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Foreign investment monitor

Issue 4

Four months in – first impressions of the UK's national security regime

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Freshfields

Welcome to our fourth foreign investment monitor

In this edition we explore five key issues in the fast-changing world of foreign investment screening.

First, we take a deep dive into the UK's new national security regime and share what we have learnt four months on from its launch. Our teams explore the practicalities of the notification process and how the government's Investment Security Unit is handling filings; what transactions are within scope; and the penalties for failing to notify.

Our next piece looks at semiconductors, a highly coveted technology that is also heavily protected by governments. We examine two key pieces of chip-related legislation recently introduced in the US and the EU, and outline how foreign investment rules are being used to limit overseas investment in semiconductor assets.

Elsewhere, we ask whether member states using their own foreign investment laws to block inbound investment from other EU countries breaches EU law; explain why financial sponsors need to be careful about the identity of their limited partners; and consider whether moves by the US government to limit domestic companies' Chinese investments could spread to other jurisdictions.

As ever, we hope you enjoy our analysis. If you would like to discuss any FDI issue in more detail we would be delighted to arrange a meeting, and we would also love to hear your ideas on how to improve the monitor.

Four months in – first impressions of the UK's national security regime

On 4 January 2022, the new Investment Security Unit (ISU) set up within the UK government to screen transactions for national security risks braced itself for an influx of notifications as the UK's first mandatory and suspensory notification regime, combined with broader "call-in" powers, went live.

Four months on, we reflect on our experience so far and highlight the key practice points for investors and companies.

A simpler and quicker screening process designed to give investors and businesses the certainty they need?

The government promised to "bring the UK's regime into the 21st century" by making the screening system "slicker and quicker for investors, providing certainty and transparency by working to clear timelines for decisions and making administrative procedures smooth." Despite what we understand to be a heavy volume of notifications, initial indications are that the ISU is largely delivering on the government's stated intentions.

- The online notification portal is simple to use. Acquirers complete the form, which asks for information about each party and the transaction. The prescriptive requirements of the form can complicate submissions in less-than-straightforward transaction structures with multiple direct and indirect acquirers, but these challenges can generally be resolved by work-arounds.
- In our experience, the ISU is accepting notifications quickly (usually within one to two working days) and is clearing most deals with time to spare in the initial 30-working-day period. However, as the ISU is unable to "stop the clock" for information requests during the initial review, parties must make sure any additional information they are asked to provide is given promptly and accurately to avoid pushing the transaction into a call-in.
- Following a call-in, the government will have an additional 30 working days to review the transaction with a possible 45-working-day extension and additional extensions if agreed to by the parties. It is too soon to tell the extent to which extensions will be used and whether the process will live up to the government's promises of efficiency in cases where national security concerns have been identified and remedies may be required.
- The ISU remains open to informal discussions with parties and is taking a pragmatic approach where possible to help investors navigate the administrative elements of the process and interpret the statutory rules.

Investors should however be warned that the regime captures a wide range of transactions – and the potential sanctions for non-compliance are severe

Notification is required if the target's activities fall within one of 17 "strategic sectors" defined in regulation and if the transaction involves a relevant change of control.

- The sector definitions are highly technical and can require significant upfront diligence on the target.

> **In serious cases, the Secretary of State can refer both companies and/or individuals to the police for possible criminal investigation**

The sectors can generally be grouped into advanced technologies, critical national infrastructure, defense and critical suppliers to the UK government. The focus of these definitions is the best indication of the areas where the government sees risks to UK national security. However, while some of the definitions were significantly streamlined over the course of the government's consultation process on the regime, others remain wide enough to catch companies with only tangential activities in these sectors which do not obviously raise any national security concerns.

- Investors should be aware that the assessment of changes of control under the legislation is not on all fours with the approach that investors will be accustomed to under merger control regimes and the legislation is full of bear traps for the unwary. For example, mandatory filings can be triggered in purely internal reorganizations where the ultimate beneficial owner remains the same and – unlike some merger control regimes – there are no exemptions for stakebuilding in the context of a public bid. Investors should therefore familiarize themselves with the idiosyncrasies of the UK rules and exercise caution in any reorganizations or share purchases to avoid any breaches.

