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MoFo Webinar

December 15, 2022

National Security – Global Trends and Convergence

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Key Trends and Developments in U.S. National Security Review and Regulation of Cross-Border Transactions

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Intensifying USG Regulatory Convergence

Convergence of focus in U.S. government, Congress on risks to national security related to foreign investment and trade

- Strategic competition with China is the defining geopolitical challenge for the United States
- Technology advantage – maintaining, increasing, and protecting – is key to winning the competition, specifically in key sectors (e.g., semiconductors/microelectronics, quantum information science, biotech, clean energy)
- Presence of/reliance on Chinese or other "countries of concern" sources in critical supply chains, critical infrastructure, and critical services is unacceptable (e.g., pharma, energy, information/telecommunications)
- Adversary "military-civil fusion" and nature of emerging technology blur legacy regulatory distinctions

Convergence in use of national security review, regulatory and enforcement capabilities for strategic impact – more seamless coverage of both inbound and outbound transactions

- FDI: CFIUS expanded scope, sharpened focus, and enhanced enforcement – plus expansion of FDI regimes in Europe, Japan, and Israel (often with USG "encouragement") with fewer exploitable seams
- Export controls as a strategic asset: Semiconductor regulations focused on China, broad restrictions on Russia post-Ukraine invasion, and continuing aggressive use of Entity List – plus USG work with like-minded allies to multilateralize coverage
- "Reverse (Outbound) CFIUS" coming in some form – Executive Order and/or legislation – in addition to existing investment restrictions in China Military-Industrial Complex (CMIC) List
- Progressive use/development of other tools restricting inbound transactions: ICTS Executive Order, Section 889, and FCC Action

"Preventive" tools complemented by developing USG industrial policy with same focus

- Including significant USG funding/incentives (e.g., CHIPS Act) and guardrails re countries of concern

CFIUS – Developments, Trends, and Potential Changes

Framework Largely Unchanged Since FIRRMA Regulations but with Enhanced Application

- CFIUS is an interagency committee authorized to review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons to determine the effect of such transactions on the national security of the United States.
- A transaction subject to review by CFIUS is called a "covered transaction."
  - Results in foreign "control" of a U.S. business;
  - Is an investment of any size, including a contingent equity interest, in a "TID U.S. business" that gives an investor certain rights with respect to "critical Technologies," "critical Infrastructure," or "sensitive personal Data;" or
  - Involves undeveloped real estate that is in close proximity to U.S. military/government facilities and grants the investor certain rights to the property.
- CFIUS reviews investments in/acquisitions of a U.S. business for potential risks to U.S. national security – and only for these risks (not for economic security).
- Largely a voluntary filing regime, except foreign government transactions involving TID U.S. businesses or covered transactions involving "critical technology" U.S. businesses.
  - Significant expansion of CFIUS efforts to identify and pursue non-notified transactions with potential national security risks even if not within mandatory filing criteria.
  - Accurate assessment of potential national security risks, not only jurisdictional criteria, is key in determining whether to make voluntary filing of any transaction with U.S. nexus – CFIUS may take an expansive view of jurisdiction where national security risks are present.

CFIUS – Developments

In September, President Biden issued a "first of its kind" executive order concerning CFIUS's mandate, but…

- The executive order does not change CFIUS's authorities under the statute or regulations, does not affect the scope of CFIUS jurisdiction (i.e., which transactions are CFIUS "covered transactions"), and does not alter the CFIUS process and timeline.
- It is intended to "sharpen the focus" in CFIUS deliberations involving identified areas, including:

Critical U.S. supply chains that may have national security implications, including those outside of the defense industrial base	U.S. leadership in areas affecting national security, including microelectronics, artificial intelligence, bio-tech and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation tech
Industry investment trends that may have consequences for a given transaction's impact on U.S. national security	Cybersecurity risks that threaten to impair national security
Risks to U.S. persons' sensitive data	Multiple investments in a sector

- Practical effects:
  - "De facto" critical technologies outside of export controls;
  - Roadmap for identifying "non-notified" transactions; and
  - Looking beyond the specific transaction and evaluating market and sector "trends."

CFIUS – Developments (cont'd)

On October 20, 2022, the U.S. Department of the Treasury, as Chair of the Committee on Foreign Investment in the United States (CFIUS), released the first-ever CFIUS Enforcement and Penalty Guidelines.

- CFIUS was previously authorized to impose penalties, but this authority was used only twice.
- Potential violations are for:
  - The failure to submit a mandatory filing;
  - The failure to comply with the terms of a mitigation agreement or order; and
  - The provision of material misstatements or omissions.
- The Guidelines provide aggravating and mitigating factors, and Treasury has signaled enforcement actions in the near future.
- The Guidelines add to a mosaic of increased visibility, attention to, and resources for CFIUS monitoring and enforcement, including enhanced efforts to pursue non-notified transactions.

Important to view in context of U.S. government's other enforcement tools. For example:

- The Federal Communications Commission (FCC) banned the sale of Huawei, ZTE, and Hikvision equipment and restricted use of some China-made video surveillance systems, citing an "unacceptable risk" to national security.
  - Most aggressive action yet to expunge Chinese tech from U.S. telecom networks.
- Numerous export control related enforcement actions and investigations ongoing.

Critical Technologies and U.S. Export Controls

Critical technologies under CFIUS regulations include:

- Technologies controlled under existing U.S. export control regimes and other regulations, including:
  - Items controlled under the Export Administration Regulations for reasons relating to national security, proliferation, regional stability, or surreptitious listening;
  - Defense articles and services controlled under the International Traffic in Arms Regulations;
  - Select agents and toxins controlled under various federal authorities;
  - Nuclear facilities, equipment, parts and components, and materials controlled under federal regulations; AND
- "Emerging and foundational technologies" to be identified and added to export controls.
  - The process to identify these technologies has been ongoing since August 2018.

Representative technology areas under review include:

- AI and machine learning, and advanced computing;
- Logistics technology (e.g., mobile electric power) and data analytics technology; and
- Robotics, additive manufacturing, and advanced materials.

Application to Entities and Transactions Outside the United States

Extraterritorial Reach

- U.S. export control laws have broad extraterritorial reach.
- As opposed to sanctions, export controls follow the item, even if (especially if) outside the United States.
- The U.S. government seeks to penalize companies and individuals that violate export control laws, regardless of where they are located.

Key Trends

- New controls on emerging and foundational technologies.
- Tightened controls on exports to countries of concern.
- Continued use of Entity List to achieve national security objectives

Export Controls: Tightened controls on countries of concern

Expanded end-user and end-use prohibitions

- On April 28, 2020, the Commerce Department's Bureau of Industry and Security (BIS) issued a final rule expanding license requirements on exports, re-exports, and transfers (in-country) of items intended for military end use or military end users in China, Russia, or Venezuela. Specifically, this rule expands the licensing requirements for China to include "military end users," in addition to "military end use."

Major New Expansion of U.S. Controls on Semiconductors and Supercomputers

- On October 7, 2022, BIS amended the Export Administration Regulations (EAR) and materially altered U.S. export controls policy toward China in the semiconductor space. This interim final rule imposed a series of restrictions aimed to limit development and production in China of:
  - advanced node semiconductors;
  - semiconductor production equipment;
  - advanced computing items; and
  - supercomputers.

Export Controls: BIS Entity List

U.S. government has aggressively used Entity List designations to target specific actors (e.g., Huawei), sectors (semiconductors), and adversaries (Russia military).

