing, there remain five Member States – Bulgaria, Croatia, Cyprus, Greece and Ireland – that do not have FDI controls in place. Bulgaria and Ireland are expected to enact FDI regimes this year while the remaining three are anticipated to progress legislative initiatives soon. Member States would have 15 months from the enactment of the proposal to introduce an FDI screening framework.
- **Extending FDI co-operation mechanism to certain investments.** The proposal covers investments made by EU investors that are ultimately controlled by non-EU investors and, notably, 'greenfield investments' (i.e., the setting-up of a facility or a business in the EU).
- **Excluding internal restructurings from FDI screening rules, provided no increase in the interest or change in governance rights.**
- **Introducing minimum standards for FDI screening.** The proposal envisages a possibility for the authorities to launch an 'own-initiative-procedure' to screen non-notified investments for at least 15 months after completion, and a right for investors

to seek judicial recourse against FDI decisions. The proposal also lists additional economic activities and technological sectors as well as projects of Union interest that should fall under mandatory filing obligation.

- **Harmonizing substantive aspects of FDI reviews.** The proposal includes a revised list of criteria that Member States should consider when reviewing a transaction. The factors include the impact on the security, integrity and functioning of critical (physical or virtual) infrastructure, the availability of critical technologies (including key enabling technologies), the continuity in the supply of critical inputs, and the protection of sensitive data (including personal data) as well as media freedom and pluralism.
- **Aligning procedural aspects of FDI screening.** The proposal requires notifications triggered in different Member States by multijurisdictional transactions to be submitted simultaneously, and Member States should use the cooperation mechanism to align on various aspects such as timing, reportability of a transaction, decisions and any remedies.

The legislative proposal was open for feedback until April 1, 2024. The Commission will review and present the summary of the feedback to the European Parliament and the Council of the European Union for subsequent legislative debate on the proposal. The revised Regulation is unlikely to enter into force before 2027.

Outbound Investments

The Commission is considering the development of an outbound investment review mechanism to prevent the leakage of sensitive technology and know-how, and to safeguard the EU's security interests. The Commission first announced its plan to investigate outbound investment review as part of the European Economic Strategy in June 2023 and has recently released a non-legislative White Paper that outlines a comprehensive plan to assess potential security risks associated with EU businesses investing abroad.

We expect the Commission to focus on monitoring and assessing with Member States outbound investments in strategic sectors in the coming months, to determine if – and what kind of – mitigating actions may be necessary. The Commission will publish its findings and potential options for regulation in Autumn 2025. At present, no details regarding the potential introduction of an outbound investment screening mechanism at the EU level are publicly known. It is possible that an EU outbound control framework would, similar to the inbound control model, include a list of sensitive activities/areas but ultimately leave the scope to the discretion of the Member States. The focus would likely be on the transfer of strategic capabilities and/or manufacturing/supply chains.

However, it could be a slow process for the EU to adopt an outbound investment screening mechanism because investment policy is still governed at the Member State level. As such, it is not unlikely that EU Member States will end up driving an outbound screening initiative before the EU takes any harmonized legislative action. For instance, a paper published by Germany's Foreign Ministry suggests that Germany is "examining the creation of a legal basis for scrutinizing foreign investments by German and European companies in security-critical areas."

Outlook for 2024

Essentially all EU Member States now have FDI screening mechanisms in place or are in the process of establishing them.

The proliferation and expansion of FDI screening regimes among EU Member States will inevitably result in a continued increase in FDI notifications in EU Member States. In addition, Member States continue to show significant degrees of variation in their formal screening processes. Applicable timelines, sectoral coverage, notification requirements and other elements still diverge significantly. As such the coordination of FDI screening processes continue to be challenging.

The Commission's proposal to revise the EU FDI Regulation is generally a welcomed development for investors. The reform is expected to introduce a certain degree of cross-EU harmonization, bringing about some certainty for investors on what should be expected in terms of the scope of application and the substantive and procedural aspects of the review. Depending on the Member State compliance, the proposal may however introduce an additional lawyer of complexity to the challenges that investors are currently facing. For example, certain revisions to the cooperation mechanism that are meant to align and shorten the review process require an active participation from the Commission and Member States, with delays on any Member State's part potentially leading to extensions of a review timeline. The legislative initiative has a long road to the enactment in front of it and may still be subject to amendments of the European Parliament and the Council of the European Union when it is tabled for their review.

In the meantime, foreign investors planning transactions that impact the EU should have a strategy in place to deal with multiple parallel notification processes across Member States to ensure a consistent approach. Potential FDI filings need to be considered early in the transaction process, and parties need to ensure they are appropriately factored into transaction timetables. Missing a mandatory filing can lead to fines, render transactions legally void or even constitute a criminal offense.

France

Key Considerations

- France requires prior authorization if an investor wishes to take a significant share in a "strategic asset." Since January 1, 2024, the scope of the French regulation has broadened.
- First, the FDI screening, which applied to investments in companies registered in France, now also covers the acquisition of control of mere establishments registered in France of foreign companies. In addition, the list of strategic assets now includes extraction, processing and recycling of critical raw materials, and the list of strategic R&D sectors has been extended to photonic and low emission energy (deemed broader that the previous reference to renewable energy).
- In 2020, the threshold for non-EU/EEA investors was reduced to 10% from 25% for listed companies. Although this measure was initially announced as temporary, it was regularly extended and has now become a permanent procedure with more clarification and simplification, as of January 1, 2024. Therefore, two distinct regimes co-exist, and assessing which will apply will depend on whether the target company is listed.

FDI Regime Overview

The French FDI regime requires foreign investors, both from within the European Union (with limited exceptions) and abroad, to obtain prior authorization from the French Ministry of Economy and Finance in order to take a significant share in a "strategic asset" in France.

The list of strategic assets is set by decree and is updated periodically. The list, last updated in late December 2023, currently comprises 21 sectors that are deemed strategic for the protection of national defense, public order, public authority and public safety – such as weapons, cryptology, energy and water supply, networks and communication as well as food, news media, and research and development in critical technologies such as cybersecurity, artificial intelligence, semiconductors, biotechnologies, photonic and low emission energies. Lastly, infrastructures, goods and services essential to guarantee the integrity, safety or continuity of the extraction, processing and recycling of critical raw materials have been added to that list. The lowering of the threshold from 25% to 10% for listed companies has become permanent as of January 1, 2024.

Control can be acquired either directly or indirectly, alone or through a shareholder agreement, and the threshold is usually set at 25% of voting rights in a company registered in France. However, in July 2020, the threshold was reduced to 10% for non-EU/EEA investors seeking to invest in public companies. This measure was deemed necessary to protect strategic assets during the pandemic and was initially set to expire at the end of 2020; since then, it has been regularly extended and has now become permanent as of January 1, 2024.

Procedure

There is an initial review period of maximum 30 business days following the submission of a complete notification. However, the Ministry of Economy and Finance may stop the clock each time an additional question is posed. In addition, the Ministry may open a second phase for an additional maximum 45 business days if the Ministry considers that the foreign investor should undertake certain commitments to ensure the protection of national interests.

Investments in public companies are subject to a customized accelerated review process. A contemplated investment in a public company may be cleared within 10 days on the basis of a simplified procedure unless the Ministry of Economy and Finance requests the standard procedure to be followed to alleviate potential concerns.

Alternatively, investors and French companies may seek, within two months, the binding opinion of the Ministry on the eligibility of the latter to the French FDI screening mechanism.

On September 8, 2022, the French Ministry of Economy and Finance issued its first guidelines, intended to make the process clearer and more transparent. The guidelines also confirm the expansive approach to the definition of a "foreign investor," which can be any type of entity, with or without legal existence, and at any level within the chain of control. These guidelines are intended to be updated as the need for more clarification arises or as regulations evolve. The Ministry is bound by its guidelines but may nonetheless deviate from them in specific circumstances motivated by greater considerations of public interest. The guidelines leave room for discretion on a case-by-case approach to key considerations, such as the definition of "strategic sectors" and control, especially in the case of joint control.

The guidelines state that, when investors are expected to undertake certain commitments to get clearance, they should not be subject to negotiation. This should be viewed in conjunction with an increase in the number of cases in which commitments have been requested. For example, in 2022, out of 325 applications filed, 131 investments (i.e., 40%) were cleared, and in 53% of these (i.e., 70), the Minister's authorization was subject to commitments from the investor. This proportion is significantly higher, up to 76%, in the defense sector. The types of commitments to which investors may be required to agree include, among others, maintaining certain assets in France for a given time frame, commitments to supply strategic national clients, protection of national secrets and governance measures designed to protect public security, such as the prohibition of representatives of foreign companies to participate in some decision-making processes. Commitments may even include the transfer of part of the acquired capital or all or part of a branch of activity carried on by the target French entity to an entity separate from the investor and approved by the Ministry.

Lastly, the guidelines do not provide transparency on the value of penalties imposed so far, the amount of the penalty (which will depend on the context and the behavior of the investor) can go up to twice the amount of the transaction, 10% of the target's turnover or EUR 5 million. However, any sanction action is time-barred after six years from the day the offense was committed.

Outlook for 2024

The Ministry of Economy and Finance's scrutiny of target companies before issuing a clearance decision is continuously increasing.

The Ministry of Economy and Finance may oppose an investment only where the commitments offered are unable to address its concerns. Therefore, although refusals are not made public, they remain rather limited in number. Nevertheless, sellers increasingly seek to shield themselves from the risk of a FDI review or intrusive commitments by negotiating appropriate protections in transaction documentation (e.g., completion covenants/undertakings and effort clauses).

