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Freshfields

Welcome to our fifth foreign investment monitor

In our latest edition, we examine four key areas of rapidly changing foreign investment screening.

First, we explore how several different jurisdictions are dealing with prohibitions and transactions called in for review in light of changing regulatory regimes. Our team examines recent developments in Germany, Italy, Japan, the UK, and the US, where Chinese and Russian purchasers in particular have come under close scrutiny.

With technological leadership playing a crucial role in the US's competitive strategy with China, we take a look at the steps the Biden administration has taken to strengthen the regulatory infrastructure to manage evolving national security risks.

Elsewhere, with the UK's national security and investment regime now operational for more than 10 months, we explore the emerging trends from the first deals where remedies, prohibitions and orders to unwind have been imposed, and what these mean for investors. We also provide an overview of the highly anticipated French guidelines on foreign direct investment, which provide clarification and useful guidance on a number of areas of FDI. Finally, we showcase the 10th edition of The Foreign Investment Regulation Review, to which we are proud to be the main contributor, as well as co-editor through our London partner Alex Potter.

If you would like to discuss any FDI issue in more detail, we would be delighted to arrange a meeting, and if there is something you'd like to see us cover in the next monitor, do let us know.

Recent prohibitions and call in for review by FDI authorities

In this snapshot, we summarize our recent experience in some key jurisdictions on prohibitions and transactions called in for review in light of new/changing regimes.

Germany

An unprecedented – and unusual – number of transactions were prohibited or abandoned in 2022 due to concerns related to foreign direct investment (FDI). Foreign investment reviews by the German Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*) (the Ministry) are confidential, with no public record of the number of transactions called in by the Ministry. However, that number is thought to be relatively low because foreign investors, who tend to take a more cautious approach in Germany, are likely to notify their transactions to maximize deal certainty.

The increase in prohibitions and abandonments does not necessarily stem from a tightened legal framework but is arguably a result of new leadership at the Ministry, now headed by Robert Habeck of the Green Party.

In light of the partial prohibition of the planned acquisition of a 35 percent interest in a seaport terminal in Hamburg by China's COSCO Shipping Ports Limited, the Green and Liberal Parties have pushed for even tighter controls. It was also Green and Liberal Party-led ministries that wanted to prohibit the acquisition altogether, while only the Social Democratic-led Chancellery was in favor of the deal. To avoid clearance by tacit approval, the different ministries involved agreed to partially prohibit the acquisition, allowing COSCO to buy a stake of only 24.9 percent in the terminal and strictly excluding the acquisition of any further rights.

Earlier this year, the acquisition of Heyer Medical AG, a manufacturer of breathing ventilators, by Chinese Oricare (HK) Ltd. was prohibited due to security concerns. The acquisition was not notifiable as it signed before the list of critical activities in the relevant law was expanded following COVID-19. Given Heyer's small market share in Germany, a prohibition would have been unlikely pre-pandemic. Similarly, the planned acquisition of German wafer producer Siltronic AG by Taiwanese firm GlobalWafers was not cleared before the long stop date because the Ministry claimed it did not have sufficient time to review the remedies conceded to the Chinese merger control authority in order to obtain clearance—only a week prior to the long stop date.

The heightened scrutiny is also evidenced by the recent prohibition of the proposed acquisition of Elmos Semiconductor SE's wafer production to China's Silex Microsystems AB. Even though the deal seemed to be on track for clearance as it related to outdated technology, the transaction was ultimately prohibited. According to media coverage, the planned acquisition of high-precision thermal solutions for semiconductor testing and packaging provider ERS Electronic by an unknown Chinese investor was prohibited at the same time.

These five prohibited and failed transactions mark only the recent culmination of the Ministry's heightened scrutiny of Chinese investors in sensitive sectors such as critical infrastructure and critical technologies. Meanwhile, the Ministry is focused not only on China but also on investors from other countries, which are now also facing more rigorous reviews for geopolitical reasons.

> In March 2021, Chinese technology conglomerate Tencent acquired a 3.6 percent stake in Rakuten, the Japanese e-commerce operator and wireless carrier, without pre-transaction regulatory review

Italy

The Italian FDI rules currently do not include a mechanism enabling the regulator, the Italian Prime Minister's Office (PMO), to call in transactions that have already been completed and were not notifiable (under the previous FDI rules, or otherwise), but which would be notifiable under the current FDI rules. The core Italian legal principle of non-retroactivity would apply. More specifically, certain precedents suggest that jurisdiction must be assessed at the time of signing of the relevant agreement or adoption of the relevant resolution(s).