It is prohibited to provide an Entity List company any "item subject to the EAR," which includes:

- All U.S.-origin items wherever located in the world;
- Any item exported from the United States (even if not of U.S. origin);
- Any foreign-made item that contains more than 25% U.S.-origin content or 10% U.S.-origin content for countries subject to U.S. sanctions (the "*de minimis*" rule); and
- Any foreign-made item that is the direct product of certain controlled U.S.-origin software, technology, or major plant or equipment located abroad.

Critical to understand breadth and complexity of "foreign direct product rule" and other jurisdictional hooks.

Outbound Investment Controls: Potential Changes and "Reverse CFIUS"

Controls are likely coming – matter of who, when, and what

Who and When:

- Executive action likely next year maybe early, and
- Legislative action may follow and expand.

What:

- Notice, approval, or hybrid;
- Scope likely to include transactions involving transfers of technology and know-how that are not otherwise caught by existing regulatory regimes; or
- May also "control" or "monitor" outbound capital investment, perhaps excluding passive investments; and
- May have extraterritorial effects.

Activities potentially in-scope:

- Joint ventures and cooperative arrangements;
- Investments in certain sectors (but how to define);
- Licensing in certain sectors; and
- Capital expenditures to develop PRC technologies.

The Chips Act of 2022 – USG Seeks to Surpass China

- The CHIPS Act of 2022, enacted on August 9, 2022, demonstrates that the USG is getting serious about winning the semiconductor race with China beyond export restrictions and preventive measures.
- It Includes (among other things) appropriations totaling $39 billion over 5 years, administered by the Department of Commerce, for incentives for investment in semiconductor facilities and equipment in the United States, which will be targeted at:
  - Large-scale investments in leading-edge logic and memory manufacturing; and
  - Investment to expand capacity of “mature technology nodes” – mature and current-generation chips.
- Foreign entities are eligible to apply for incentive funding, meeting the eligibility requirements as U.S. domestic entities, but:.
  - The Act specifically prohibits providing any funds to a “foreign entity of concern.” This includes entities subject to sanctions or controlled by certain governments, including China.
  - No CHIPS Act funds may be used to construct, modify, or improve a facility outside of the United States.
- Incentives may be in the form of grants, loans, and/or loan guarantees. The Act separately also provides for investment tax credits.
  - Commerce intends to begin soliciting applications/proposals for semiconductor incentives by February 2023.
- The Act includes several “guardrails” provisions on recipients’ use of funds, including regarding activities in or with countries of concern. The Secretary of Commerce is required to claw back the full funding amount provided if:
  - The recipient knowingly engages in joint research or technology development with a “foreign entity of concern” (the Technology Clawback).
  - The covered entity who received the funds engages in a “significant transaction involving the material expansion of semiconductor manufacturing capacity” in *China or any other foreign country of concern*, with certain exceptions, during a 10-year period beginning on the date the funds are awarded (the Expansion Clawback).

CFIUS – Trends

Process is slowing

- Taking longer to “get on the clock”
- More declarations resulting in “no action” or resulting in full notices
- More cases requiring second investigation phase
- Multiple periods to negotiate mitigation

- Start your CFIUS diligence (and other FDI work) as early as possible
- Political ranks are filling at agencies
- Communication problems persist among agencies and with parties
- Expect strict compliance with mitigation terms and more formal engagement with monitoring agencies
- Treasury is poised to enforce and make a splash doing so

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Global Foreign Investment Control and National Security Reviews – Focus on Europe

PRESENTED BY:

FELIX HELMSTÄDTER

December 15, 2022

FDI Screening – An Accelerated Global Trend

More Jurisdictions with a Broader Scope of Foreign Direct Investment (FDI) and National Security Regimes

More and more countries across the globe are introducing new FDI regimes or are expanding existing screening mechanisms.

Increasing range of sectors and activities that are considered “sensitive” from a National Security perspective.

No or low thresholds apply – even a small target business can trigger a mandatory filing.

Increasing number of FDI regimes apply even without a local legal entity incorporated in the relevant jurisdiction (e.g., sales or assets can be sufficient).

FDI – Global Impact on Cross-Border M&A

- *FDI filings can be triggered in many jurisdictions across the globe, depending on global footprint of target business.*
- *Current geopolitical environment causes greater protectionism and scrutiny by governments.*
- *If mandatory rules do not apply, voluntary filings may still be warranted if available.*
- *Impact on deal timelines and transaction security.*
- *We will focus on EU and the UK, but other regimes often also relevant (e.g., Australia, and Canada).*

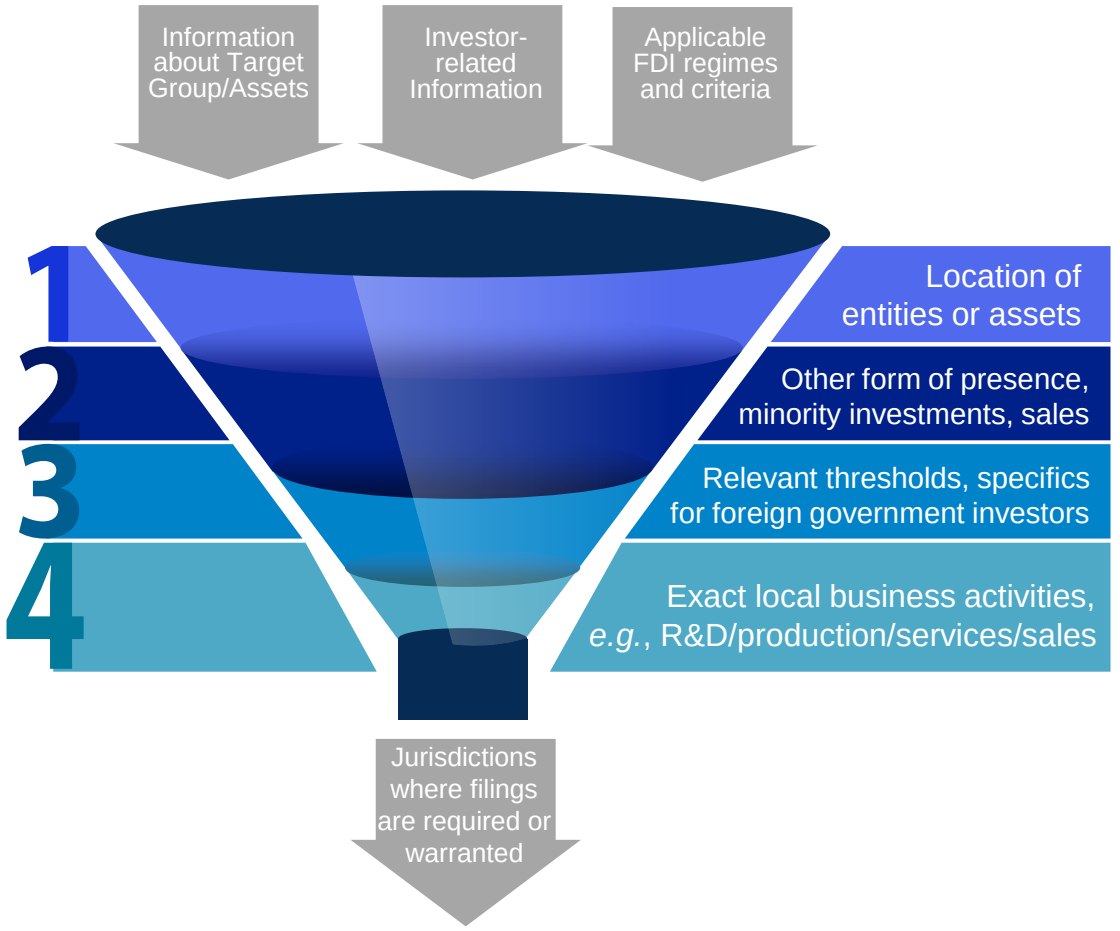
Multi-jurisdictional FDI Filing Analysis – Funnel Process