The recently published guidelines have proved useful to provide legal certainty, harmonization and stability in the implementation of the French FDI regime. They should be soon updated and would provide clarity on the enlarged scope of eligibility, but also on the proportionality of commitments and fines.

Germany

Key Considerations

- Germany remains an investor-friendly jurisdiction, but the German Ministry for Economic Affairs and Climate Protection ("BMWK") is now heavily scrutinizing deals involving companies active in the communications and IT sectors and/or investors from the People's Republic of China.
- Investors must notify the BMWK before acquiring interests of at least 10% or 20% of voting rights in German entities that are active in certain business sectors (the relevant threshold depends on the business sector in question).
- The BMWK may initiate a review on its own initiative in the case of an acquisition by a non-EU investor of 25% or more of the voting rights in any German company if the transaction poses a threat to public order or security in Germany.
- The timing of an investment review can be unpredictable, with some complex reviews significantly exceeding the deadlines set out in the applicable laws.

FDI Regime Overview

The German rules on FDI are set out in the German Foreign Trade and Payments Act ("Außenwirtschaftsgesetz" or "AWG") and the German Foreign Trade and Payments Ordinance ("Außenwirtschaftsverordnung" or "AWV"). The BMWK carries out its reviews in consultation with the Foreign Office, the Ministry of Defense and the Ministry of the Interior.

Non-German investors need to notify the BMWK before directly or indirectly acquiring voting interests of 10% or more in, or essential assets of, a German entity that is active in a "sensitive security area" (called "sector specific screening" which includes defense or cryptography sectors). Additionally, investors from outside the EU and the European Free Trade Association ("EFTA") must notify the BMWK before acquiring directly or indirectly at least 10% or 20% (depending on the relevant business sector) of the voting rights in, or essential assets of, a German entity that is active in certain other sensitive sectors, including critical infrastructure (energy, water and food supply, information technology and telecommunications, health (including certain healthcare services, medical products, pharmaceuticals and labor diagnostic products and services), finance and insurance, transport and traffic, as well as municipal waste) and software for such infrastructure, certain IT services (in particular cloud computing services), IT security products, healthcare and key technologies such as semiconductors, artificial intelligence, robotics, satellite technologies, aviation and aerospace, autonomous driving and critical raw materials (called "cross-sectoral screening"). Investments in companies active in sensitive security areas or sensitive sectors that meet the relevant thresholds give rise to a standstill obligation. Parties may not consummate the transaction until the BMWK has cleared the transaction or the applicable review period has lapsed.

Transactions subject to mandatory notification are provisionally void under German civil law until clearance has been granted or the applicable review period has lapsed. Failure to obtain clearance prior to the consummation of a notifiable transaction is also subject to criminal exposure (criminal fines or imprisonment of up to five years).

The BMWK may initiate a review on its own initiative in case of an acquisition by a non-EU investor of 25% or more of the voting rights in any German company where the transaction poses a threat to public order or security in Germany. This right to call in transactions also applies to deals where the investor acquires so-called "atypical" control, a vague concept which is intended to cover circumstances in which an investor acquires influence going beyond the rights related to the acquired interest through the means of additional board seats, veto rights or access to certain specific information.

To obtain legal certainty regarding transactions that do not trigger a mandatory notification, non-EU investors often apply for a certificate of non-objection confirming that the BMWK has no objections to the deal.

If the BMWK prohibits a transaction, it becomes void under German civil law as regards the German activities of the target.

Recent Filing Data

In 2023, 257 transactions were notified to the BMWK based on the German domestic FDI regime, a drop by 16% compared to 2022. 220 transactions (86%) were notified under the cross-sectoral screening regime. The majority of the notified transactions involved U.S. investors (37%), followed by transactions involving investors from the UK (14%) and from China (8%). The sectors most frequently reviewed were information and telecommunication technologies (28%), health and biotech (13%) and energy (9%). In 2023, 10 cases out of 257 (4%, 26 cases were ongoing at the beginning of 2023) were subject to restricting measures (conditions, public-legal contracts, administrative orders or prohibitions). In 2022, 12 cases out of 306 (4%), and in 2021 14 cases out of 306 (4.5%), were subject to such restricting measures.

Timing Considerations for Transactions

In transactions that trigger mandatory notifications, the BMWK has an initial period of two months to determine whether to open a formal review. If a formal review is opened, it lasts another four months, beginning with the receipt of all relevant documents.

The formal review period can be extended by another three months in exceptionally complex cases, and four months in defense deals. A review can be suspended in case of additional information requests, and for as long as negotiations on mitigation measures are carried out between the BMWK and the parties involved.

In cases of voluntary applications for a certificate of non-objection, the BMWK must decide within two months whether to issue the certificate or open a formal review. If the two-month period expires without commencing a formal review procedure, the non-objection certificate is deemed to have been issued.

The BMWK does not hesitate to make use of its ability to stop the clock when it feels that it needs more time for its review. In practice, review periods may significantly exceed the deadlines set out in the applicable laws.

However, in 2023, approximately 54% of notified transactions were cleared within 40 days, and thus well ahead of the statutory two-month review period. Only 17.5% were closed after more than 60 days, and 10% were still under review in January 2024.

Case Study: KLEO Connect

In September 2023, the BMWK prohibited the complete takeover of KLEO Connect, a satellite communications joint-venture, by its two Chinese shareholders which already held a combined 53% interest in the company. Although the BMWK did not intervene when the Chinese shareholders acquired their majority interest in 2018, it prohibited the redemption of the shares held by the minority shareholders from Germany and Liechtenstein in KLEO Connect, which is involved in a project for the creation of a European low earth orbit satellite fleet intended to become a system comparable to the Starlink system operated today by SpaceX. The particularity of the case was that the BMWK applied the German FDI screening regime to the redemption of shares initiated by the majority shareholders as a legal operation which does not constitute a transaction between a seller and an acquirer by which an interest in a company is transferred, but in a unilateral act by which certain shares cease to exist resulting in an increase of the interest of the remaining shareholders. The BMWK considered that there was an unintended loophole in the FDI regime in this respect which needed to be closed by an analogous application of the relevant provisions. It considered that this was necessary in light of the legislator's intention to enable the competent authorities to screen, and if necessary, block, an acquisition of control over critical German undertakings by non-EU investors.

Investors have recently overturned BMWK prohibition decisions on procedural grounds in German courts. In November 2023, the Berlin Administrative Court annulled two BMWK decisions for procedural non-compliance. In the first case, an Austrian company's indirect acquisition of a 37.5% stake in PCK oil refinery was initially notified. After a pre-emptive right was exercised by another shareholder, the Austrian company deemed its notification obsolete. However, Ukraine war developments nullified the pre-emptive right, prompting the Austrian company to revert to its initial notification. Concurrently, arbitration was underway between the seller and the Austrian company over the transaction's alleged cancellation. The BMWK prematurely closed its review without a formal decision on the basis that the transaction had been aborted, prompting the court to rule that the BMWK's closure lacked legal basis and that the transaction was deemed cleared after the statutory review period lapsed without an in-depth investigation.

In the second case, the court reversed the BMWK's prohibition of Heyer Medical AG's acquisition by China's Aeonmed Group. The court found that the BMWK failed to respect the parties' right to be heard and did not initiate its review within the required two-month period after learning of the transaction through an online article. The timing of the prohibition decision post-Aeonmed's last hearing was also deemed excessively long.

These rulings highlight the imperative for the BMWK to strictly adhere to procedural rules under German administrative law and the FDI regime.

Outlook for 2024

While Germany remains a foreign investor-friendly jurisdiction, the BMWK has intervened in a significant number of transactions since the first tightening of the regime in 2017. Against the background of increasing political tensions and military conflicts around the globe, this may be perceived as a trend not only to actively protect German economic interests in what is perceived to be an increasingly hostile global economic climate, but also to achieve a more "politicized" investment control.

While prohibitions of deals on foreign investment grounds have become more common in recent years, the BMWK has also been inclined to discuss remedies to mitigate security concerns in certain sensitive transactions. The multitude and magnitude of recent developments in relation to FDI screening has led to a heightened sense of uncertainty among foreign investors contemplating transactions in Germany.

It remains to be seen whether a proposal for a new standalone Investment Screening Act will successfully streamline the current patchwork of FDI regulations and reduce uncertainty and whether the BMWK will issue guidelines similar to those of competition authorities, aiding investors in navigating the German FDI regime.

Conversely, there are concerns that the FDI landscape may grow more complex, especially with the government's plans to tighten rules for critical infrastructure and sectors like AI, semiconductors, cloud computing, cybersecurity and raw materials. The expanded regime could encompass IP licensing, research collaborations and greenfield joint ventures, targeting strategies that investors might use to bypass FDI scrutiny. This could potentially shift the burden of proof onto investors to demonstrate their investments do not threaten security interests.

Given these potential changes, it is crucial for non-German investors involved in transactions with German entities to proactively address and plan for the challenges of Germany's evolving FDI regime to prevent future complications.