For transactions where the target's activities are closely linked to the mandatory sectors or the target's activities are in scope but an investor will only acquire material influence in an entity, or the transaction only involves the acquisition of assets, it may be advisable to submit a voluntary notification for the sake of legal certainty. Transactions can otherwise be subject to call-in for five years.

Failing to notify a qualifying transaction attracts significant penalties.

- The Secretary of State can impose financial penalties on companies and individuals (for example directors) up to the maximum amounts set out in the legislation (£10m for individuals or for businesses the higher of 5 percent of total global turnover of the business including its controlled subsidiaries).
- In serious cases, the Secretary of State can refer both companies and/or individuals (for example directors) to the police for possible criminal investigation.
- The transaction will be deemed void in law, impacting both the buyer and the seller and resulting in significant complications.

An evolving picture – more details will emerge as the ISU publishes its annual report and experience to date

The regime is still in its infancy and direct experience remains key to understanding the nuances of its application. This is particularly the case given the relative lack of transparency over the ISU's decision-making and processes.

Over the next few months, more information will emerge on the overall volume of notifications, the timings, the sectors involved and the outcomes when the ISU publishes its first annual report – and as cases raising concerns following an in-depth national security assessment are finally determined with remedies. The legislation obliges the ISU to publish certain information in its annual report, but the only statutory obligation on the ISU to publish details of individual cases is when "final orders" (i.e. remedies) are imposed to resolve national security concerns.

In addition to the statistics required in the annual report, the ISU is expected to publish market guidance notes with more details on the types of notifications it has received and the transactions that have been called-in to help parties assess whether a deal should be notified.

The ISU continues to welcome feedback on the regime, particularly in relation to any issues arising where clarification of the rules is needed to improve investor confidence or, if necessary, where the government should use its powers to exempt certain types of transaction or acquirer on the grounds that concerns are highly unlikely to arise.

If you would like to discuss any issues arising in practice, or how the regime applies to a particular deal or transaction structure, please get in touch.

Out of stock – chip shortages result in new regulation

In recent years, industries have faced a shortage of advanced semiconductors aggravated by the COVID-19 pandemic – a situation which brought, for example, the automotive sector to a quasi-standstill in mid-2021. As a result, these small but very significant chips have rapidly become the centre of attention for policymakers and governments across the world.

Here, we examine two key pieces of legislation introduced in the US and the EU to foster domestic production – and explore how foreign investment rules are being applied to semiconductor transactions.

EU and US introduce Chips Acts to promote local production

Both the EU and the US have introduced Chips Acts in a bid to promote local semiconductor industries.

The EU Chips Act focuses on a combination of improved state-aid funding opportunities on the one hand and new research centres and co-operation between industry players and universities on the other in a bid to help the European Union achieve technological sovereignty in semiconductors. At the same time, the EU wants to remain an attractive destination for foreign investment, especially in the high-tech sector, although always with a focus on safeguarding (local) security of supply.

The CHIPS for America Act (US Chips Act, which was enacted in the FY 2021 National Defense Authorization Act although funding is still pending in Congress) aims to strengthen the United States' position in semiconductor research, development and manufacturing. It offers financial incentives for the construction or modernization of semiconductor fabrication plants ("fabs") in the US and establishes the Multilateral Semiconductors Security Fund which aims to foster secure semiconductor supply chains by creating a common funding mechanism between the US and its international partners.

Rigorous FDI review complicates foreign investments in semiconductor industry – the Siltronic case

Against this backdrop, investments into the European semiconductor industry by way of acquisition are closely scrutinized. The most recent example of this came in January 2022 when the proposed buy-out by Taiwan-based GlobalWafers of Germany's Siltronic was abandoned after the German Ministry of Economics failed to grant FDI approval within the relevant deadline.