Step I
FDI Due Diligence/Q&A

Step II
Global FDI Filing Analysis

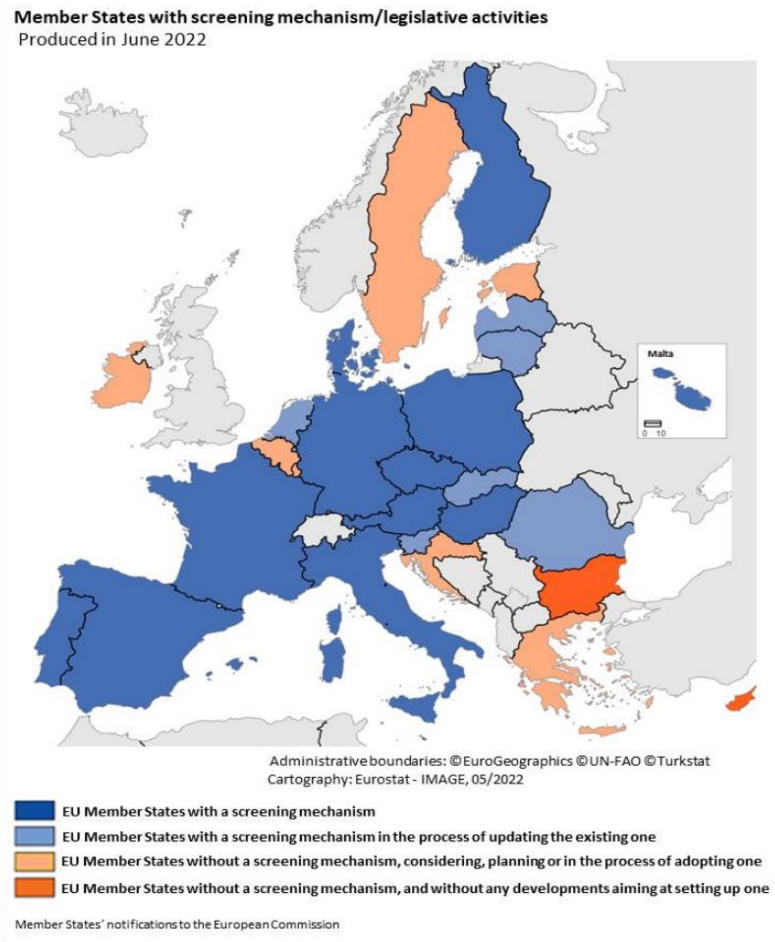
Step III
Reflect results of global FDI analysis in Share/Asset Purchase Agreement (closing conditions, co-operation, Longstop date, etc.)

Step IV
Prepare and submit filings



Screening Regimes in Europe – EU Member States Overview

- There are two layers of legislation that govern FDI screenings in the EU – (1) the EU's Framework Regulation and (2) the laws of the EU Member States.
- Since the adoption of the EU Framework Regulation in 2019, the EU Commission has been urging national governments to strengthen or introduce FDI screening regimes.
- Existing global trends toward protectionism of critical infrastructure and supply chains and technology sovereignty exacerbated by pandemic and Ukraine war.
- 18 MS have notified their FDI rules to the EU Commission, and overall, 25 of 27 MS have a screening mechanism in effect or are about to adopt one – Bulgaria and Cyprus remain the only exceptions.
- Non-EU countries in Europe, such as the UK, Switzerland, and Norway are following this trend.



Source: 2nd Annual FDI Report by EU Commission (Sept' 2022)

EU Framework Regulation and EU Member States' National FDI Rules

What are the EU's powers?

- 2019: Adoption of EU Framework Regulation (Reg. (EU) 2019/452 establishing a framework for review of FDI into the EU)
- October 2020: the EU Framework Regulation came into full effect
- No decision-making power granted to EU institutions, and MS remain free to adopt FDI regimes
- Only cooperation between EU Member States and EU Commission is required for any existing regimes
- EU Commission may issue opinions, and EU Member States can provide comments to other MS

Who decides?

- National FDI authorities remain responsible to conduct FDI screening and to decide about individual transactions
- National FDI authorities have to take EU Commission opinions and other MS comments into account
- Responsible national FDI authority leads the process at national level and coordinates with other MS and EU Commission, but often involvement of several other national government bodies during FDI screening process
- Political level of national governments involved in prohibition decisions

What is the impact?

- Multijurisdictional FDI analysis for the EU comprises the 18+ FDI regimes of the EU Member States
- There are no harmonized criteria and local activities of target groups and may differ between relevant jurisdictions, so various FDI regimes within the EU may or may not be triggered
- If several filings need to be made, content of each filing is different and has to comply with local requirements – standard template is used only for EU cooperation mechanism, not for national filings
- Review periods and outcome may vary significantly between EU Member States

Limited Level of Harmonization under EU Framework Regulation

Certain Elements of Harmonization established under EU Framework Regulation

- Cooperation mechanism provides for transparency within the EU
- Sensitive sectors and review criteria set out in the EU Framework Regulation are not binding for Member States
- EU guidance: Member States may screen minority investments starting at 5% (qualified shareholding)
- However, no EU-wide rules about investment thresholds
- Member States may opt for investment value, asset value, or revenue thresholds
- Key test under EU Framework Regulation: whether the investment is likely to affect security or public order

General concepts applied by Member States

- Acquiring control of, or minority investment in, a relevant entity or asset is subject to approval
- Standstill obligation applies if filing is mandatory
- Broad overlap between sectors subject to mandatory filing, but also differences rooted in specifics of national economy (e.g., protection of “national agri-food heritage” in Italy; manufacturing of chemicals and fertilizers in Poland)
- In some Member States, relatively “loose” links of target suffice to trigger FDI regime: Investments in branch offices (Germany), assets (Spain), and even “strategic relationships” in certain sectors (Italy, Czech Republic, potentially new regime in Netherlands) may be subject to review – often subject to case-by-case analysis

FDI Screening in the EU – Types of Transactions

- **Broad range of transactions can be covered under Member State laws**:
  - Share deals, asset deals, “financial agreements” (Denmark), joint ventures (Spain) – in some Member States even certain greenfield investments are caught (Spain, Denmark)
  - Minority investments are caught by most FDI screening regimes in the EU (starting at 3% in Italy for the defense and security sector, 10% in Spain, Denmark and the Czech Republic, for certain sectors in Germany and Austria, and for listed companies in France, and 20% in Poland, amongst others)
  - In many jurisdictions, filing is also required for increases of shareholdings by crossing of each additional threshold (Germany: (10%,) 20%, 25%, 40%, 50%, and 75%; Italy: (3%/5%,) 10%, 15%, 20%, 25%, 50%).
  - Intra-group restructuring is caught by many national FDI regimes and may therefore require filings (e.g., Sweden, Czech Republic, Poland), exemptions with specific scope apply, e.g., in Denmark, Germany, France (Italy: intragroup transactions are subject to a “simplified procedure”)
  - Trend: New investment screening regimes apply irrespective of investor origin (even if no foreign ultimate beneficial owner): Sweden, Netherlands (following UK example)
- **Takeway: consider FDI filing requirements in every transaction**