Ireland

Key Considerations

- The Screening of Third Country Transactions Bill 2022 was signed into law as the Screening of Third Country Transactions Act ("STCTA") on October 31, 2023, becoming Ireland's first law regarding a foreign investment screening regime and giving effect to the EU Screening of FDI Regulation (EU) 2019/452. STCTA is expected to enter into effect in Q2 of 2024.
- The STCTA establishes a "process to allow for certain transactions that may present risks to the security or public order of the State to be reviewed by the Minister for Enterprise, Trade and Employment" ("Minister").
- Unusually for FDI laws, the STCTA contains criminal provisions for failure to notify the Minister of a transaction, among other things. The STCTA also will allow the Minister to review transactions that were completed up to 15 months prior to the enactment of the STCTA.

FDI Regime Overview

The STCTA creates a mandatory pre-notification and approval obligation on parties to any "transaction" – defined to include any acquisition, agreement or other economic activity, including minority investments, resulting in a change in control of an asset in Ireland or the acquisition of any amount of interest in an Irish company – that meets the following criteria:

- The transaction relates to or has an effect on areas such as critical infrastructure (e.g., communications, energy, aerospace, transportation), critical technologies and dual-use items (e.g., semiconductors, artificial intelligence, biotechnologies), supply chain needs (e.g., energy, raw materials), access to sensitive information (e.g., personal data) and the freedom of the media;
- An investor, or person connected to the investment, is from a "third country" (any country outside the European Union, European Economic Area and Switzerland);
- Such person does not, directly or indirectly, control all the parties to the transaction; and
- The transaction's value is equal to or greater than EUR 2 million, or an amount to be determined by the Minister.

Transactions that result in the acquisition of shares or voting rights, rather than a change in control, do not require prior notification unless each of the four elements previously listed are met and the percentage of voting rights or shares shifts from: (i) an amount equal to or less than 25%, to an amount more than 25%; or (ii) an amount less than or equal to 50%, to an amount more than 50%.

Procedure

Notifiable transactions must be notified at least 10 days before closing. Reviews must be concluded within 90 days (which can be extended an additional 45 days) and should consider factors such as whether a party to the transaction is controlled by a government of a third country, or whether the transaction would result in persons acquiring access to information, data, systems, technologies or assets that are of general importance to the security or public order of Ireland. Though all parties involved in a transaction are required to notify, the law allows for one party to provide consent to another party to notify the Minister on its behalf. If the Minister determines that a transaction would likely affect the public order or security of the country, the Minister may require the parties to, among other things, not complete the transaction, sell or divest, cease a certain practice, comply with national security risk mitigation conditions or abandon the transaction. Adverse decisions by the Minister may be appealed in writing within 30 days of receiving the notification of the screening decision.

Failure to notify a notifiable transaction will result in an automatic finding that the transaction does affect, or is likely to affect, Ireland's security or public order. Such a finding would enable the Minister to, among other things, order the parties to sell or divest assets and/or modify or cease a specific practice. Failure to notify and/or providing false information on a notice is a criminal offense with penalties of imprisonment up to five years and a fine of up to EUR 4 million.

The Minister has discretion to review non-notifiable transactions where the Minister has reasonable grounds to believe the transaction could or does affect public order or security; and the transaction could or does result in a third country investor or connected person acquiring or changing the extent to which it has control of an Irish asset, control of or interest in an undertaking in Ireland, legal rights in relation to a person, asset or undertaking in Ireland, the ability to exercise effective participation in the management or control of an undertaking in Ireland, or the ability to exercise control over an undertaking in Ireland through a change in ownership or legal structure of that undertaking.

The Minister may begin a review of a non-notified transaction (i.e., a notifiable transaction where the parties did not submit a notification) up to five years from the transaction's completion date or six months from the date on which the Minister first becomes aware of the transaction, whichever is later. For non-notifiable transactions, the Minister has up to 15 months after the transaction is completed to commence a review.

For both notified and notifiable transactions, the Minister may review transactions completed up to 15 months before the STCTA goes into effect.

Outlook for 2024

The STCTA is Ireland's first foreign investment review mechanism. The Act appears to be overly broad because of its low financial threshold (EUR 2 million, although the Minister may change this number) and its applicability to allied jurisdictions, such as the United States and United Kingdom. Given its breadth, it will be noteworthy to observe how quickly the Minister will be able to review relevant transactions. It is possible that Ireland will consider exempting from the notification requirement certain friendly states in the future.

It will also be important to monitor how some of the unusual aspects of Irish FDI will be applied once the STCTA goes into effect, including consent notices and criminal penalties. Most other FDI regimes do not provide for one party to notify the authority on behalf of others, and most do not include criminal penalties. Further, it will be of interest to see how the Irish government will review foreign investments retroactively in the 15 months prior to the law's going into effect.

Russia

Key Considerations

- Russia's FDI screening regime comprises three mechanisms. The first covers 50 sectors of the economy that have been designated as "of strategic importance" for state defense and security. The second requires review of a transaction of a non-Russian investor with special status, or when certain circumstances are in place. The third mechanism, governed by presidential decrees, was introduced in response to economic sanctions and export control restrictions imposed on Russia and covers almost any transaction involving (either directly or indirectly) investors from so-called "unfriendly" countries (unless ultimately controlled by a Russian person).
- The timing of a classic FDI review under the first two mechanisms should conclude within six months, and in 2023 typically concluded within three months. The timing of reviews under the presidential decree framework is more difficult to predict. Transaction clearance may take a few weeks, in circumstances where it is of great importance to the Russian government (this became extremely rare in 2023), or several months, wherein the applicant may be required to make several repeated submissions to the authorities. In a notable number of cases, approvals took longer than a year and/or have not yet been provided.
- The majority of notable transactions involving foreign investors these days are exit sales and fall under the third mechanism (presidential decrees). Based on unofficial statistics, there are approximately 400 applications currently under review within the presidential approval process and more than 2,000 under consideration within the approval process of the Sub-Commission of the Government Commission for Control over Foreign Investments (the "Sub-Commission").

FDI Regime Overview

Historically, FDI screening in Russia was based on two main legal instruments: Federal Law No. 57 "On Foreign Investments in Entities Having Strategic Importance for Security and Safety of the State" of April 29, 2008 ("SSL"), and Federal Law No.160-FZ "On Foreign Investments" of July 9, 1999 ("FIL") (each as amended).

However, this regime was supplemented with an additional set of procedures under presidential decrees adopted after March 1, 2022 (the "Decrees") which materially modified the FDI regime applicable to both exit-sale transactions and new investments if they involve, directly or indirectly, a person from "unfriendly" jurisdictions (either on the buyer or seller side).

Regime under the Decrees

The Decrees apply to any transaction related to the establishment, change, termination or encumbrance (directly or indirectly) of rights with respect to equity interests (either shares or interests in limited liability companies) in Russian legal entities, if such transaction involves, directly or indirectly (by way of indirect control over the buyer or the seller), a non-Russian investor from an "unfriendly" country. This new clearance regime is composed of numerous presidential decrees that apply to non-specific Russian targets (under a general regime requiring approval by the Sub-Commission), as well as to specific entities and/or entities operating in specific sectors and/or engaged in specific activities, such as credit organizations (banks, etc.), companies in the oil, gas and energy sectors and certain other subsoil users. Transactions in these sectors may require approval from the Russian president rather than the Sub-Commission. From late February 2024, the Sub-Commission has been required to provide its recommendation to the President regarding transactions falling under the presidential approval regime (subject to exceptions). The Decrees regime may also apply to the acquisition of equity interests through the establishment of a Russian entity.

The restrictions outlined above apply to all citizens of "unfriendly" countries, entities with a principal place of business or registered in such countries, and those whose income is primarily derived from or generated in such countries. The list of "unfriendly" jurisdictions currently totals 49 countries and territories, which comprises all major jurisdictions that have imposed sanctions against Russia, including the United States, Australia, the United Kingdom (together with its overseas territories) and the European Union.

The Sub-Commission and the Office of the President have broad powers to approve or modify transactions that fall within their respective jurisdictions, including by directing a modification (decrease) of the purchase price, removing collateral and imposing key performance indicators.

The Decrees regime sets out a list of requirements for transactions. Among others, parties are required to: (i) procure an appraisal report on the market value of the Russian target from a listed appraiser, together with a certification of such report's compliance with applicable Russian standards; (ii) accept a 50% discount on the deal price (based on the appraisal value of the business); (iii) pay an additional exit tax to the Russian government in the amount of 15% of the appraisal value; and (iv) comply with key performance indicators imposed by authorities on the buyer. The requirements imposed by the government, including the ultimate size of the discount and/or the exit tax, may vary.

Classic Regime

Russia's two main instruments of its FDI regime, the FIL and SSL, apply to non-Russian investors, which includes Russian individuals holding foreign citizenship, who plan to acquire an equity interest in, or establish control over, a Russian entity. General oversight is carried out by the Federal Antimonopoly Service ("FAS"), which handles administrative preparatory work, and the Government Commission for Control over Foreign Investments (the "Commission"), which approves transactions under FIL and SSL. The Commission should not be confused with the Sub-Commission, which is also an *ad hoc* institution, but is technically a different body that deals with clearance of transactions under a different FDI regime established by Decrees and consists of some other authorities.

The FIL does not specifically cover investments in domestic assets (property) of Russian entities, and it generally has no sector or industry focus. However, the December 2022 amendments added several new criteria that increase the chances of triggering the requirement of FIL review (for example, if the target company has a dominant position in a given market or operates in the energy or movable satellite radio sectors).