This unsuccessful bid shows the difficulties Taiwanese companies may face when pursuing investments in European high-tech businesses. However in the Siltronic case, political motivations may not have been behind the German government's inability to approve the deal: just two weeks before its review deadline the ministry had received information about merger control commitments given by the parties to the Chinese authorities, including "most favored nation" clauses, which would have had a significant impact on German customers. Nonetheless, the regulation of – and rhetoric against – foreign investors in the semiconductor industry has sharpened in recent years. For instance, the German FDI Ordinance now considers semiconductors a key technology and requires a mandatory FDI filing in cases like the Siltronic transaction – whereas before the legislation was introduced, such investments would only have been caught by the general FDI regime (and indeed the review of the Siltronic case was itself triggered by a voluntary filing).

A parallel case in Italy in April 2021, in which the Milan-based automotive semiconductor supplier LPE was shielded from being acquired by the Chinese government-affiliated Shenzhen Investment Holding, shows that European governments are extremely sensitive to the security of supply chains and view foreign investments in the semiconductor industry critically.

> **"The increasingly unclear international security situation may lead to more semiconductor supply shortages**

Taiwanese investors may face higher scrutiny

Another relevant factor in the Siltronic case may have been the fact that GlobalWafers is based in Taiwan. In light of the current geopolitical tensions between the West and mainland China, investments from Taiwan may receive tougher scrutiny from Western governments.

US-headquartered Intel, by contrast, faced no hurdles when planning its European advanced semiconductor plant. As a greenfield investment, Intel did not require German FDI approval, with the country's minister for the economy even going as far as to call it "a key step for Europe's digital sovereignty". GlobalWafers' bid however, was not seen as positive, with the same ministry stressing the potential "drain of German High-tech assets" and the threat to "supply chain security," even though it could have led to a similar expansion of chip production capacity in Germany as Intel's investment. That said, the difference in evaluation may also have been driven by the type of investment proposed: while Intel invested in a new plant, GlobalWafers tried to acquire an existing European business – which may have raised concerns relating to the potential drain on domestic assets and knowledge.

In the US, between 2018 and 2020 the Committee on Foreign Investment in the United States (CFIUS) reviewed 16 filings from Taiwan. To date, no Taiwanese investment has been prohibited by the President at the recommendation of CFIUS, but the number of deals either voluntarily abandoned or subjected to significant mitigation remedies is unknown due to CFIUS's strict statutory confidentiality requirements. Factors impacting CFIUS's understanding of potential risks posed by investment from Taiwan might include concerns related to technology being transferred from Taiwan to mainland China, purported Chinese cyber activity targeting Taiwanese companies, and supply chain vulnerabilities created by the US Department of Defense's reliance on chips produced in Taiwan.

Outlook: Investments in the high-tech sector will face intense scrutiny

Foreign investments in the high-tech industry, especially from investors with links to China or Taiwan, will need to be assessed carefully and may face significant hurdles in both Europe and the US. Additionally, the increasingly unclear international security situation may lead to more semiconductor supply shortages and thus to further strengthening of European and US FDI control instruments relating to semiconductor investments. Such developments should be closely monitored, especially when considering deals in the high-tech sector.

Limited partners in the FDI spotlight

When a financial sponsor seeks to acquire a new portfolio company, it may not be fully considering the impact its limited partners could have on the FDI regulatory processes to which the transaction may be subject. But those LPs are increasingly subject to scrutiny as part of foreign investment review.

Not all limited partners are created equal in the eyes of FDI screening mechanisms. While an LP's rights may be sufficiently limited to satisfy legal, corporate, and tax requirements, their particular rights may nonetheless trigger FDI screening notification obligations. Furthermore, depending on the limited partner and the portfolio company, limited partner interests, even with only typical LP rights, can sometimes be the source of regulator concern over a fund's acquisition of the portfolio company. Consequently, FDI authorities may seek disclosure and assurances about such investors (or the funds in which they invest).