EU Framework Regulation – Sensitive Sectors and Activities Often Triggering Mandatory Filings in Member States

Critical infrastructure	Critical technologies and dual use items	Sensitive information and data	Others
▪ Energy ▪ Transport ▪ Water ▪ Health ▪ Communications and media ▪ Data processing/ storage ▪ Aerospace ▪ Defense ▪ Electoral or financial infrastructure	▪ Artificial intelligence ▪ Robotics ▪ Semiconductors ▪ Cybersecurity ▪ Aerospace ▪ Defense ▪ Energy storage ▪ Quantum and nuclear technologies ▪ Nanotechnologies and biotechnologies	▪ Access to/control of sensitive information and personal data	▪ Supply of critical inputs ▪ Freedom and pluralism of the media

Mandatory and Voluntary Regimes

Mandatory filings

- In most Member States, investments in relevant sensitive sectors and above relevant thresholds must be filed
- Significant differences on “de minimis exceptions”: Many jurisdictions do not limit filing requirements subject to turnover of the target or transaction value - but there are exceptions (for example, in Austria, no filing is required for companies with fewer than 10 employees and annual turnover of less than EUR 2 million)
- Some Member States require filing based on investor-related criteria (Spain: Filing required whenever investor is foreign government investor or already made investments affecting public security, public order or public health in EU) – most Member States only consider investor-related criteria during assessment of FDI
- During the review, any transactions subject to mandatory filing will be void and of no legal effect if they close without clearance
- Specific restrictions during the FDI review process may apply: For example, in Germany in case a notification is required, the target company is prohibited from providing certain security-sensitive information to the investor prior to clearance

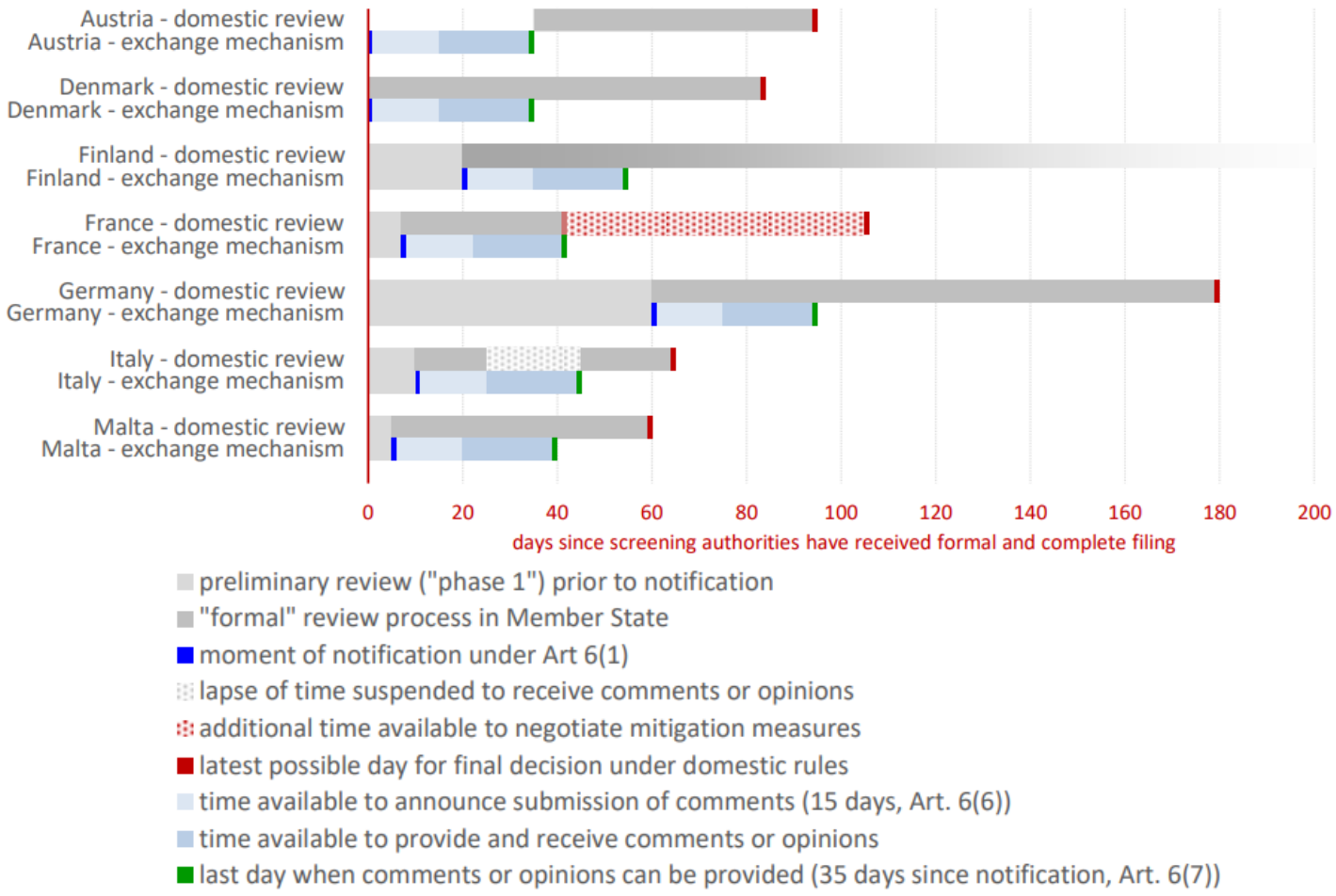
Voluntary filings

- Certain EU Member States can call-in transactions for review also outside the sensitive sectors (cross-sector review outside the mandatory regime, e.g., Germany and Denmark)
- Determination to be made by investor:
  - “voluntary filing” warranted if investor considers that an investment may have risks to national security and be called-in for review (e.g., application for certificate of non-objection in Germany)
  - Otherwise, the transaction can be investigated and, in the worst case, unwound, until a certain time period has elapsed (five years in Germany)
- In cases of doubt whether an investment could be reviewed, certain Member States provide for means to obtain further clarity:
  - Formal “pre-filings” (e.g., Italy)
  - Informal consultations to confirm application of the FDI regime (e.g., France)

FDI Screening in the EU – Impact on Timelines

- **Considerations for deal timeline**:
  - Mandatory and voluntary filings can be decisive for overall transaction timeline
  - Duration depends on jurisdictions involved, foreign investor and type of target business activities and impact of EU Cooperation mechanism: Longer review procedures may occur in particular in the areas of defense and aerospace, in high-tech industries or those industries where the EU and its MS are aiming at stronger independence, such as healthcare and semiconductors
  - Case-by-case investigations: From our experience, the review can take as little as one-two months for less sensitive transactions to nine months or more in case of sensitive target businesses and/or concerns about investor where governments ask numerous questions and/or commitments are requested from the parties
  - In simple cases clearance decisions may be issued earlier than the maximum statutory review period would suggest (e.g., Slovenia, Italy, and Germany)
  - FDI authorities are still in the process of adding internal resources: lack of resources may delay the processes, and even leading to opening of phase-II investigation only to avoid the expiry of the deadlines
  - The expiry of statutory deadlines without a decision by the FDI authority has different effects across Member States, for example:
    - In Austria, Germany, and Italy, the investment is deemed granted
    - In France, the investment is deemed prohibited