In certain cases, FIL approval will most likely be required, for example, for the clearance of: (i) investments in Russian entities by foreign states or international organizations (or their affiliates/entities under their control) where an equity interest of more than 25%, or other rights which allow an investor to block decisions/resolutions of the target entity, are acquired; and (ii) any investment in Russian entities where the Head of the Commission has requested a review (so-called "*ad hoc* cases"). The FIL may also apply to the acquisition of equity interests through the establishment of a Russian entity (where the SSL does not apply unless establishment involves obtaining a license for strategic activities).

In contrast, the SSL regulates acquisition of control over (usually, acquisition of more than 50% of votes or rights to manage the business), or other investments in (e.g., acquisition of a minority stake of 5%, depending on the target business and investor, or of veto rights), Russian companies (or their assets) that operate in any of 50 sectors of the Russian economy that have been designated as being "of strategic importance" for state defense and security. Those key sectors include: aviation and space, cryptography and related equipment and services, mass media and telecommunications (depending on coverage), military equipment and related services, nuclear, survey and mining of natural resources at strategic subsoil plots and services provided by natural monopolies (for example, oil and gas pipelines, railroads, ports and airports). As a rule, regulatory clearance is required to acquire "control" over a strategic Russian company.

Post-completion notifications need to be submitted to the FAS including following the completion of a transaction where the Commission issued its prior approval under FIL, or SSL, or following the acquisition of a 5% or more equity interest in a strategically important entity.

The Commission has broad powers and may require non-Russian investors to enter into written commitments in terms of the conduct of the business as a condition of approval. A transaction clearance granted to a non-Russian investor must set out the timing for the closing to occur. Failure to seek approval for a notifiable transaction would render it void and lead to related consequences, such as restitution or the loss of voting rights on application to a Russian court, or even nationalization.

Timing Considerations for Transactions

Timing depends on the applicable FDI regime that is involved. There are no set timelines for the review process under the Decrees regime. In practice it may take anywhere from a few weeks from the time of submission of the application (this happens only rarely, typically in cases in which an influential counterparty is involved), to several months to obtain transaction clearance under the Decrees regime. In certain cases, it takes more than a year to get approval. Depending on the applicable decree and the industry in which the target operates, the process involves several authorities, including the industry-specific ministry which acts as the entry point and carries out the initial stage of review, the Ministry of Finance and the Sub-Commission, which consists of the representatives of the Office of the President, the Central Bank and the Ministry of Economic Development, among others. If a transaction requires approval of the President (as opposed to the Sub-Commission), such as for transactions involving banks and companies in the oil and gas sector, the process is even more complex and uncertain, as it involves recommendations from the Sub-Commission, representatives of additional government bodies, as well as, in some cases, representatives of Russian state-controlled companies.

The FIL does not establish a bespoke review process for notifiable transactions; rather, the law provides that the procedures of the SSL apply. However, the authorities have a broad margin of discretion with regards to the interpretation and application of the statutory deadlines for FIL approval under the procedures set out in the SSL. Therefore, although the time limit of six months applies, it may take longer in practice.

Under the SSL, the Commission is supposed to issue its decision within a maximum review period of six months. Nevertheless, the statutory deadline is not always respected. Although decisions may be issued within the initial review period of three months, the timing is uncertain since (i) the Commission is an *ad hoc* body which does not hold regular meetings, and (ii) the review process requires the input of multiple government departments (e.g., the Ministry of Defense, the Federal Security Service), which is often delayed. The SSL contains a simplified clearance procedure, but only certain transactions may benefit from it; for example, if a company generally operates in non-strategic areas, but has certain listed strategic assets. If a transaction falls under the Decrees regime and either FIL or SSL, the Commission tends to issue approvals under FIL or SSL faster, e.g., within two to three months.

Non-Russian investors should also reserve at least one additional month to prepare the filing under any of the mechanisms given the need to obtain notarized and apostilled documents, prepare Russian translations, and, in certain cases, disclose ultimate beneficial owners in advance.

The key takeaway is that the approval process, as amended in recent years, allows a lot of discretion for authorities, which leads to unpredictable timing and procedure.

Recent Filing Data

Russian authorities disclose statistics on filings under the FIL and SSL sporadically and do not disclose statistics on the Decrees regime.

In terms of the Decrees regime, based on unofficial statistics that include internal restructurings:

- Only 50 transactions have been approved under the Presidential approval process, with 400 currently under consideration; and
- More than 2,000 applications remain under consideration in the Sub-Commission approval process. It is unclear how many applications have been approved since February 2022. It is generally believed that only one-third of all transactions falling under the Sub-Commission regime have been approved, while other transactions are either still under consideration or have been withdrawn.

Normally, the Sub-Commission and/or the Office of the President do not issue an outright rejection, but rather put the deal on hold and require the parties to modify their terms. The modifications required by the government may extend to the value of the deal, certain covenants required to be undertaken by the parties (mostly the buyer), or even the identity of the buyer (for example, in the case of a tender process).

Recent Enforcement Trends

2023 was marked by an increased number of forced equity transfers to the Russian state or persons affiliated with the Russian state. For example, a number of companies were put under temporary external management, which implies that a Russian company is still owned by a Western business while its management is carried out by an external person or Russian Federal Agency for State Property Management (notable examples include: Uniper, Fortum, Danone, and Carlsberg). Companies have also been nationalized through court proceedings. Typically, such cases are initiated by the Russian Prosecutor-General's office based on violations of privatization procedures dating back to the 1990s. However, authorities may also informally request companies sell their Russian business (this happened primarily to grain traders in the past year);

Western companies affected by a forced equity transfer must either seek to settle with the Russian state or pursue court or arbitration proceedings (e.g., Fortum has initiated arbitration proceedings, while Uniper has put Russia on notice of a potential investment treaty claim).

Outlook for 2024

Since the beginning of 2024, approximately 20% of the remaining US and EU companies in Russia have withdrawn from the country. As such companies continue to exit the Russia market, foreign investors will remain entangled in a long and convoluted clearance process imposed by FDI regime restrictions.

There were continuous refinements of Russia's FDI regime throughout 2023, which have resulted in additional hurdles for investors. Among other changes, the size of the "exit tax" payable by parties to the Russian government was increased from 10% to 15% of the target's market value, while the purchase price is now generally paid in instalments. This trend of raising the burden on transactions is likely to continue through 2024. Forced equity transfers will also most likely continue, leading to an increased number of arbitration and court proceedings, including potential investor-state disputes.

In addition, under the Decrees regime, certain transactions requiring the President's approval will need to pass through an additional layer of review from the Sub-Commission, which must then recommend to the President whether a transaction should be approved. However, there are certain instances in which the President may approve a transaction without such recommendation, and time will tell which transactions will benefit from this exception.

There are also certain bills proposed in the legislature that would require that transfers of intellectual property (e.g., as a part of transaction) be covered by the Decrees regime and require approval by the Commission. As we have seen in prior years, this will mean that transactions involving foreign investors (i.e., sales of assets or exits) will remain subject to a lengthy approval process administered under the Decrees regime.

Singapore

Key Considerations

- Singapore has introduced a new investment management regime to regulate significant investments (whether local or foreign) into entities that are critical to the country's national security interests.
- Under the Significant Investments Review Act ("SIRA"), entities that are designated as critical to Singapore's national security interests must notify or seek approval from the government for certain changes in ownership or control arising from investments.
- The SIRA also grants the Minister for Trade and Industry (the "Minister") "call-in" powers to review ownership or control transactions (within a two-year period) involving any entity that has acted against Singapore's national security interests, regardless of whether it has been designated.
- The regime under the SIRA is intended to complement the existing suite of sector-specific legislation by bringing critical entities that are not already adequately covered by such sectoral legislation within the scope of the government's oversight and management.
- The administration of the SIRA will be handled by the Office of Significant Investments Review ("OSIR"), which has been set up by the Singapore Ministry of Trade and Industry to serve as the dedicated one-stop touchpoint for stakeholders.

FDI Regime Overview

The SIRA and its related subsidiary legislation came into force on March 28, 2024 to boost Singapore's ability to safeguard its national security interests as a small and open economy amidst an increasingly complex global landscape.

The SIRA does not supersede existing sectoral legislation which manages entities in regulated sectors such as telecommunications, banking and utilities, but will complement them by empowering the government to more broadly scrutinize investments into critical entities that are not already adequately covered by such existing legislation.

Under the SIRA, any entity which (i) is incorporated, formed or established in Singapore, (ii) carries out any activity in Singapore, or (iii) provides goods and services to any person in Singapore, may be designated as a "designated entity" if the Minister considers such designation to be necessary in the interest of Singapore's national security.

The term "national security" has not been specifically defined in order to give the government the flexibility to respond quickly to changing security concerns in a rapidly evolving global landscape.

In deciding whether an entity should be a designated entity, the Minister will consider if such entity provides a critical function in relation to Singapore's national security interests (for instance, being a key provider of security-related functions where there are few or no alternatives), and whether it is already adequately covered by existing sectoral legislation.

A list of the designated entities will be published in the government Gazette and will be reviewed by the OSIR on a continuous basis.

Designated entities will be subject to notification and approval obligations under the SIRA, as elaborated on below.