The bottom line is that it is important for financial sponsors to understand that, from a regulator's perspective, limited partner does not necessarily mean limited risk. Here, we explore this evolving area of risk.

Disclosure obligations

FDI screening regimes require varying degrees of disclosure regarding the ownership and control chain of the acquiring person. FDI screening may involve general disclosures in relation to the mix of nationalities of the limited partners and participation by government entities in the investing fund. In the United States, for example, there is a requirement to disclose any government interest regardless of the nature and size of that investment; and in some European jurisdictions, there is a requirement to disclose any government interest above a certain threshold (e.g. representing a stake of at least 10 percent in the fund).

There may also be a requirement to drill down to specific limited partners, depending on whether any is seen as having an outsized role; a fund of one, or a fund comprised solely of limited partners from a single jurisdiction, for example, is likely to result in a full disclosure obligation.

Additional disclosures around limited partnership agreements – either summaries or production of the full

> Ultimately regulators may impose an outright prohibition if the involvement or concerns relating to limited partners cannot be mitigated

agreements – are not uncommon in the United States and are becoming increasingly so in European jurisdictions, too. In certain instances, such disclosure can extend to cover side letters, minutes of advisory committee meetings, and certain internal documents of the general partner or manager. In general, when regulators request these types of documents, they are looking to confirm that the limited partners in the fund are indeed passive investors with only the rights and accesses typically afforded to a limited partner.

Impact on jurisdictional and filing analysis

It is important also to consider whether any limited partner independently may have a filing obligation or impact the reportability analysis of the underlying transaction (this applies not only to FDI regimes but equally to merger control regimes, some of which also require non-controlling minority interests to be notified).

Limited partners often will hold an indirect, largely passive, minority investment that will fall below the filing thresholds of many FDI (or merger control) regimes, but it is important to consider those regimes that have fairly low thresholds. For example, the German and Italian FDI regimes apply to acquisitions of a 10 percent or greater interest, although the German regime does not apply where the limited partner does not hold a voting interest. In the US, CFIUS has jurisdiction over covered investments in certain US businesses which can cover non-passive minority investments of any size depending on the rights the investor has. This analysis looks at whether an investor may have, either via participation on an advisory committee or pursuant to a side letter, any right (whether exercised) to a board seat or observer, access to certain information, or, where applicable, involvement in certain decision-making beyond voting shares. When performing its jurisdictional analysis CFIUS can aggregate the interests of limited partners owned or controlled by the same foreign government.

While side letters may grant a limited partner certain rights, they also are often used to blunt the impact of limited partners on the regulatory analysis. Forgoing rights or access via a side letter can provide comfort that a limited partner is not itself independently engaging in a covered investment subject to jurisdiction.

Substantive considerations

Limited partners can impact the substantive analysis of a transaction even when they are passive. Where a particular limited partner or group of limited partners from a particular jurisdiction has an outsized role, it can have an impact on the risk analysis and outcome of a particular case. Indeed, in light of current and past geopolitical developments, we have seen an uptick in the scrutiny of limited partners from certain jurisdictions.

Regulators increasingly require the disclosure of detailed information, and it may no longer be sufficient to demonstrate that limited partners are truly passive investors that have no legal decision-making rights over investments or portfolio companies. Further safeguards may be required to alleviate any potential concerns by regulators, including extending as far as carving out limited partners or co-investors from certain investments; ultimately regulators may impose an outright prohibition if the involvement or concerns relating to limited partners cannot be mitigated.

Where a single limited partner or a group of limited partners from the same jurisdiction hold a majority or dominant minority interest in a fund, it can be difficult to convince regulators that the investment is truly passive. In the United States, for example, CFIUS blocked a proposed acquisition by a US-based private equity firm that had one limited partner, a wholly owned subsidiary of a large Chinese investment fund. In Europe, we have seen regulators requiring increasing safeguards and conditions relating to the involvement

> Avoiding this reputational risk requires fund managers to understand how regulators think about national security risk

of limited partners from certain jurisdictions, including imposing information conditions. Such conditions, for instance, relate to the general partner or manager keeping the regulator updated on the composition of the investing funds and the identity of limited partners.