FDI Screening Procedures – Timelines (examples)

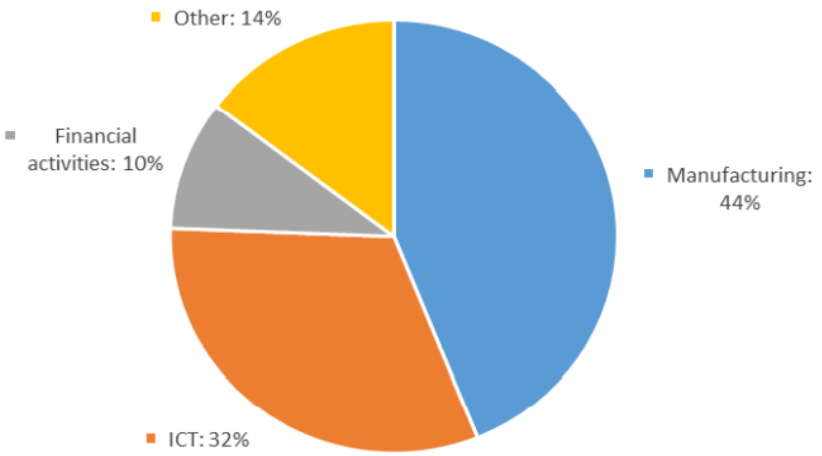


Source: OECD 2022 – Framework for Screening Foreign Direct Investment into the EU

FDI Screening – EU Commission Involvement

- Based on recent data for 2021 published by the EU Commission, filings were mostly triggered in **the Information and Communications Technology (ICT) and manufacturing sectors** (including critical infrastructures and/or technologies such as defense, aerospace, energy, health, and semiconductor equipment).
- Five EU MS are responsible for 85% of the notifications to the EU: **Austria, France, Germany, Italy, and Spain**; 86% of the cases were closed by the European Commission in **Phase 1**.
- In **Phase 2**, the cases mainly concerned are the sectors of Manufacturing, ICT, and Financial activities. Manufacturing and ICT accounted for 76% of all Phase 2 cases, and the ICT sector rose significantly (from 17% in the previous report) to 32%.
- Manufacturing in the EU Commission statistics encompasses critical infrastructures and/or technologies, i.e**., defense, aerospace, energy, health (including pharma), and semiconductor equipment**. Defense and aerospace account for almost half of the notifications in that sector (45%).

Phase 2 Reviews by the EU – Affected Sectors (2021)



Source: 2nd Annual FDI Report by EU Commission

FDI Screening in the EU – Overall Timeline

Potential overall FDI timeline (exact duration depends on variety of factors such as number of jurisdictions involved and responsiveness of parties)

2 Weeks

Multi-jurisdictional FDI filing analysis with RFIs to target and investor to confirm filing requirements: about 2 weeks

+ 2 Weeks

Coordination and preparation of filings: about 1-2 weeks, with some overlap with multi-J analysis.

Caution: some Member States have filing deadlines (Slovenia: 15 days after signing)

(+3 Weeks)

Potential pre-filing/consultation: 2-4 weeks

Some jurisdictions offer fast-track procedure for low transaction values (Spain: 30 days if value of Spanish target is between EUR 1 million and EUR 5 million)

+ 8 Weeks

Phase 1 / initial review: 30 business days (France) to 2 months (Germany), subject to extension

Some Member States only provide for one review period (for example Italy: up to max. of 75 calendar days)

+ 12 to 16 Weeks

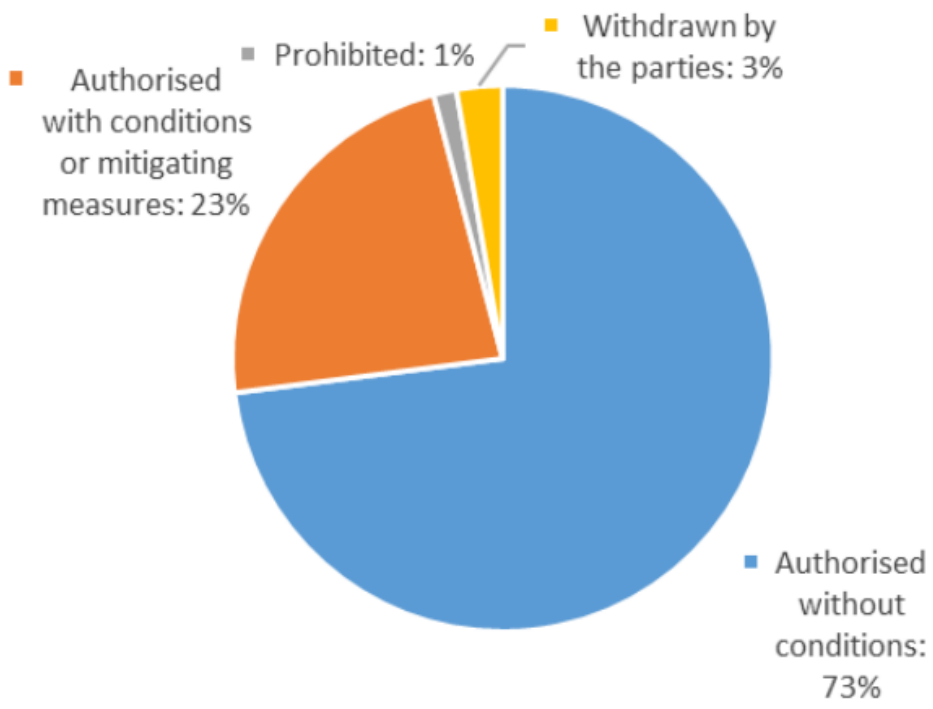
Phase 2 / in-depth assessment

Can range from 45 business days (France) to 4 months (Germany), subject to extension and duration of EU Cooperation Mechanism

FDI Screening – Possible Outcome and Restrictions

- The EU emphasizes that it remains open for foreign (non-EU) investments.
- Blocking of transactions remained rare for a long time, and still only occurs in a few cases.
- In most instances (although not exclusively), blocking decisions concern Chinese investors.
- Following an assessment, powers to impose conditions on, prohibit, or cause unwinding of investment.
- In case of violations of filing requirements or restrictions: civil and criminal sanctions can be severe.

EU Commission statistics for 2021



Source: 2nd Annual FDI Report by EU Commission

FDI Screening – Mitigation and Conditions

Typical mitigating measures to protect national security include:

- Obligation to continue to supply certain security-relevant domestic customers (e.g., government or defense industry)
- Prohibition to transfer local assets or IP abroad for certain time periods
- Commitment to continue the business operations of the domestic target company without any substantial changes
- Obligation to comply with stricter export-control requirements (in addition to applicable laws)
- Obligation to notify authorities of any relevant changes to ownership structure or activities of domestic entity as described in filing
- Limitation of level of voting rights that can be obtained (e.g., cut-off at 24.9% of the shares/voting rights), to ensure continued control of domestic investors

Trends

Japanese Investments

- For Japanese investors, based on our experience, investments in target companies based in the EU are generally very likely to be approved by FDI authorities.
- Although depending on the sensitivity of the activities in the EU, the approval may be subject to certain commitments.
- To date, we are **not** aware of any prohibition decision concerning an investment by a Japanese investor.