Currently, under Italian FDI rules, we are aware of two cases where the PMO opened *ex officio* proceedings for "failure to notify" transactions. In both instances, the relevant moment in time for establishing jurisdiction (either signing or closing) was irrelevant given that the outcome would not have been different either way.

In 2021 the Italian PMO opened *ex officio* proceedings in relation to the failure to notify the 2018 sale to state-controlled Chinese investors of a 75 percent stake in Alpi Aviation S.r.l., a manufacturer of high-tech drones for the armed forces. In relation to this transaction, the Italian PMO exercised its veto right and ordered the transaction to be unwound – three years after closing. In parallel, with reference to this transaction, an investigation was opened for violation of regulations on the handling of military material.

Further, the Italian PMO used its powers primarily to counter perceived Chinese and Russian attempts to expand their presence and influence over the eurozone's economy. We are aware of six prohibitions in the last 12 months, five of which were in relation to the acquisition by Chinese companies of a robotics company, a dronemaker, two semiconductor firms and a company active in the agritech sector (which was confirmed by the administrative courts and is now subject to further appeal). The sixth prohibition came against a Russian acquirer, in relation to the acquisition of a company active in the design and production of cylinders and systems for the storage of high-pressure gas. We are also aware of at least two transactions involving Chinese and Russian acquirers that were abandoned in light of concerns that they might be vetoed by the Italian authorities.

Japan

The Japanese FDI rules currently do not contain a mechanism enabling the regulator to review transactions that would have been notifiable on the basis of new provisions. There is a call-in power, but that is applied only to transactions which were incorrectly not notified (i.e. where a mandatory pre-closing filing was required) under designated business sector rules. The call-in power is not applied to sectors for which no pre-closing filings are required.

However, in recent years, regulators have shifted slightly and carried out ex post facto interventions, monitoring transactions despite there being no obligation to make pre-transaction filings.

In March 2021, Chinese technology conglomerate Tencent acquired a 3.6 percent stake in Rakuten, the Japanese e-commerce operator and wireless carrier, without pre-transaction regulatory review – with Tencent becoming the major shareholder holding 3.65 percent of Rakuten shares. Tencent's capital tie-up with Rakuten qualified under the regular exemption from pre-transaction filings, having been considered a straightforward equity investment without material involvement in management decisions. However, the investment drew the interest of the government in the United States, where a 2021 executive order by President Trump prohibiting transactions with Tencent related to WeChat highlighted concerns over Chinese access to US person data. (President Biden subsequently would revoke and replace the Trump Order with an executive order requiring a review of apps from adversary countries.) Immediately after Rakuten's announcement, the National Security Service (NSS) and other relevant departments of the Japanese government reportedly were informed of the concerns by President Biden's administration. The Japanese government decided to continue monitoring Tencent's conduct as an investor to ensure its compliance with terms of the exemption, particularly those involving access to Rakuten's customer data.

> CFIUS has always had the authority to call-in so-called "non-notified transactions," but historically had limited resources dedicated to doing so, relying mostly on parties self-notifying transactions

United Kingdom

The UK government has broad powers to call in for national security review deals closed before the new regime came into force and deals that fall outside the mandatory notification thresholds.

Firstly, the UK government is able to exercise retrospective call-in powers to review certain transactions that closed during the period between 12 November 2020 (when the draft legislation was first laid before the UK parliament) and 4 January 2022 (when the new regime came into force), provided the transaction was not reviewed under the previous public interest regime.

If the Secretary of State for Business was aware of the transaction before 4 January, the government was able to exercise its call-in powers up to 6 months from the regime coming into force (by 4 July 2022). If the Secretary of State was not aware of the transaction before 4 January, the government is able to exercise its powers up to 6 months from when the Secretary of State became aware (up to a maximum of 5 years from 4 January 2022).

The government has used these powers in a number of cases, including the high-profile acquisition by Chinese-owned Nexperia of Newport Wafer Fab (the UK's largest semiconductor manufacturer), which completed in July 2021 and was called-in for a national security review in May 2022. Following a lengthy and extended review, the government announced on November 16, 2022 that Nexperia must sell the 86 percent stake it acquired in July 2021. The government decided that the sale is necessary and proportionate to remedy a risk to national security relating to the potential reintroduction of compound semiconductor activities at the Newport site (which could undermine UK capabilities) and the potential impact on industries in the region (the South Wales Cluster) being engaged in future projects relevant to national security. On the same day, Nexperia announced that it will appeal the government's decision. This deal could prove to be the first test case for the regime.