When raising a new fund or adding new limited partners to an existing fund, firms should be cognizant of reputational considerations that might be implicated by their choice of limited partners and the technology or sectoral focus of their funds. In general, regulators understand that private equity and venture capital firms raise funds that contain both private and government-owned limited partners from a variety of jurisdictions, including jurisdictions that regulators might view as higher risk in the context of a direct investment. However, regulators may draw a negative inference about a firm that has a significant concentration of limited partner interests from a higher risk jurisdiction and that attempts to invest in sensitive technologies (e.g. artificial intelligence) or sectors (e.g. critical infrastructure). Avoiding this reputational risk requires fund managers to understand how regulators think about national security risk and to select limited partners and target companies for acquisition accordingly.

Thinking ahead to reorganizations and bolt-on investments

The original investment may not be the end of the FDI screening. There are a variety of scenarios in which a change in limited partner composition of a fund could come under scrutiny, even with respect to a completed acquisition by a fund. Consequently, it is important to consider your investor mix at every step.

For example, reorganizations, adding additional investors, and bolt-on transactions at the portfolio company level may all result in potential future FDI filings that will disclose the revised investor structure. Specifically, in the United States, but also certain European jurisdictions, even entirely internal reorganizations can trigger a mandatory filing obligation. In certain jurisdictions, even the entry of new limited partners into the funds making the investment can trigger a renewed FDI screening. And if such additional reviews are triggered, or the fund makes a new portfolio acquisition, any changes in the limited partner composition of the fund in the interim could affect the review, particularly if those changes involve the addition of limited partners from higher risk jurisdictions.

Does EU member states' screening of intra-EU investment violate EU law?

The Commission may have reached a turning point with respect to its assessment of member states' FDI screening regimes. A recent decision against Hungary, which quashed a veto by the Hungarian FDI authority, suggests that Brussels closely monitors screening mechanisms and national authorities' decisions.

So should more member states be concerned about whether their regimes comply with EU law?

In its decision announced on 21 February 2022, (M.10494 – VIG/AEGON CEE), the Commission found that Hungary's veto of the Vienna Insurance Group's acquisition of Hungarian subsidies of AEGON on security grounds constituted a breach of EU law. The transaction was later cleared unconditionally by the Commission; in its view, the Hungarian veto violated Article 21 of the EU Merger Regulation (EUMR) because it was unclear how the acquisition would pose a threat to a fundamental interest of society.

EU has final say on intra-EU combinations – except in limited circumstances

Under Article 21 EUMR, the Commission has exclusive jurisdiction to review concentrations with an EU dimension. Member states may only take measures to protect their "legitimate interests", which include public security, media plurality and prudential rules. The term "public security" is interpreted narrowly and should only comprise a member state's essential (national) security interests, i.e. the defense sector and related activities. The aim of this rule is to protect the free movement of capital within the EU, which can only be trumped by specific national interests. However, most FDI regimes are much broader and also relate to a variety of other sectors. Because of this, many national FDI regimes (like the EU FDI Screening Regulation) differentiate between investments from within and from outside the EU. That said, the line is often blurry – and it may not always follow the principles of EU law.

> It seems that the Commission itself may have played a role in this when, during the pandemic in 2020, it recommended that member states establish or strengthen their FDI screening regimes

Member states expand powers to review EU investments during pandemic

It seems that the Commission itself may have played a role in this when, during the pandemic in 2020, it recommended that member states establish or strengthen their FDI screening regimes. This was at a time when stock prices were at all-time lows and fears of foreign buyouts were at all-time highs. Among many other changes, some member states (for example Italy and Spain) expanded their ability to review intra-EU transactions outside purely public security grounds. These changes were originally intended to be transitory, but some have now been made permanent or are expected to be extended. Other countries had already given up strictly differentiating between investments from EU member states and those from third countries before the pandemic. For example, France added a number of sectors to its regime that also apply to EU investors.