General Trends

- More prohibition decisions regarding Chinese investments (semiconductor industry, critical infrastructure) and new policies/strategies towards China aiming at greater independency and reciprocity (could lead to more screening of greenfield and outbound investments)
- EU Chips Act and EU's foreign subsidies rules underpin this trend
- Evaluation of FDI regimes introduced since 2020 (increase effectiveness and practicability)

Outlook 2023 – New and Broader FDI Regimes in Europe

- **Netherlands**: Introduction of general Investment Screening Bill in addition to sector-specific control, applies retroactively as of September 8, 2020 (expected to become effective in 1st quarter 2023)
- **Luxembourg**: Introduction of first general foreign investment control regime across various sectors (expected to become effective in first half of 2023)
- **Ireland**: New "Screening of Third Country Transactions Bill 2022": Broad scope of application, retroactive application for up to 15 months (expected to become effective in first half of 2023)
- **Belgium**: Introduction of first national FDI screening mechanism with relatively broad scope (expected to become effective in mid-2023)
- **Sweden**: Introduction of general, broad investment control regime in addition to current review of investment in security-sensitive companies (expected to become effective in second half of 2023)
- **Switzerland**: Introduction of "Foreign Investment Screening Act" as first general FDI regime with targeted scope (expected to be become effective in 2023)
- New rules also expected in 2023 for **Norway**, **Greece**, **Estonia**, and **Croatia**

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UK National Security Regime

PRESENTED BY:

MARIE-CLAIRE STRAWBRIDGE

The UK's National Security Regime

What is it?

- The UK's new FDI regime came into effect in January 2022 via the National Security and Investment Act 2021 (**NSIA**). The NSIA introduced:
- a new **mandatory** and **suspensory** notification regime for certain sensitive sectors
- **wide powers** to review a wide range of other transactions on broad national security grounds
- Extensive power to impose **remedies to prevent or mitigate** national security risk
- **criminal penalties** and invalidity for failing to notify

When does it bite?

- The NSIA could be relevant to transactions having any UK nexus (subsidiaries, sales, or assets), including:
- **M&A**
- **joint ventures**
- **asset deals**
- **licensing deals**
- **corporate restructurings/reorganizations** (which can trigger mandatory notification requirements)

What should you be doing?

- Ensure that transactions are reviewed during diligence stages to confirm whether the NSIA applies.
- Assess whether a mandatory filing is required or a voluntary filing is advisable.
- Understand risk of mitigation and impact on deal timetable.

What are the thresholds for a mandatory filing?

Acquisition of "control"

- Acquisition of **shares** or **voting rights** of 25%, 50% or 75%, or moving between these levels
- Acquisition of ability to block **resolutions governing the affairs of the entity**
- Includes **indirect** acquisitions of control if there is a chain of "**majority stakes**"

Over a "qualifying entity"

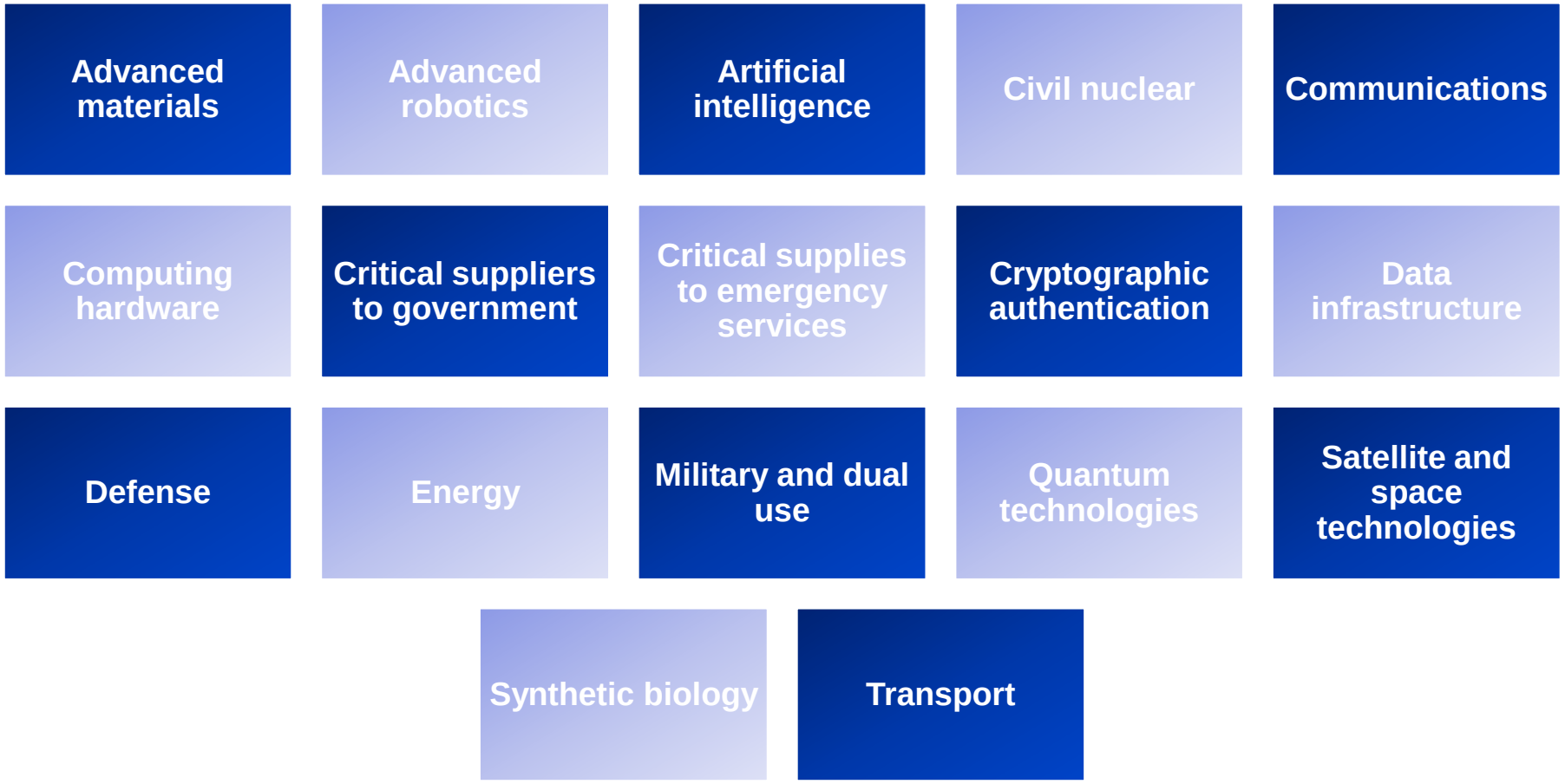
- Any entity other than an individual, including not-for-profit entities
- Includes non-UK entities
- Asset transfers not caught (but subject to call-in risk)

Of a "specified description"

- The qualifying entity must **carry on activities** in the UK
- Requires some nexus – more than pure sales but can be easily triggered
- The activities must fall into one of the identified **mandatory sectors (see later slide)**

Mandatory filing can be required in context of **internal reorganizations/restructurings** if there is a change of control over a qualifying entity – no exemption for this as in some other jurisdictions.

What are the mandatory sectors?



What other transactions can be reviewed?