The government also has broad powers to call in for review transactions that fall outside the mandatory notification requirements – and it has exercised these powers and imposed remedies in several cases so far. For an overview of prohibition and remedy decisions announced by the UK government over the last few months and the key trends emerging, please see The UK's national security and investment regime - key trends article.

United States

The Committee on Foreign Investment in the United States (CFIUS) has broad jurisdiction with respect to acquisitions of control of US businesses by foreign persons. Its jurisdiction was expanded further in 2018 to include not only controlling but also non-controlling transactions. The CFIUS regime however remains largely voluntary, with a filing being mandated in only a subset of transactions.

CFIUS has always had the authority to call-in so-called "non-notified transactions," but historically had limited resources dedicated to doing so, relying mostly on parties self-notifying transactions. Parties are incentivized to notify transactions to CFIUS because any transaction subject to CFIUS jurisdiction that has not previously been notified to, and cleared by, CFIUS remains indefinitely subject to CFIUS remedial action. Any such remedial action is based on the nature of the US business and national security considerations at the time of the CFIUS review, even if the review takes place many years after closing.

CFIUS was allocated additional resources to identify non-notified transactions in connection with CFIUS reform legislation that was passed in 2018. Such efforts are directed at both identifying potential non-compliance with the mandatory regime and seeking to review transactions that might raise national security concerns that have not been mitigated. We are now seeing the impact of that increase in resources. CFIUS reported in its annual report that in 2021 (the last year for which data is available) it reached out to the parties to 135 transactions and requested that the parties submit a filing in connection with 8 of them. If parties do not agree, CFIUS can initiate its own review.

"Many of the post-closing actions with respect to Chinese purchasers involve US businesses that have critical technologies or sensitive personal data

CFIUS non-notified resources have focused mostly, although not exclusively, on Chinese and Russian investment. Several transactions involving Chinese purchasers have been called in by CFIUS post-closing and resulted in the foreign person being subject to a divestment order, including the acquisitions of dating app Grindr, hotel property management software provider StayNTouch, and video app TikTok. However, in the case of TikTok, it appears that the app's owner, ByteDance, could eventually reach a deal with CFIUS to allow it continue ownership of TikTok in some form, but with very onerous mitigation. Within the past year, CFIUS also forced a fund run by a Ukranian-born investor to divest its interest in space launch company Firefly Aerospace. More recently, CFIUS took action with respect to a nearly 10-year-old transaction, ordering China's UniStrong Science & Technology to divest satellite technology company Hemisphere GNSS, which it had acquired in 2013. Many of the post-closing actions with respect to Chinese purchasers involve US businesses that have critical technologies or sensitive personal data. However, it is not just Chinese and Russian transactions that are subject to CFIUS' call-in authorities; European companies have also received requests for information with respect to non-notified transactions, and in some cases post-closing mitigation has been imposed.

Only the US President can prohibit a pending transaction or force divestment of a completed transaction, and that action (unlike actions taken by CFIUS itself) is public. While there are some high-profile examples, there have only been seven Presidential orders since Congress gave the President this authority in 1988. However, the number of transactions that have been abandoned in light of CFIUS opposition is actually much higher, as parties generally take the option to voluntarily abandon a transaction or divest before the matter is referred by CFIUS to the President with a negative recommendation. In each of 2021 and 2020, seven transactions were abandoned pre-closing for failure to reach a resolution. These included Wise Road Capital's proposed acquisition of semiconductor company Magnachip and Asymchem's proposed acquisition of chemical technology company Snapdragon Chemistry, both involving Chinese acquirers.

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Biden administration pushes forward strategy to protect US technology edge

The Biden administration continues to build out the US regulatory infrastructure to manage evolving national security risks and to maintain the US edge in technology, particularly in relation to China.

These steps – reinforcing the focus and enforcement of inbound investment screening (CFIUS) rules, developing a potential outbound investment screening process, and promulgation of significant new export control measures – are likely to have long-lasting and significant effects on the competitive environment for both US and non-US companies, even in cases without a direct China nexus.