Notification and approval obligations relating to ownership and control of designated entities:

- Buyers must notify the Minister within 7 days after they become a 5% controller[2] of a designated entity.
- Buyers must seek the prior written approval of the Minister before (i) becoming a 12%, 25% or 50% controller of a designated entity, (ii) becoming an indirect controller[3] of a designated entity, or (iii) acquiring the business or undertaking (or any part thereof) of a designated entity as a going concern.
- The approval for (iii) should be sought together with the designated entity.
- Sellers must seek the Minister's prior written approval before ceasing to be a 50% or 75% controller of a designated entity.
- Upon a designated entity becoming aware of any of the changes in ownership or control, such designated entity has a duty to report the relevant change to the Minister within 7 days of it becoming aware of that fact.
- Transactions completed without the requisite approvals will be rendered void, unless the Minister issues a validation notice stating otherwise. The Minister may issue such validation notice (i) upon application by any person which is materially affected by the fact that the transaction is void, or (ii) on his own initiative, if he is satisfied that it is in the interest of Singapore's national security to validate the transaction.

2 A controller means a person who, alone or together with his/its associates, holds a certain percentage of the total equity interests in a designated entity, or is in a position to control a certain percentage of the voting power in the designated entity.

3 An indirect controller, in relation to an entity, generally means any person (whether acting alone or together with other person(s), and whether with or without holding equity interests or controlling any voting power of an entity) – (i) whose directions, instructions or wishes the directors, officers or trustee (as applicable) of the entity are accustomed or under an obligation to act in accordance with, or (ii) who is in a position to determine the policy of the entity.

Others:

- Designated entities must seek the Minister's approval for the appointment of key positions, such as (i) the CEO, Directors or Chairman of the board of a corporation, or (ii) the manager or partner of a limited liability partnership. The Minister may by written notice require the removal of any key personnel if deemed necessary in the interest of national security.
- A person cannot make any application for any compromise or arrangement between a designated entity and its creditors, members or shareholders, unless such person has served 14 days' notice in writing of his intention to make that application on the Minister. The Minister must then be made a party to such proceedings, and any representations made by him in such proceedings must be taken into consideration by the court.
- Designated entities cannot be dissolved, voluntarily wound up or subject to judicial management without the Minister's consent. The Minister must also be made a party to such proceedings, and any representations made by him in such proceedings must be taken into consideration by the court.
- A person cannot (i) enforce any security over the property of a designated entity, or (ii) execute or enforce any judgment or court order against a designated entity, unless such person has served 14 days' written notice of his intention to the Minister.

All approval applications will be processed promptly by the OSIR (although the exact approval timeline is yet to be determined), and applicants will be notified should more time or documents be required.

Note that the provisions under the SIRA will not affect arrangements which are already in place. They will only apply to entities after they have been designated. The SIRA also does not provide for a voluntary review regime at this time, only the mandatory review regime for designated entities (or specific actions by the Singapore government as described below).

The SIRA also empowers the Singapore government to take action against any entity that has acted against Singapore's national security interests, whether they are designated or not.

The SIRA grants the Minister the power to "call-in" ownership or control transactions of any entity for review if (i) such entity has acted against Singapore's national security interests (the "Relevant Action"), and (ii) the ownership or control transaction occurred within the two years prior to the Relevant Action.

Following such review, the Minister may require for a range of targeted actions to be implemented, such as directing the transacting party to transfer or dispose of its shareholding in the entity, or directing the entity to restrict disclosure of confidential information to any person.

Outlook for 2024

The full impact of the SIRA regime remains to be seen, but the Singapore government has emphasized its commitment to maintaining a balance between protecting the country's national security interests and minimizing adverse impact on business and investors.

The expectation is that "only a handful of critical entities" will be designated under the SIRA, as most critical entities are already sufficiently covered by existing laws.

The government will work closely with affected stakeholders and implement clear processes where possible. In the meantime, once the list of designated entities has been published, investors should make sure that applicable notification and/or approval requirements are duly factored into transaction timelines if they are investing into a target which has been listed as a SIRA designated entity.

United Kingdom

Key Considerations

- While most transactions are cleared unconditionally under the National Security and Investment Act 2021 (the "NSI Act" or the "Act"), it has become clear that the UK government will not shy away from exercising its wide-ranging powers to investigate, impose remedies and block transactions that raise UK national security concerns.
- Remedies imposed under the NSI Act tend to be "behavioral" rather than "structural" (for example, implementing information safeguards or "capability preservation," which aim at retaining the presence of certain industries in the UK). While recent transactions requiring remedies involved a broad spectrum of acquirers, statistically most acquirers in transactions blocked by the UK government had a nexus to China.
- In response to concerns over foreign influence on British media, the UK government has proposed legislation enhancing the scrutiny of foreign acquisitions of British news publications.

FDI Regime Overview

The NSI Act came into force on January 4, 2022, introducing a standalone comprehensive FDI screening regime. It provides the UK government with powers to review and intervene in transactions on "national security" grounds, a term that is intentionally undefined.

The UK government has emphasized that the country is "open for business" and, in practice, only a small number of transactions have been subject to a full-blown national security assessment. Nevertheless, the wide jurisdictional reach of the regime, mandatory notification requirement and potential retrospective application add to an increasingly complex regulatory landscape for transactions connected with the UK.

The NSI Act captures investments in:

- "Qualifying entities," which include a broad range of legal structures (for example, companies, limited liability partnerships, any corporate body, trusts and unincorporated associations), which carry out activities in the UK or supply goods or services in/to the UK; and
- "Qualifying assets," including tangible property such as land and moveable objects, as well as intangible property, such as ideas, information, techniques or intellectual property, which are used in connection with activities in the UK or the supply of goods or services to people in the UK.

Compared to the UK merger control regime, the NSI Act has a much broader jurisdictional scope in that its criteria for applicability are not framed by references to minimum turnover or threshold relating to shares of supply or acquisition of goods or services. Instead, investments that satisfy the following control thresholds in specific sensitive areas of the UK economy fall within the scope of the Act (as "trigger events"), irrespective of the nationality of the investor:

- Shares or votes in a qualifying entity exceed 25%, 50% or 75%;
- Voting rights that enable or prevent the passage of any class of resolution governing affairs of a qualifying entity;
- Ability to "materially influence policy" of a qualifying entity; and
- Ability to use a qualifying asset, or direct or control its use, ability to do so to a greater extent than prior to the acquisition.

It is worth noting that indirect acquisitions of rights may also need to be notified. Further, qualifying acquisitions encompass internal corporate reorganizations that meet the above control thresholds, even where the ultimate beneficial owner remains the same.

The 17 specified sensitive areas of the economy are the following: advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, cryptographic authentication, data infrastructure, defense, energy, military and dual-use, quantum technologies, satellite and space technologies, synthetic biology and transport.

Although the government has indicated that it intends to focus on UK-based entities and assets, the NSI Act has extraterritorial reach since it applies to any entity or asset that is connected to the UK through activities carried on in the country and to the supply of goods or services to local customers. The connecting factors which may be considered when determining whether an overseas entity falls within the scope of the Act include but are not limited to local presence such as an office or branch; the supply of goods that are modified or used domestically; and carrying out research and development activities in the UK. Investigations into acquisitions of assets located outside the UK are expected to be rare, but the Act could apply to assets that are used in connection with the supply of goods or services to the UK and to the generation of energy or materials consumed domestically.

Mandatory vs. Voluntary Notification

Transactions must be notified pursuant to the mandatory notification regime where the shares or votes acquired by the acquirer in a "qualifying entity" exceed 25%, 50% or 75%; or confers the ability to pass or block resolutions governing its affairs and the entity is active in one or more of the 17 specified areas of the economy ("notifiable acquisitions"). A failure to seek approval for a notifiable acquisition before completion renders it automatically void. In addition, the acquirer and personnel of the acquirer may be subject to criminal and/or civil penalties for completing the transaction without first obtaining clearance. Acquisitions of assets are exempt from the mandatory notification obligation, although the government may choose to exercise its "call-in" power where it identifies a potential national security risk.

For qualifying acquisitions falling outside the mandatory regime, including the acquisition of material influence and qualifying assets, the assessment of whether the government should exercise its call-in power is based on three risk factors:

- **Target risk:** If the target, the entity or asset being acquired, is being used, or could be used, in a way that raises a risk to the UK's national security. This assessment may also take into consideration potential risks arising from the target's proximity to "sensitive sites."
- **Acquirer risk:** Whether the acquirer has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target. This assessment will consider not only an acquirer's country of origin, but also its ties or allegiance to a state or organization hostile to the UK.
- **Control risk:** The amount of control that has been, or will be, acquired through the qualifying acquisition. A higher level of control may increase the level of national security risk.

The call-in power is broadly framed, and the government can retrospectively review transactions that closed on or after November 12, 2020, for a period of up to five years, although this is reduced to six months if the government has "become aware" of the transaction.

Parties to transactions that are not caught by the mandatory regime are able to submit voluntary notifications to obtain certainty that the government does not intend to exercise its call-in power. In addition, it is possible to submit retrospective validation applications for completed transactions.

Review Process

The NSI regime is overseen by the Investment Security Unit ("ISU") in the Cabinet Office, the ministerial department supporting the Prime Minister.

The review process of qualifying acquisitions is divided into three parts:

- **Assessment of a notification's completeness:** The ISU is not subject to a statutory time limit but in practice accepts non-problematic transactions for a review promptly and generally within three to five working days from the submission. When a notification is rejected, the ISU will inform the parties of the rejection and the reasons for it. The rejection is communicated on average within 6-12 working days.
- **Review period:** The ISU has a statutory deadline of up to 30 working days to clear or call-in a transaction for a full national security review, with the ISU taking on average 27 and 28 working days to clear voluntary and mandatory notifications, respectively. The vast majority – 93% – of transactions are approved within the initial review period.
- **Assessment period:** Full national security assessment: the ISU has up to an additional 30 working days to decide whether to clear the transaction, impose remedies, extend the period for assessment, or prohibit the transaction. The assessment period can be extended by a further 45 working days and further by a period of time agreed by the government and the acquirer.