Acquisition of "control" – wider

- Same as mandatory filing requirements, plus acquisition of "**material influence**"
- For assets, acquiring ability to use or control (or use or control to a greater extent) over a qualifying asset
- Can include contractual arrangements

Over a "qualifying entity" or "qualifying asset"

- Qualifying entities
- No requirement to be "carrying on activities" (sales only)
- Includes acquisition of assets, broadly defined
- Applies to **assets outside the UK**, if these are used in connection with activities carried on in the UK or the supply of goods or services into the UK

Where there may be a "risk to national security"

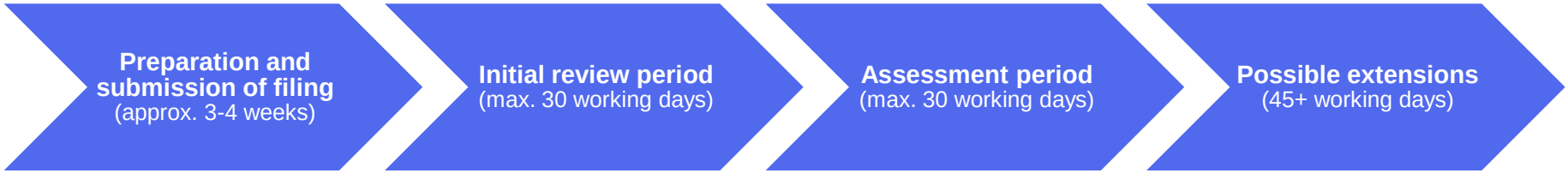
- Not defined in the act to give maximum flexibility

Even if no mandatory filing is triggered, there is still a risk of "call-in" in respect of a wider set of transactions, including asset deals. Option to submit voluntary filing to give certainty regarding call-in risk.

The NSIA – procedure

The process

- The same process applies for both voluntary and mandatory notifications:



- The Government decides whether to call a transaction in for more detailed review within the "initial review period."
- Simple cases (no material national security issues) can be cleared within 1-2 months from submission. Complex cases can take 3-5 months (and up to 6-7 months inc. remedies).

Engagement with the ISU and Government

- The wording of the NSIA and associated regulations is highly technical and difficult to apply in practice. Limited guidance, case law, or willingness to provide guidance on applicability of the sectors.
- Process for consideration of substantive national security concerns entirely non-transparent.
- Complex cases need a careful strategy to navigate government machinery and stakeholders.

Substantive assessment – call-in risk

What is a national security risk?

Framework for assessment:

- **Target risk** – *activities of target*
  Is target engaging/could it engage in activities that raise risks to national security? Activities within/relating to **17 mandatory sectors** are more likely to be called in.
- **Acquirer risk** – *acquirer's profile*
  - Passive/long-term investors – low risk
  - Financial investors/PE – some risk
  - Country of origin not determinative, but ties/allegiances to states or organizations that are hostile to the UK will be considered (inc. SoEs/ SWFs)
- **Control risk** – *level of control acquired*
  The more control, the higher the risk of call-in.

Key concerns:

The NSIA does not define "*national security*," but key concerns emerging from cases to date:

- Preventing the transfer of strategic knowledge and technology out of the UK/industrial espionage

- Ensuring the availability of critical assets and services required for Government and defense purposes; preservation of critical infrastructure, supply chains, and capabilities

- Controlling access to classified information/sites

The NSIA – overview of operation so far

Expectations vs. reality

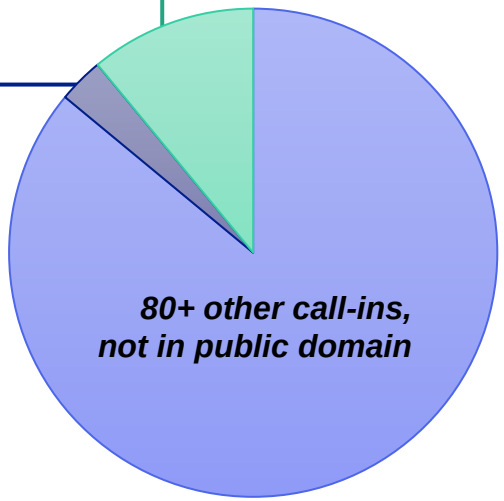
- Original estimate: 1,000–1,830 notifications each year. First quarter resulted in 222 notifications, but overall volume consistent with expectations.
- There have been approximately **100 call-ins to date**.

11 other call-ins in the public domain

- 2 cleared with no conditions (*BT/Altice & Royal Mail Plc/VESA*).
- 9 resulted in conditional clearances. These have involved ultimate acquirers from the UK, UAE, China, the United States, as well as individuals of different nationalities.

11

3



2 transactions blocked, and 1 M&A deal unwound

Each transaction involved:

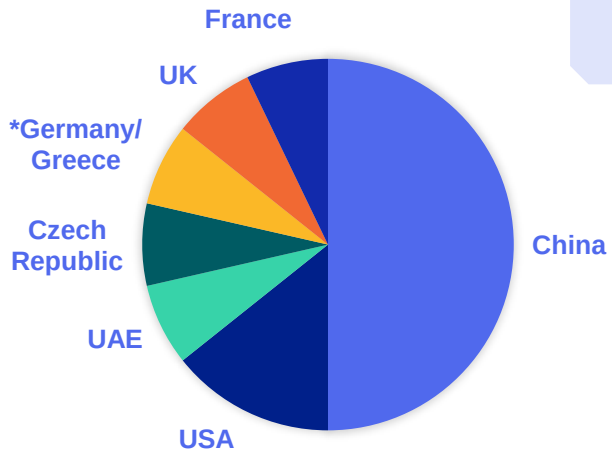
- Chinese/ultimately Chinese-owned acquirers; and
- strategically important or dual-use software or technology.

Notable features of called-in transactions …

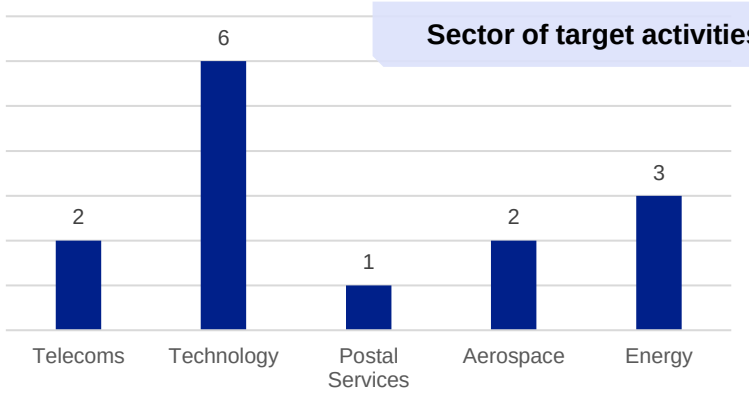
- Acquirer or ultimate owner of acquirer being from a hostile state
- Possibility of transfer of technology out of UK
- Items that are dual-use or which may become subject to export controls if produced outside of UK
- Critical/sensitive information and contracts with the UK Government
- Businesses forming part of the UK's critical infrastructure: energy, communications, postal services, etc.
- Products/services forming part of a key UK supply chain
- Media/public interest in the transaction