Commission decision highlights importance of free movement of capital

It seems that, except for Hungary, no authority has yet blocked an intra-EU investment in a sector that is not clearly related to public security. The Hungarian case was unique because the authority did not even attempt to explain why the transaction could potentially have affected national interests, which may have justified an intra-EU prohibition. However, the Commission's decision makes clear that member states must consider the fundamental freedoms and, in particular, the freedom of capital movement when their FDI regimes affect investors from within the EU because both DG Comp and DG Trade monitor FDI regimes and decisions and are ready to take action quickly.

Outbound investment controls: the US looks to expand its regulatory arsenal

Notwithstanding the immediate focus on the risk posed by Russia, China continues to be viewed by much of the US government as the principal long-term national security threat, both economically and militarily. This consensus has resulted in continued bi-partisan efforts to develop tools and resources to deny China certain capabilities and to protect and reinforce critical US capabilities. Here, we explore one of the emerging areas of US government interest: risks related to outbound investment into China.

Key takeaways

- The policy discussion surrounding outbound investment relates to concerns about technology transfer (sharing of advanced technologies with military/intelligence applications), technological competitiveness (ability to compete more generally as it relates to technology development), supply chain security (ensuring that the United States is not reliant on any adversary country for critical inputs), and human rights (ensuring US persons are not supporting foreign development of tools used to commit human rights violations).
- The more aggressive versions of proposed outbound restrictions, reflected in legislation currently pending in Congress, would establish mandatory screening of transactions involving foreign investment in, or offshoring of, a broadly defined set of critical capabilities. Even the least ambitious proposals are likely to at minimum require the monitoring, and potentially CFIUS-like review, of financial sponsor investments in certain technology areas in China.
- While there are very different views about the nature and objectives of any outbound investment rules, there appears to be enough bi-partisan interest that some are likely to be established.
- The Biden administration may be looking to establish these rules through an executive order, which may reduce the pressure for passage of any legislation, but to the extent the administration might prefer a notification regime without remedial authority, political pressure may push towards a review process with remedial authority, though likely focused on a defined set of technologies.
- If the United States were to adopt such a policy, it would likely seek to influence European governments to consider similar controls. This would follow now established precedent in the inbound investment review space.

How did we get here?

The US government has established a number of tools over the past several years to fill some perceived gaps in its ability to address China-related risks, including around the transfer of sensitive technologies to China and

> **With the pandemic and resulting supply chain disruptions, there has also been increasing focus on China's control over critical supply chains**

introduction of Chinese-origin goods and services into the United States that could be exploited by the PRC government.

- In 2018, through the Foreign Investment Risk Review Modernization Act (FIRRMA), Congress expanded the authority of CFIUS to enable it to review certain non-controlling investments in US companies.
- In 2018, through the Export Control Reform Act, Congress directed the review and expansion of export controls to cover "emerging and foundational technologies" that might otherwise only be subject to minimal controls.
- In 2020, President Trump issued an Executive Order under the International Emergency Economic Powers Act (IEEPA), reaffirmed in 2021 by President Biden, that served as the basis for a new regulation allowing the Department of Commerce to review certain transactions involving the sale or use in the United States of information and communications technology and services from adversary countries, including China.
- In 2020 President Trump also issued an Executive Order under IEEPA that, as subsequently revised by President Biden, prohibits US persons from transacting in publicly traded securities of Chinese companies designated by the government as being part of the Chinese military-industrial complex or as producing surveillance technology to facilitate repression or serious human rights abuses.

Though some of these measures are intended to address the risks of US companies sharing technology or otherwise bolstering Chinese capabilities, there continues to be dissatisfaction in some parts of the government with the authority to address technology transfer risks resulting from US companies in strategically important sectors investing in China. With the pandemic and resulting supply chain disruptions, there has also been increasing focus on China's control over critical supply chains (such as semiconductor fabrication, rare earth minerals, and active pharmaceutical ingredients) and how those could be used offensively to apply pressure or deny vital inputs. Most recently, concern has focused on financial sponsor investment in Chinese companies, where such investment reinforces Chinese technological competitiveness with the United States and potentially also China's military capabilities via the PRC's policy of Military-Civil Fusion.