The ISU has broad investigatory powers including the ability to request information and meetings with the parties. The Act also foresees a wide range of remedies to address national security concerns, including imposing conditions and blocking transactions as well as issuing interim orders to prevent parties from acting, which may undermine the ISU's ability to effectively resolve potential national security concerns. Non-compliance carries severe penalties, including imprisonment of up to five years, fines up to 5% of worldwide turnover or £10 million (whichever is greater) and transactions being legally void if closed in breach of the NSI Act.

Recent Filing Data

The UK government's annual report on the NSI Act for the period spanning April 1, 2022, to March 31, 2023 (the "Reporting Period") reveals that the ISU processed 866 notifications, comprising 671 mandatory notifications, 180 voluntary notifications and 15 retrospective validation applications for transactions that should have been reported under the NSI Act but were not. A minor proportion, 43 notifications, were dismissed by the Secretary of State, primarily because they were incorrectly filed as voluntary rather than mandatory.

Of the notifications assessed during the Reporting Period, only 7.2% resulted in a call-in notice, indicating a need for further scrutiny, while the vast majority, 92.8%, received no further action notices. Among the acquisitions scrutinized after the initial review period, 37% were associated with the Military and Dual Use sector, 29% with Defense and 29% with Advanced Materials – sectors that would be linked with national security issues on their face.

During the Reporting Period, there were 57 final notifications, whereby a transaction is cleared after being called in for assessment ("Final Notification"), equating to 97% of the total called in acquisitions in the Reporting Period. There were 15 final orders made, whereby the Secretary of State either approves a transaction subject to conditions, unwinds or blocks the transaction ("Final Orders"). This equates to less than 2% of the total notifications in the Reporting Period.

While remedies were imposed on transactions with both UK or U.S. acquirers and the NSI Act does not inherently discriminate based on country of origin, investments with links to China constituted 42% of the call-ins and most of the Final Orders, although Chinese-related notifications were just 4% of the total. This statistic highlights the UK government's continued scrutiny of Chinese investments.

For further insights and analysis, please refer to our detailed OnPoint article on the UK government's annual report on the NSI Act.

Recent Enforcement Trends

The government tends to impose behavioral rather than structural remedies. Only five out of the 20 Final Orders (including six Final Orders made since the Reporting Period) involved the blocking or unwinding of a transaction. The behavioral commitments imposed so far are similar to those imposed under the UK's previous national security regime and can be grouped into the following categories:

- **Information security measures:** The government restricted the sharing of information from the target to the acquirer in, e.g., Redrock Investment Limited/Electricity North West Limited, XRE Alpha/China Power and Ligeance/Sichuan. The final order in Ligeance/Sichuan also specified security measures that would need to be in place. In Viasat/Inmarsat and Sepura/Epiris, the final order obliged the parties to implement controls to protect sensitive information from unauthorized access. In EDF Energy Holdings/GE Oil & Gas Marine & Industrial and GE Steam Power, the final order required information security requirements, governance arrangements for sensitive information protection and the establishment of a steering committee for oversight of compliance with protection of sensitive information.
- **Maintenance of UK strategic capabilities:** The parties were ordered to maintain the strategic capabilities in the UK in Viasat/Inmarsat and EDF Energy Holdings/GE Oil & Gas Marine & Industrial and GE Steam Power. In CPI/Iceman and TransDigm/Iceman, the final orders required the parties to maintain the target's research, development and manufacturing capabilities in relation to atomic clocks in the UK.
- **Restrictions on board composition:** In Ligeance/Sichuan, the final order required the parties to: (i) remove the target's and the acquirer's representatives from the board of the subsidiary engaged in sensitive activities; and (ii) appoint a UK government observer to the board of the subsidiary. Similarly, in Vodafone Group/Emirates Telecommunications Group, the final order required the parties to meet specific requirements regarding board composition.

Additional measures implemented in Vodafone Group/Emirates Telecommunications Group and EDF Energy Holdings/GE Oil & Gas Marine & Industrial and GE Steam Power reflect an intensified government commitment to the oversight and potential direct management of entities operating within national security-sensitive sectors. Specifically, Vodafone Group was required to form a National Security Committee dedicated to supervising operations with national security implications. In EDF Energy Holdings' case, the final order included a provision granting the Secretary of State the authority to take over the operational control of the business should a breach occur that poses a significant risk to essential Ministry of Defense programs. These provisions underscore the government's proactive stance in safeguarding the UK's national security interests.

Other types of remedies include reporting obligations, requirement to obtain government approval before appointing a power offtake operator or entering into an agreement to sell, transfer, lease or license parts of a silicon conductor processing facility and maintenance of capabilities in the UK in repairing, servicing and maintaining devices.

When a transaction is reviewed under the NSI Act and by the Competition and Markets Authority ("CMA") under the merger control regime of the Enterprise Act 2002, the ISU and CMA are likely to co-ordinate in relation to any required remedial actions to avoid potential conflicts between remedies ordered as part of their respective reviews.

Outlook for 2024

Although most acquisitions under the NSI Act are cleared within the initial 30 working day review period, the regime's low thresholds necessitate that many benign transactions be notified due to meeting mandatory notification thresholds, which can affect deal timelines. However, the statutory deadline for the initial review aids in planning for transactions where security concerns are unlikely. With increasing global awareness of the NSI Act mandatory notification requirement and associated sanctions, we may see an increase in notifications from transactions involving non-UK investors.

While the government has an opaque screening process and makes only limited information publicly available on the substantive aspects of enforcement, remedies and prohibitions are generally in line with recent approaches taken by other FDI authorities around the globe.

The UK government is considering amendments to the NSI regime based on industry feedback from the "Call for evidence" concluded in January 2024. This includes revisions to the 17 sensitive areas of the UK economy subject to mandatory notification requirements, including refining the scope of the Artificial Intelligence area. Another particular focus is the potential introduction of targeted exemptions from mandatory notification requirements, especially in cases where investments do not confer significant levels of control or result in a change of control, such as restructurings within a corporate group. This change aims at streamlining the process, reducing the regulatory burden on transactions that pose minimal risk to national security while maintaining the necessary safeguards.

Separately, in light of the proposed acquisition of Telegraph Media Group by an Abu Dhabi-backed fund, the UK government introduced in March 2024 an amendment to the Digital Markets Bill that would give the government the right to block acquisitions by foreign states of UK news publications. The proposed change would represent a significant shift in the UK's approach to foreign investment in the media industry. If it becomes law, this screening tool would become part of the UK's merger control regime, contained in the UK Enterprise Act 2002.

United States

Key Considerations

- The Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") is an interagency committee that has broad powers to review foreign investments in and acquisitions of U.S. businesses to determine the potential impact on U.S. national security.
- The Committee has an increased focus on specific investments in certain U.S. businesses. Transaction parties should evaluate CFIUS considerations around investments in U.S. businesses that involve critical technology, critical infrastructure and sensitive personal data, especially clean energy and biotechnology.
- Investors should conduct due diligence to understand national security touchpoints on all sides of a transaction. A sophisticated CFIUS strategy that accounts for an investor's objectives and anticipates and mitigates potential U.S. national security risks increases the likelihood that transaction parties will achieve closing on their preferred timing.
- Investments by non-U.S. investors in U.S. real estate as well as increasing Chinese investments have gained more attention and demands for action by congressional members.
- Although not yet implemented, U.S. outbound investment review made its debut in August 2023 via Executive Order, and we can expect to see implementation happen later this year.

FDI Regime Overview

The Committee has the authority to approve transactions, impose mitigation measures, suspend transactions and, where appropriate, recommend that the President block or unwind transactions. Recently, key areas of concern for CFIUS have included the energy, biotechnology and entities that handle Americans' sensitive personal data. Parties can prepare for CFIUS scrutiny by conducting due diligence and structuring deals with national security concerns in mind.

The Committee's jurisdiction encompasses:

- Mergers, acquisitions and takeovers that could result in a non-U.S. person acquiring control over a U.S. business;
- Certain non-controlling investments by non-U.S. persons in U.S. businesses associated with critical technology, critical infrastructure and sensitive personal data (with mandatory filing requirements for transactions involving certain U.S. businesses dealing in critical technologies or non-U.S. persons affiliated with non-U.S. governments, including sovereign wealth funds); and
- Transactions involving the purchase or lease by, or concessions to, a non-U.S. person of certain U.S. real estate that might raise national security concerns.

Transactions are brought to the Committee's attention through filings that take the form of either "notices" or "declarations." It generally takes a few weeks to a month to prepare a filing, though this timing can be accelerated. Notices are multi-page, in-depth descriptions of the transaction and parties that result in a four- to six-month review process and possible investigation. Notices can result in the deal being cleared to proceed; being subject to mitigation measures to protect national security concerns; or, in rare cases, being blocked. In 2022, it took CFIUS longer to conduct investigations (80 days) as compared to 2021 (65 days), per the Annual Report (as hereinafter defined). Declarations, by contrast, are typically no longer than five pages and present a simplified method of informing CFIUS of a transaction. Following submission, CFIUS has 30 days to review a declaration. The Committee may respond to a declaration in one of four ways, by informing parties that it: has cleared the transaction; is initiating a unilateral review; is requesting that the parties submit a full formal notice; or is unable to reach a decision regarding clearance based on the declaration alone.