Furthermore, the US appears to be having success in persuading allies and partners to act, or at least strongly consider acting, in similar fashion.

China at the core of the Biden administration's technology protection objectives and strategy

The Biden administration's October 2022 National Security Strategy (NSS) identified geopolitical competition as one of the principal challenges that the United States faces, with China being "the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it." A key strategy to address the geopolitical challenge, according to the NSS, is to ensure that "strategic competitors cannot exploit foundational American and allied technologies, know-how, or data to undermine American and allied security."

President Biden's National Security Advisor, Jake Sullivan, identified these foundational technologies in a September speech. Three "families of technologies," he argued, will be force multipliers — the twenty percent of technologies that will determine 80 percent of success: (1) computing-related technologies, including microelectronics, quantum information systems, and artificial intelligence; (2) biotechnologies and biomanufacturing; and (3) clean energy technologies. These areas cover a range of sub-technologies, many of which were identified in a February list of "critical and emerging technologies" published by the White House.

To protect these technologies, Sullivan stated, and the NSS reiterated, the specific intent of the US government to modernize and strengthen export control and investment screening mechanisms and to pursue "targeted new approaches," such as screening of outbound investment.

Since September 2022, the Biden administration has taken a deliberate series of steps to reinforce or lean into its strategy to address concerns related to technology, particularly as it relates to China.

Inbound investment screening (CFIUS)

While the Trump administration substantially revamped the infrastructure of CFIUS by pushing for the enactment of the Foreign Investment Risk Review Modernization Act of 2018 and significantly growing the CFIUS staff, the Biden administration has taken a number of steps in the last few months to further develop CFIUS as a means of effecting its policy objectives.

In September 2022, President Biden issued Executive Order 14083 (EO), the first executive order on CFIUS since President Bush issued an executive order in 2008 revising the operating rules for CFIUS. (See our blog post on the EO.) While the EO more reflects current trends than establishes a new direction for CFIUS, it is still notable as confirmation that an increasingly

> **CFIUS received penalty authority in 2008 but did not issue its first penalty until 2018**

broader range of US targets and foreign investors will face tougher CFIUS scrutiny. It provides greater transparency into key policy considerations that drive CFIUS reviews, provides more definitive direction to CFIUS agencies to align the review process around Biden administration priorities, and places the administration's stamp on the CFIUS process.

The key policy considerations include that:

- Economic security is a key driver of national security.
- Non-Chinese investor ties to China will draw scrutiny.
- Transactions are to be reviewed in context of broader investment and industry trends, not in isolation.
- Supply chain risks are not limited to the defense industry but include areas important to economic security.
- Technological leadership considerations are within the scope of CFIUS's definition of national security.
- Cybersecurity risk, including third party risk, and sensitive personal data will continue to be key areas of focus.

Then, in October 2022, the US Department of the Treasury, as chair of CFIUS, released the first-ever CFIUS Enforcement and Penalty Guidelines. CFIUS received penalty authority in 2008 but did not issue its first penalty until 2018 and since then has only issued one additional penalty, both being $1 million or less, so very small. While the guidelines are a listing of common-sense factors that CFIUS will consider to be aggravating or mitigating as it assesses what action to take in response to a violation of the CFIUS regulations and agreements, they are clearly part of an effort by CFIUS to create an expectation of increased enforcement. Indeed, it is widely expected that the issuance of these guidelines is a prelude to CFIUS issuing a first-time penalty within the next year for failure to comply with the mandatory filing requirement and to levy a more substantial fine for non-compliance with a mitigation agreement.

Export controls

In October 2022, the Bureau of Industry and Security, the US dual-use export control agency, issued a major rule targeting the export of semiconductor manufacturing equipment, advanced computing integrated circuits, and other emerging technologies. The rule targets not just Chinese acquisition of technology and products produced in the United States, but goes significantly beyond prior rules in restricting the use of US technology in third countries to produce certain products that would not be exportable to China if produced in the United States. Furthermore, it imposes restrictions on US persons supporting the development of production of certain semiconductors in China. The issuance of this rule has created significant challenges in the context of M&A transactions, as companies struggle to understand the impact on target companies and investments for in-progress deals and adjust to a new reality of more robust diligence exercises to ensure compliance with the rule going forward.