Increasing support within government for outbound investment review.

As a result, there is increasing support in the US government for the establishment of outbound investment review authority, at least in relation to investment in China and other countries of concern. The most visible effort thus far is legislation drafted by Senators Casey and Cornyn, the National Critical Capabilities Defense Act of 2021 (NCCDA). The NCCDA would create an interagency body, chaired by the US trade representative, to review transactions that would shift to a country of concern (or entity of concern) any business activities, investment, or ownership of certain critical capabilities, including medical supplies and services, articles or services essential to critical infrastructure, and critical components of military/intelligence systems. It would be mandatory to file transactions with the body, which could then recommend to the President that they take action to address or mitigate a risk to these critical capabilities.

As drafted, therefore, the NCCDA actually goes beyond review of investment in third-party companies in countries of concern to cover companies investing in their own

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subsidiaries in China and even outsourcing on a contract basis. Though consensus over China as a threat has only hardened in Congress since the business community successfully pushed back efforts to give CFIUS authority to review outbound joint ventures as part of FIRRMA in 2018, the scope of the NCCDA is so sweeping as to make it unlikely that it will be enacted in its current form. The NCCDA will be considered by the committee formed by the House of Representatives and the Senate to reconcile the House's America COMPETES Act (to which the NCCDA was attached) with the Senate's US Innovation and Competition Act (which omitted the NCCDA due to business community concern) – counterpart legislation intended to build US resiliency against competition from China.

White House focused on more targeted authority

The Biden administration has agreed that outbound investment into China is a concern, but it has not put out a statement of support for the NCCDA. Instead, it appears that the White House is focused on developing more targeted authority, perhaps focusing on technology transfer and technological competitiveness, as opposed to supply chain vulnerabilities. In July of 2021, national security advisor Jake Sullivan stated that the administration is "looking at the impact of outbound US investment flows that could circumvent the spirit of export controls or otherwise enhance the technological capacity of [US] competitors in ways that harm our national security." In March 2022, at the Berkeley Forum on M&A and the Boardroom, hosted by Berkeley Law and Freshfields, special assistant to the President Peter Harrell noted that the administration is focused on "pretty narrow and tightly scoped categories of US investment … in competitor nations … where there are national security risks that need to be evaluated." Mr. Harrell went on to note, as an example, specific concern with US and international investment in the creation of high-end semiconductor capabilities in China, and stressed that Taiwan and South Korea already regulate such outbound investment. Though the administration has not publicly discussed a list of technologies beyond semiconductors that may be subject to such controls, it would be reasonable to assume it would be a subset of the list the White House National Science and Technology Council identified in February 2022 as "critical and emerging" technologies.

New rules likely to be established through executive order.

Given the difference in focus of the NCCDA and the White House approach, and that there is now established precedent for using executive orders under IEEPA to address trade and investment concerns related to China, the greater likelihood is that the White House will seek to establish any outbound investment rules through executive order, which will give it the ability to craft a more targeted program. More recently, however, Bloomberg has reported that the US Treasury Department, which would be involved in any executive branch discussion, raised the possibility with legislators of a notification program without any remedial authority. That proposal, not surprisingly, received a cool reception from advocates of outbound screening in Congress. To the extent that the administration had been considering implementation of such a notification process, the negative reaction may make it more difficult to adopt a process that does not include some remedial authority.

Mr. Harrell noted concern not just with US investment in Chinese capabilities, but international investment in advanced Chinese capabilities. Just as the US government sought to influence European governments to adopt CFIUS-like inbound investment regimes, there is every reason to believe that once the United States adopts an outbound investment regime, it will seek to influence allied nations, in particular Canada, Japan, and across Europe, to consider similar measures.

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