The Committee's expanded jurisdiction as a result of the Foreign Investment Risk Review Modernization Act ("FIRRMA") continues to demand greater attention from transaction parties to potential CFIUS considerations from the very start of the transaction process to identify risks and manage potential impediments to closing. Once again, there is scrutiny around certain investments involving critical technology, critical infrastructure and sensitive personal data.

Recent Filing Data

In July 2023, CFIUS published its latest Annual Report to Congress on key activities, including notices, declarations and withdrawals through 2022 ("Annual Report"). Keeping up with an increasing trend year after year, 2022 was the Committee's most active year to date; there were a record 440 total cases (both declarations and notices) presented to the Committee for review.

This data reflects both the expansion of the Committee's jurisdiction in recent years and an ongoing surge in global M&A to record levels from 2021 onward. Singapore slightly surpassed China for the greatest number of notices filed (37), followed by China (36) and the United Kingdom (18). Similar to 2021, Canada remains as the lead declaration filer (22), followed by investors from Japan (18) and South Korea (11).

Recent Enforcement and Mitigation Data

Mitigation measures and enforcement are also at the top of the Committee's agenda. CFIUS is increasingly imposing mitigation measures during the transaction process. Per the Annual Report, there was a 67% increase in the number of transactions in which CFIUS imposed mitigation measures. Even though the Committee has a limited history of imposing penalties (only two known cases), CFIUS officials have continuously stated that CFIUS has enforcement actions in process that will soon be made public (which we discuss in our OnPoint here).

The Annual Report included examples of mitigation measures negotiated in 2022, each of which required the parties involved to take specific verifiable actions and are typically codified in National Security Agreements ("NSA") between transaction parties and CFIUS member agencies. Example mitigation measures include the following:

- Establishing guidelines and terms for handling existing or future contracts with the U.S government or its contractors, U.S. government customer information and other sensitive information;
- Establishing a corporate security committee, voting trust and other mechanisms to limit non-U.S. influence and ensure compliance, including the appointment of a U.S. government-approved security officer and/or member of the board of directors and requirements for security policies, annual reports and independent audits; and
- Requiring prior notification to and approval by relevant U.S. government parties in connection with any increase in ownership or rights by the non-U.S. acquirer.

In addition to the most recent Annual Report, the Department of Justice's ("DOJ") FY 2025 budget proposal offers insight into DOJ's enforcement and mitigation activities as a CFIUS member agency. In particular:

- The National Security Division ("NSD") is monitoring 199 active NSAs, 27 of which were entered into in 2023.
- NSD terminated 48 NSAs in the 2022-23 period.
- As part of its NSA compliance responsibilities, NSD conducted 52 site visits (both in person and virtual) in 2023, which is a 41% increase as compared to 2022.
- In the 2022-23 period, NSD led a CFIUS penalty proceeding that resulted in the largest ever civil monetary penalty for NSA violations (although the actual amount is still unreleased). There were also at least three additional penalty proposals raised by CFIUS member agencies during the 2022-23 period.

CFIUS' office of non-notified transactions also has seen an uptick in requests for formal CFIUS filings, despite no change in its mandate. CFIUS officials have stated that the Annual Report does not provide detail on what's going on behind the scenes of the Committee, including the numerous transactions reviewed by CFIUS member agencies, like the U.S. Department of Defense, U.S. Department of Homeland Security and the U.S. Department of Energy, on a weekly basis.

The increased use of mitigation measures as a condition for clearing transactions by the Committee and intensification of scrutiny from the Committee's office of non-notified transactions emphasizes the need for investors to employ thoughtful CFIUS risk mitigation strategies from the earliest stages of the transaction planning process.

Evolving U.S. National Security Landscape

The national security landscape continues to evolve each year and 2023 was no exception. In the aftermath of President Biden's executive order issued in September 2022, regarding areas of heightened interest to the Committee (see our OnPoint), CFIUS has remained increasingly interested in clean energy and biotechnology as the U.S. Department of Energy grows its CFIUS-related team to accommodate (which we wrote about here). Additionally, 2023 emphasized CFIUS' and other local jurisdictions' (within the United States) growing concern over foreign interests held in real estate.

In June 2023, the CFIUS real estate regulations were amended to include additional military installations. In total, CFIUS added eight military installations to its list of covered installations in response to well-publicized instances of non-U.S. investors' acquisitions near certain military installations (e.g., Grand Forks Air Force Base in North Dakota) that were not previously subject to CFIUS review.

Some congressional members have called upon CFIUS to expand the list of covered installations to cover all military facilities as well as acknowledged intelligence sites, defense-funded and university-affiliated research centers, national laboratories and critical infrastructure sites. Likewise, there has been a push by congressional members to better protect U.S. agricultural land and involve the U.S. Secretary of Agriculture as a voting member of CFIUS, involving the agency in cases concerning farmland or agriculture technology.

Officials from the Committee have also showcased that CFIUS has been building up its ranks, including the addition of five new deputies, operating with two Deputy Assistant Secretaries (for the first time ever), and adding compliance personnel and subject matter experts, likely with an eye toward increasing enforcement. Furthermore, Treasury's FY 2025 budget proposal includes a request for an additional 16 full time employees, which would increase CFIUS' total ranks to 138 full time employees.

Focus on China

The House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party (the "Select Committee") has been active with respect to attempting to broaden CFIUS' mandate. For example, as discussed above, most of the U.S. congressional members calling for expansion of CFIUS' real estate jurisdiction (i.e., proposing that the list of covered installations to cover all military facilities, as well as other government sites) sit on the Select Committee. In addition, in December 2023, the Select Committee released a report containing 150 policy recommendations, many of which called for substantive changes to CFIUS' process (as we discussed in depth here). The Select Committee's members have been vocal regarding CFIUS' regulatory approach being insufficient to "combat [China's] Military-Civil Fusion." The Select Committee asserted that, as currently drafted, the CFIUS regulations are "country-agnostic" and fail to distinguish between allies and foreign adversaries.

Outbound Investments

President Biden unveiled via Executive Order the much anticipated U.S. outbound investment regime on August 9, 2023. The Advance Notice of Proposed Rulemaking ("ANPRM"), issued concurrently with the Executive Order, initiated a rulemaking process to develop and implement an outbound investment regime that addresses the national security threat posed by "countries of concern" seeking to exploit advanced technologies to enhance their military, intelligence, surveillance, or cyber-enabled capabilities. Under the current proposal (which we discuss at length here), the U.S. government is focusing on certain investments by U.S. persons in companies located in the People's Republic of China, Hong Kong or Macau that engage in activities involving certain advanced technologies.

Although the ANPRM provides that Treasury may request information about transactions by U.S. persons that are or will be completed or agreed to after August 9, 2023 (i.e., the date of issuance of the Executive Order) to better inform the program's development and implementation, there will be no retroactive look-back period for covered transactions completed before the regime's implementing regulations are promulgated.

Importantly, after much speculation about the proposed scope and nature of the initial outbound investment regime, it is clear from the ANPRM that Treasury is not contemplating a CFIUS-like process. Instead, covered transactions will either be prohibited or require a notification to Treasury. As a result, there will be no case-by-case consideration of whether prohibited "covered transactions" may proceed on a specific basis (for example, after the implementation of mitigation measures meant to reduce any identified risk to national security).

The ANPRM targets "U.S. persons" participation in "covered transactions" with foreign persons from countries of concern that involve "national security technologies," i.e., semiconductors and microelectronics, quantum information technologies and AI systems with specific end uses. Although the full scope of national security technologies may change, the current proposal reveals a common theme with respect to a specific U.S. national security risk – U.S. capital funding advanced technology that could be used against the United States. A motivating factor behind the outbound investment review mechanism is China's "military-civil fusion" regime, which seeks to develop the most technologically advanced military by removing barriers between civilian and defense sectors.

The proposed definition of "U.S. person" is unlikely to extend to non-U.S. subsidiaries, but the ANPRM proposed a requirement that a U.S. person "take all reasonable steps to prohibit and prevent any transaction by a foreign entity controlled by such United States person that would be a prohibited transaction if engaged by a United States person," which otherwise creates an obligation for U.S. parents that control non-U.S. entities. It is unclear what "all reasonable steps" entails, but the ANPRM defined it to include implementing relevant policies, procedures, training and internal controls (including a testing and audit function) to govern the U.S. parent's compliance with the obligations under the implementing regulations in respect of its controlled foreign entities.

With respect to scope, the proposed definition of "covered transactions" is as follows:

- Acquisitions of equity interests or contingent equity interests (such as options-like investments) in a covered foreign person;
- Provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest;
- Greenfield investment that could result in the establishment of a covered foreign person; and
- The establishment of a joint venture, wherever located, that is formed with a covered foreign person or could result in the establishment of a covered foreign person.

In addition to the above, indirect transactions via intermediary entities are also expected to be captured by the mechanism. For example, a U.S. person cannot knowingly invest in a foreign entity that will engage in a covered transaction that that would be subject to the jurisdiction of the outbound investment regime if engaged in by a U.S. person directly.