The rule reflects the balance that the Biden administration is seeking to achieve to advance its China technology competition strategy. On the one hand, it is adopting carefully targeted policies after significant internal deliberation and scrutiny and alongside active engagement with foreign allies and partners. On the other hand, it has proven willing, at least as it relates to competition with China, to upend existing assumptions about US regulatory policy and to disrupt commercial activity. In addition to being a significant expansion of existing tools, it reflects a major shift in long-standing technology policy as related to China, portending a more aggressive technology control policy. Sullivan noted in his September speech that the United States can no longer just aim to stay a couple steps ahead of China but must maintain as much of its current advantage as it can.

Outbound investment screening (reverse CFIUS?)

At the same time as the US government works to strengthen the existing inbound investment and export control regimes, there is broad agreement in Washington that these tools do not fully address the technology competition risk from China. There is an emerging view in Washington that some form of outbound investment control is necessary.

The theory is that investors, including financial sponsors, are particularly skilled at driving organizational

> Some outbound investment restrictions were included in the recently enacted CHIPS Act, which is legislation designed to support semiconductor production in the United States

effectiveness and technological innovation. Furthermore, their participation in a project lends it a degree of credibility that will itself better position the Chinese business to succeed. The net result, or so is the concern, is that the investment of capital and business acumen could be used by China to facilitate the indigenous development of technologies that it cannot otherwise acquire from the United States.

The Biden administration has not yet settled on whether it will seek to establish a mechanism initially intended just to collect information about investment in China or to establish a screening mechanism that requires investments in specific technologies to first be notified to a US government body for review and approval. It has emphasized that any such mechanisms will be targeted to tightly scoped categories of investment.

An effort in Congress to establish a much broader form of outbound investment control, extending not just to investment in Chinese technological capabilities but also to offshoring of critical supply chains to China, has not yet received sufficient support to pass and has been met with opposition from some members of Congress and from the business community.

Some outbound investment restrictions were included in the recently enacted CHIPS Act, which is legislation designed to support semiconductor production in the United States. The Act provides for "guardrails" for funding recipients, including a requirement that recipients and their affiliated entities agree not to engage in significant transactions involving the material expansion of semiconductor manufacturing capacity in China for 10 years (other than certain legacy chips).

At present, it is not clear whether Congress will pass some narrowed form of outbound investment screening legislation. However, given the now repeated statements by the Biden administration that it sees outbound investment as an important element of its China strategy, it remains likely that it will issue an Executive Order within the next year. This is clearly an area of trans-Atlantic discussion as well, as the European Commission recently stated that it will be examining a potential outbound investment mechanism as part of its 2023 agenda.

Implications for international investment

There are several key takeaways that investors can derive from these developments in the United States:

- The concept of economic security is firmly established as a pillar of US national security strategy. Moreover, because economic security appeals to both China hawks and economic protectionists, it will likely be less susceptible to shifts in the partisan balance of power. The flavor of policies pursued as part of an economic security agenda may vary slightly from administration to administration, with more or less emphasis being placed on domestic spending initiatives, but the general concept appears to be here to stay.
- National security analysis is a necessary part of diligence in just about every significant cross-border transaction. With the proliferation of economic security concerns under the rubric of national security, deals that several years ago would have had no apparent national security nexus might now end up on CFIUS's radar and, possibly, called in for review.
- Investors should take a proactive approach to managing their exposure to national security risk. This means developing an effective messaging strategy that communicates how the commercial goals of a transaction align with the national and economic security goals of the United States. It also means understanding how an investor or target's global operations, relationships, and investments portfolio – particularly in China and Russia – might be viewed by US regulatory authorities or affected by new regulations in these areas.

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The UK's national security and investment regime – key trends emerging from the first remedy cases and 10 months of experience

Since our last update in May 2022, the UK government has started publishing details of the first transactions found to raise national security concerns where remedies (Final Orders) have been imposed. Combined with our own experience of the regime in practice, these developments illustrate several important trends in terms of how the UK government is exercising its powers under the new regime, with implications for investors and target businesses.

Early indications of the types of remedies imposed

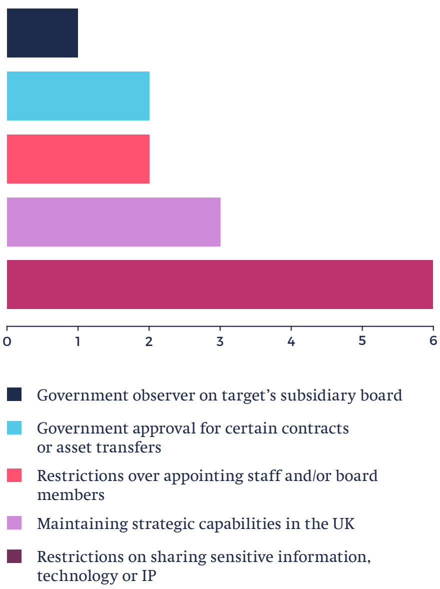
When the UK government published its first set of statistics covering the first three months of the regime, 17 deals of 222 notified had been called in for in-depth review, but none were yet subject to a Final Order (see our earlier blog). Since July 2022, the UK government has now published summaries of ten cases where a Final Order has been imposed:

- three transactions have been blocked or ordered to be unwound: all involve Chinese acquirers of rights over, or ownership of, advanced technologies with dual-use applications; and
- seven transactions have been allowed to proceed subject to conditions.

As the graph below shows, in those transactions which were not blocked, the most common conditions involve restrictions on the sharing of sensitive information, technology or IP between the target and acquirer (or other third parties). Other conditions involve:

- commitments to maintain certain strategic capabilities in the UK (e.g. government contracts, manufacturing and/or R&D);
- restrictions over appointing staff and/or board members in the target business;
- requirements for government approval before certain contracts are agreed or asset transfers take place; and
- in the most far-reaching set of conditions imposed so far (Sichuan / Ligeance) a government observer being appointed to the board of the target's subsidiary (Gardner Aerospace), despite the fact that the target has owned the subsidiary since 2017.

Types of remedy imposed (July - November 2022)



> Back in July, during the contest to be the UK’s next Prime Minister, the recently appointed new Prime Minister Rishi Sunak MP set out a series of plans to tackle what he called the “largest threat to Britain and the world’s security”

As expected, the types of remedies required to mitigate risks to national security are broadly in line with the UK government’s practice under the previous public interest regime, and this trend is expected to continue.

Timely illustrations of practice under the previous regime are the undertakings accepted in two transactions where the Secretary of State intervened on national security grounds before the current regime came into force. In *Cobham / Ultra*, the strict conditions to clearance included creating two new “SecureCos” (UK entities which encompass the facilities that deliver sensitive capabilities to the government), placing a government appointed non-executive director on the board of each SecureCo, and giving the government strong step-in rights (similar to a “special share”). In *Parker-Hannifin / Meggitt*, the undertakings ensure security of supply to the UK’s Ministry of Defence and protect sensitive information and sovereign UK defense capabilities.

One notable difference, however, is that far fewer details of the specific conditions imposed on parties are published as the UK government seeks to balance the trade-off between protecting national security and providing transparency and certainty for the market. Also, unlike the previous regime, there is no public consultation on the terms of a Final Order. The UK government’s approach towards the level of detail that should be made available is expected to be subject to review as practice develops.

The types of acquirers and target businesses attracting scrutiny

The UK government’s previous statements that the regime would be “nationality agnostic” have borne out in practice. Several Final Orders, as well as transactions currently under review, involve acquirers from traditional allies including France, Germany, Australia, and the United States. One case (the acquisition by UK-based private equity firm Epiris of Sepura, from Chinese owners) demonstrated that even UK investors are not immune from the imposition of remedies. Together, these cases emphasize the regime’s focus on the nature of the target’s business and – in some sectors – the need to protect sensitive information, technology or critical infrastructure, irrespective of the acquirer’s nationality.

A notable trend, however, is the significant proportion of Final Order cases involving Chinese acquirers (over half so far). This reflects concerns expressed by UK government ministers and security services over the threat posed by technology transfer to China. Back in July, during the contest to be the UK’s next Prime Minister, the recently appointed new Prime Minister Rishi Sunak MP set out a series of plans to tackle what he called the “largest threat to Britain and the world’s security” (China and the Chinese Communist Party), including:

- building a new international alliance to share best practice in technology security;
- providing more support to counter industrial espionage and help companies protect their intellectual property; and
- preventing Chinese acquisitions of key British assets including strategically sensitive tech firms.