Note, the definition of "covered transaction" will not include certain categories of activities such as university to university research collaborations, intellectual property licensing arrangements, bank lending and payment services and underwriting services. Certain passive investments (such as passive investments in publicly traded securities and investment funds), equity interest buyouts, intercompany transfers and transactions involving committed but uncalled capital, will also be exempted from the definition of covered transaction. However, the extent of the exemption for passive investments may be limited.

Pursuant to the ANPRM, notices must be submitted to Treasury no later than 30 days after a covered transaction has closed and there are 10 areas of information for inclusion in such notice, including beneficial ownership information for all transactions, a description of rights related to U.S. persons in the transactions and others.

To operationalize the proposed U.S. outbound investment regime, Treasury has requested as part of its FY 2025 budget US$16.7 million and 15 full time employees. Treasury's FY 2025 budget also provides that the U.S. outbound investment regime will begin "in earnest" in FY 2025, which appears to suggest that the regulations will be proposed and finalized by the end of 2024.

Proposed Changes to the CFIUS Regulations

After almost a year of preview from CFIUS officials, Treasury released a Notice of Proposed Rulemaking on April 11, 2024 ("NPRM") that is said to "enhance [CFIUS'] procedures and sharpen its penalty and enforcement authorities." The proposed changes to CFIUS' implementing regulations (i.e., 31 C.F.R. Part 800 and 802) seek to build on CFIUS' Enforcement and Penalty Guidelines, which were published in October 2022, and reflect lessons learned by CFIUS with respect to compliance, deterrence, enforcement, and addressing U.S. national security risks in connection with CFIUS' work.

Key proposals from the NPRM include:

- **Timing Constraints for CFIUS Mitigation Negotiations.** Currently, the CFIUS regulations do not include a specified timeframe in which transaction parties must respond to proposed mitigation agreement terms. The NPRM proposes that transaction parties would have three business days to provide a substantive response to proposed mitigation agreement terms (both initial and subsequent proposals or revisions) unless CFIUS grants an extension.

- **Enhanced Ability to Investigate and Request Information.** CFIUS may currently request from transaction parties the following: (i) information to monitor compliance with or enforce the terms of a mitigation agreement, order or condition, (ii) information to determine whether transaction parties have made material misstatements or omitted material information during the course of previously concluded review or investigation (including in such cases where the transaction parties' CFIUS filing was rejected by CFIUS), and (iii) information necessary to determine whether the non-notified transaction would constitute a "covered transaction" that is subject to CFIUS' jurisdiction for review. In addition, if deemed necessary by CFIUS, it may exercise its subpoena authority in order to obtain information from transaction parties. The NPRM proposes that CFIUS may also request such information from non-transaction parties (or "other parties"), as well as seeks to codify CFIUS' ability to request the following additional types of information: (i) information necessary to determine whether the non-notified transaction would trigger a mandatory CFIUS filing obligation, and (ii) information necessary to determine whether the non-notified transaction would raise national security considerations. The NPRM also proposes to expand CFIUS' subpoena power to encompass the additional categories of requested information, and cover requests made to non-transaction parties.

- **Expanded Penalties.** The current maximum penalty amounts for certain enumerated actions/violations in the CFIUS regulations are either (i) $250,000 (per violation), or (ii) the value of transaction (whichever is greater). The NPRM proposes that the maximum penalty amounts be increased to (i) $5,000,000 (per violation), (ii) the value of the transaction, or (iii) the value of a non-U.S. investor's interest in a U.S. business at the time of the violation or the transaction (whichever is greatest). The NPRM also proposes an additional action that may create a potential violation, making a material misstatement or omission to CFIUS in contexts outside of a CFIUS filing (e.g., in response to CFIUS' requests for information related to non-notified transactions or in response to CFIUS' request for information relating to monitoring or enforcing compliance).

The NPRM invites public comment on the proposed changes to CFIUS' regulations, and public comments can be submitted through May 15, 2024.

Outlook for 2024

Greater scrutiny of investment by non-U.S. investors in the United States should be expected. The Committee has been active, and all indications suggest that this trend will remain. Investors should also expect to see more information regarding the penalties CFIUS has administered in the 2022-23 period and should note that we appear to be entering an active CFIUS enforcement climate.

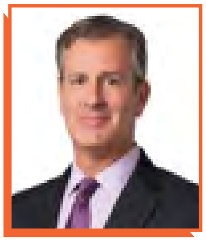
Further, based on our experience and data provided by the Committee, CFIUS is more likely to impose mitigation measures today than at any other time in its history. Given this trend, investors should expect to see the imposition of more mitigation agreements as a condition to receiving CFIUS clearance going forward. It is critical that U.S. businesses subject to mitigation agreements develop and implement effective NSA compliance programs. Not only does CFIUS have multiple tools in its enforcement toolkit to ensure compliance with mitigation agreements, such as site visits and civil monetary penalties, they are prepared (and willing) to use them.

Finally, even though the outbound investment regime has not been finalized, the ANPRM provides helpful insight into what to expect (as well as what not to expect) from the implementing regulations. It also shows how much work is still to be done to achieve the Biden Administration's goal of balancing the United States' commitment to open investment with the desire to disrupt strategic military, intelligence, surveillance and cyber advancements in countries of concern. Nonetheless, investors should begin to evaluate the forthcoming measures in connection with their China investment strategy.

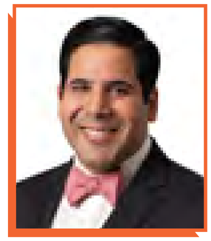
When contemplating a transaction, investors should conduct due diligence to understand national security touchpoints on all sides of a transaction, including the investors and the investment target. A sophisticated strategy that accounts for an investor's objectives, the nature of the business of the underlying target and the identity of the investment target, as well as mitigates potential national security risks, can make a significant difference. Moreover, companies with business lines that are of interest to CFIUS should be prepared to negotiate mitigation measures and have a compliance framework in place to ensure obligations stemming from such measures are observed.

Authors

United States



Jeremy B. Zucker
Partner | Washington, D.C.
+1 202 261 3322
jeremy.zucker@dechert.com

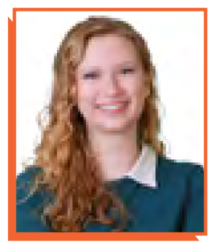


Hrishikesh N. Hari
Partner | Washington, D.C.
+1 202 261 3347
hrishikesh.hari@dechert.com

Darshak S. Dholakia
Partner | Washington, D.C.
+1 202 261 3467
darshak.dholakia@dechert.com

Rachel Davies
Associate | San Francisco
+1 415 262 4542
rachel.davies@dechert.com

Betsy Feuerstein
Associate | Washington, D.C.
+1 202 261 3366
betsy.feuerstein@dechert.com



Amy A. Jicha
Associate | Charlotte
+1 704 339 3128
amy.jicha@dechert.com

Brooklynn Moore
Associate | Washington, D.C.
+1 202 261 7920
brooklynn.moore@dechert.com

Europe & Asia

Siew Kam Boon
Partner | Singapore
+65 6730 6980
siewkam.boon@dechert.com

Eric Deltour
Partner | Brussels
+32 2 535 5418
eric.deltour@dechert.com

Timothy Goh
Partner | Singapore
+65 6730 6960
timothy.goh@dechert.com

Saira Henry
Partner | London
+44 20 7184 7373
saira.henry@dechert.com

Thomas Kim
Partner | Singapore
+65 6730 6961
thomas.kim@dechert.com

Douglas Lahnborg
Partner | London
+44 20 7184 7893
douglas.lahnborg@dechert.com

Michael I. Okkonen
Partner | Brussels
+32 2 535 5416
michael.okkonen@dechert.com

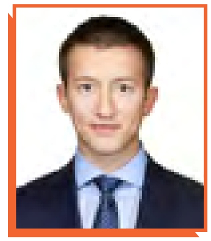
Sophie Pelé
Partner | Paris
+33 1 57 57 80 98
sophie.pele@dechert.com

Yang Wang
Partner | Hong Kong | Beijing
+852 3518 4732
yang.wang@dechert.com

Clemens York
Partner | Brussels | Frankfurt
+32 2 535 5411
clemens.york@dechert.com

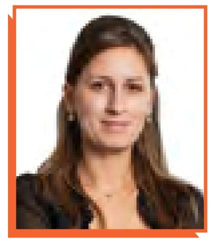
Europe & Asia

Marjolein De Backer
Associate | Brussels
+32 2 535 5414
marjolein.debacker@dechert.com



Pavel Dunaev
Associate | London
+44 20 7184 7602
pavel.dunaev@dechert.com

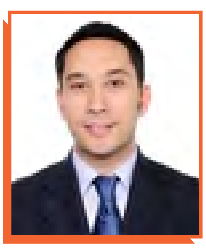
Geoffroy Fink
Associate | Brussels
+32 2 535 5412
geoffroy.fink@dechert.com



Margaux Lasseigne
Associate | Paris
+33 1 57 57 82 91
margaux.lasseigne@dechert.com

Huilin Peng
Paralegal | Beijing
+86 105 829 1317
huilin.peng@dechert.com

Kirill Skopchevskiy
Associate | London
+44 20 7184 7846
kirill.skopchevskiy@dechert.com



Thirith von Döhren
Associate | Frankfurt
+49 69 7706194254
thirith.vondoehren@dechert.com

Dian Wang
Registered Foreign Lawyer | Hong Kong | Beijing
+852 3518 4754
dian.wang@dechert.com

dechert.com

05-24