More recently, at the G20 summit in Indonesia, the Prime Minister cited the UK’s national security and investment regime as a good example of the UK’s powers to defend itself against China as “undoubtedly the biggest state-based threat to our economic security”. The new Secretary of State for Business, Grant Shapps MP, is now charged with implementing those powers. His first published decision – ordering China’s Nexperia to sell the 86 percent stake in Newport Wafer Fab (the UK’s largest semiconductor manufacturer) which it acquired in July 2021 – has underscored the government’s approach. As Nexperia has announced its intention to appeal the government’s decision, this could be a test case for the regime.

Mirroring this trend, a significant proportion of Final Order cases involve targets developing advanced or sensitive technologies (particularly those with dual-use applications), as well as those owning and operating critical national infrastructure assets (notably in the energy sector).

> **The UK's new regime has now been fully operational for 10 months, but it is still relatively early days for transactions that raise concerns to undergo a full national security review and conclude with remedies**

A broad range of transaction types

We are also seeing the UK government using its expansive powers to review a broad range of transaction structures. That a third of the Final Order cases so far involve transactions where the relevant "change of control" falls outside the mandatory notification regime highlights the need for investors to be mindful of the government's broader call-in powers. These include:

- share acquisitions below 25 percent: the acquisition by UAE's Tawazun Strategic Development Fund of shares in Reaction Engines is an example of a transaction being called in and having remedies imposed where the acquirer gained the lowest level of control for potential call-in ("material influence") – which can arise at significantly lower levels than the (over 25 percent) minimum threshold for mandatory notification; and
- acquisitions of control over assets: two Final Order cases involved acquirers gaining rights to direct or control how an asset is used, illustrating the broad nature of relevant asset acquisitions which again fall outside mandatory notification requirements. In the first case (*Beijing Infinite Vision Technology / University of Manchester*), the government blocked a license agreement that would enable the Chinese entity to use IP relating to vision sensing technology with dual-use applications. In the second case (*Stonehill Energy Storage / Stonehill project asset development rights*), a Chinese entity acquired development rights for an energy storage project; this transaction was allowed to proceed subject to conditions designed to protect the important electricity asset and services provided to National Grid.

These cases illustrate the importance of assessing the risk of certain transactions being called-in – and the benefits of voluntary notification – when the criteria for mandatory notification are not met.

Lengthy review periods and a turbulent political climate

One of the stated benefits of the regime is the clear (and relatively short) statutory time periods for review. It has become increasingly clear, however, that while the vast majority of cases are cleared within these timescales, the period for review of cases raising concerns can be long and unpredictable.

There are two main reasons for this:

- "**Clock-stopping**": if the Investment Security Unit (ISU) requires more information from the parties after a transaction has been called-in for further review (as is the case for most deals), the review clock stops until the ISU is satisfied that the information has been provided. As several notices are often served on multiple parties during the review, this can significantly extend the time period.
- **Extensions**: following the initial 30 working day period after a call-in notice, the time period can first be extended by 45 working days and then for an undetermined period with the agreement of the parties. As the ISU is often finalizing remedies during this latter period (liaising with other Government departments and inviting representations from the parties), the end date for such reviews is often unclear.

The net result is that the majority of notified deals are cleared within 6–7 weeks of notification, but parties should be aware that, in the more complex cases, reviews can be on-going for over 6–7 months – and this should be anticipated in deal documents with appropriate long-stop dates and obligations on all parties to cooperate with the ISU's review.

Looking ahead

The UK's new regime has now been fully operational for 10 months, but it is still relatively early days for transactions that raise concerns to undergo a full national security review and conclude with remedies. Practice is therefore still developing, and the ISU continues to monitor and update its guidance to reflect developments. The current turbulent political climate in the UK could also impact the types of deal that attract heightened scrutiny.

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Key takeaways from the French Guidelines on FDI

On September 8, 2022, the French Treasury published its long-awaited guidelines on the application of the French foreign direct investment regime (Guidelines).

These Guidelines form part of the French Treasury's ambitions to make foreign direct investment (FDI) regulation more transparent and accessible and to provide helpful clarification on the relevant legislation based on past decisional practice.

Sensitive activities covered by the regime

Given the sensitive nature of the assessment conducted by the Treasury, the Guidelines provide only general guidance on the determination of the sensitive activities subject to review under the regime. As expected, the Guidelines do not provide much detailed clarification on the scope of activities covered by the regime.

Some activities are inherently sensitive, such as the activities in the defense and security sectors (e.g. arms, munitions, explosive substances for military purposes, dual-use goods and technologies, cryptology services) and the investments in related critical technologies as well as research and development activities.

The assessment is more difficult for investments which may fall in the category of infrastructure, or goods or services that are "essential" to ensure the integrity, security or continuity of supply of energy, water, transportation, space operations, electronic communication networks and services, the protection of public health, and food security.

For this category, a "sensitivity test" is used by the French Treasury, which assesses a number of factors on a case-by-case basis. These factors include the customers of the French target, the nature of the target or its products, the specificity and the applications of the products, services and know-how of the French target, their substitutability and the danger posed by its activities.

The case-by-case approach presented in the Guidelines provides enormous discretion to the French Treasury in interpreting what activities are sensitive. Indeed, such interpretation may be subject to change over time depending on various factors. This justifies the "open" definition adopted by the Treasury and explains why "sensitive" activities are assessed as of the date of the transaction.

Because certain activities may be deemed sensitive and in scope for the authorities one day and not another, this approach does not provide much legal certainty to companies. In particular, what constitutes a subject of national interest worth protecting evolves over time, especially given current geopolitical developments. A way to mitigate uncertainty is the possibility for the target to engage in a pre-transaction consultation procedure with the Treasury.

The Guidelines also point out that there is no materiality threshold for the application of the French FDI regime. Therefore, an activity can be considered "sensitive" as a result of one isolated contract, regardless of the turnover generated by the French target in the market.

Types of investments covered by the regime

The interpretation of what constitutes foreign investments is very broad in the Guidelines. It covers all types of transactions in sensitive sectors, including mergers, acquisitions of shares in a French entity, or asset acquisitions if they include a "branch of activity" of a French company.

The regime may apply even if the transaction perimeter does not include a local legal entity. In this regard, the Guidelines confirm the very broad and flexible approach adopted by the

> **In a post-Brexit environment, the Guidelines confirm that only Iceland, Liechtenstein, and Norway are treated as equivalent to European investors**

Treasury concerning the notion of acquisition of part of a branch of activity, which may cover:

- a significant number of IP rights necessary for the operation of a "branch of activity;"
- an assignment of a patent or the granting of an exclusive or non-exclusive license of a patent;
- a portfolio of sensitive contracts; and/or
- equipment, vehicles, furniture and machinery used in the operation of the "branch of activity" where they are sufficiently consistent to make a "part of a branch of activity."

The Guidelines specify that only one of these elements can be sufficient to trigger control, for instance when it is essential for the performance of the sensitive activity.

Clarification of the legislation

Turning to French FDI legislation, the Guidelines aim to provide clarification. We note, in particular, the following:

- An expansive concept of **foreign investor**, which may cover natural persons and any type of entity such as public or semi-public companies, branches, associations, trusts, investment vehicles, and special purpose acquisition companies.
- The French rules apply when **the chain of ownership involves a foreign entity**, even where the ultimate controlling entity is French.
- In a post-Brexit environment, the Guidelines confirm that only Iceland, Liechtenstein, and Norway are treated as equivalent to **European investors** (and are therefore exempt from filing when crossing a 25 percent threshold). This does not apply to UK investors, which are treated as non-European for purposes of the regime.
- The **change of the quality of control** (e.g. moving from joint control to sole control) does not in itself require approval, unless the transaction meets other criteria.
- **Minority acquisitions** could constitute an acquisition of control if special voting rights are granted to the investor (e.g. double voting rights) or when the investor has specific prerogatives, veto rights or the power to appoint the majority of the members of the governing bodies of the French target.
- **Greenfield investments** in newly formed companies do not fall within the scope of the rules. Investments involving French branches (succursales) of non-French companies are also not in the scope of the regime.
- A filing is only required when the relevant **voting rights threshold** is crossed for the first time, not for additional shareholding acquisitions.
- **Conditions** are imposed in more than half of the cases in France. The Guidelines provide further clarification on the monitoring of the conditions by the competent authorities and the circumstances under which the conditions may be revised. Conditions may be revised by the Minister or the investor (subject to approval from the Treasury) provided that the investment continues to be in line with the protection of French national interests.
- In terms of sanctions, if an investment is made without prior authorization, it will be void and the investor may face financial and criminal sanctions. The Guidelines specify that the foreign investor can rectify the nullity of the transaction by submitting an ex post request for approval. If granted, the civil nullity of the transaction will be purged, save that the investor may still be subject to a risk of a financial penalty.

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