The NSIA – analysis of publicly called-in transactions

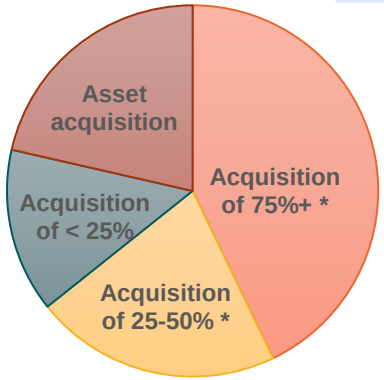
Nationality of *ultimate* acquirer



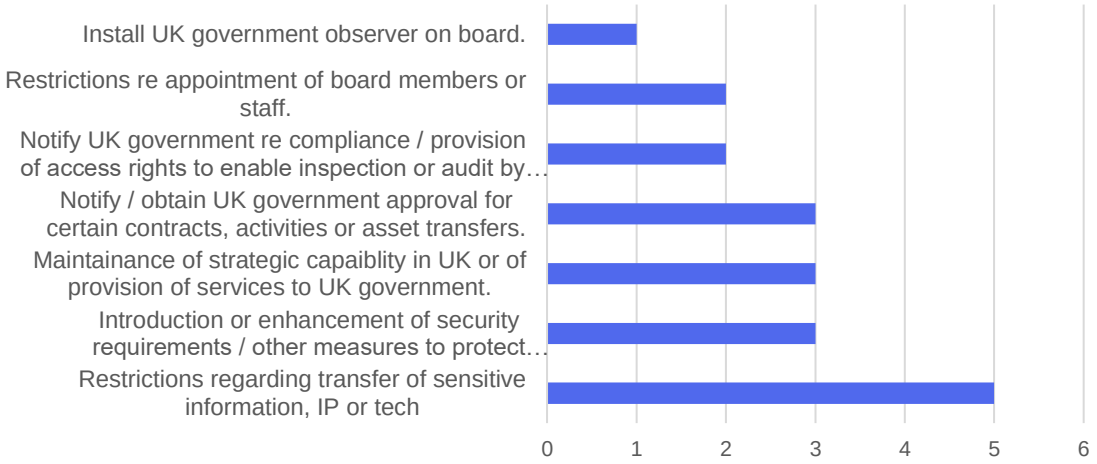
Sector of target activities



Acquisition types



Remedies imposed



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Key Global Developments in National Security Review of Cross-Border Transactions – Japan Update

PRESENTED BY:

NOZOMI ODA, FUMIHIKO HORI

Strengthening of National Security Regulations

2020: Following the strengthening of regulations in Europe and the United States, the Japanese government strengthened foreign direct investment regulations.

- Substantially expanded the scope of Restricted/Highly Restricted Businesses that require prior approval from regulators with respect to the receipt of foreign direct investment.
- The threshold for the requirement of prior notification to regulators for the acquisition percentage of stock of a publicly traded company (that is considered a Restricted/Highly Restricted Business) was decreased from 10% to 1%.
- Prior notification also became required for a foreign investor exercising their voting rights to appoint a director at a company (that is considered a Restricted/Highly Restricted Business).

2022: Prime Minister Kishida designates economic security as a key policy.

- The Economic Security Promotion Act was enacted to cross-sectorally protect Japan's key industries.
- The Act on the Review of the Use of Real Estate Surrounding Important Facilities and on Remote Territorial Islands was enacted to regulate use of land that is important from a national security perspective.

Overview of Foreign Direct Investment Regulations

Foreign Exchange and Foreign Trade Act ("FEFTA")

"Foreign Direct Investment" means:

- Who – "Foreign Investor"
- What – taking certain actions, such as
  - acquiring stock;
  - acquiring a business; and
  - exercising voting rights to appoint a director to a company
  - of/to a Japanese corporation that engages in any Restricted or Highly Restricted Business.

The Foreign Investor must provide prior notification to, and obtain clearance from, Japanese regulators before the applicable "closing" of the relevant transaction or action.

- The standard review period is 30 calendar days.

Overview of Regulated Business under the FEFTA

- There are over 150 categories of businesses that are designated as a Restricted or Highly Restricted Business.
- Overview of Highly Restricted Businesses
  - weapons, aircrafts, nuclear facilities, space, dual-use technologies, cybersecurity
  - electricity, gas, water supply, railway, oil, important mineral resources
  - semiconductors
  - telecommunications that require a regulatory license
  - software/information processing business that involves management of sensitive personal data
  - advanced medical devices (e.g., ventilators), pharmaceuticals related to infectious diseases (e.g., vaccines)
- Overview of Restricted Businesses
  - software/information processing, telecommunications, cybersecurity, electricity, gas, water supply, railway and oil, manufacturing of ICT devices, in each case excluding those categorized as Highly Restricted Business
  - heat supply, broadcasting, public transportation, air transportation, maritime transportation
  - biological chemicals
  - manufacturing of leather products
  - security services
  - agriculture, forestry, fisheries

Key Steps of FEFTA Prior Notification

Step #1 – Due diligence on:

- Foreign investor's upstream capital structure
- Target's business

Step #2 – Prior consultation with FEFTA regulators (optional)

Step #3 – Prior notification filed with FEFTA regulators

- The 30-calendar-day review period starts

Step #4 – Q&A correspondence

Step #5 – FEFTA approval

Step #6 – Closing of the relevant transaction/action

Key Topics of FEFTA Review

Nationality of Foreign Investor

- Is it China or Hong Kong?

Nature of Target Business

- Is it a Restricted Business or a Highly Restricted Business?
- Are there any customers/business partners of the target business that are sensitive from a national security perspective?

Nature of Investment

- What is the percentage of post-closing ownership by the foreign investor?
- Will there be any business collaboration between the foreign investor and the target business?
- Is there any plan of exit by the foreign investor?

Overview – Act on the Review of the Use of Important Real Estate Surrounding Important Facilities and on Remote Territorial Islands (Important Real Estate Use Regulation Act)

Monitored Areas

- **Subject areas:** Areas within approximately 1,000 meters (approx. 0.6 miles) from important facilities, such as facilities of the self-defense forces and the coast guard and nuclear facilities
- **Government rights:** Rights to investigate the owner and usage of the Monitored Areas and order discontinuation of use that interferes with important infrastructure

Special Monitored Areas

- **Subject areas:** Areas close to specified important facilities such as the headquarters of the self-defense forces where sensitive information is kept
- **Government rights:** The transfer of such areas that are 200m^2 (approx. 2,100 square feet) or larger requires prior notification to the government

Potential Effects of the Important Real Estate Use Regulation Act on the FEFTA

Potential effects on the FEFTA review process

- The real estate included in the target company/target business may be added to the FEFTA review criteria.
- If such real estate is situated close to important infrastructure, the FEFTA review may become more stringent.
- If the nationality of the foreign investor is China or Hong Kong, then the FEFTA review with respect to such real estate may become more stringent.

Introduction of Team

Presenters

Brandon Van Grack
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Brandon co-chairs firm's National Security and Global Risk + Crisis Management groups. His practice focuses on investigations, criminal defense, and compliance matters involving export controls and sanctions, foreign investment, and cyber incidents. Brandon's arrival to the firm follows more than a decade of service at the U.S. Department of Justice (DOJ), where he held multiple senior positions. In those positions, he helped manage the U.S. government's tools to address perceived national security threats in China and Russia, oversaw every criminal investigation involving sanctions and export controls, was Chief of DOJ's Foreign Agents Registration Act (FARA) Unit, and handled the review of transactions before CFIUS for DOJ. He also served as a lead prosecutor for Special Counsel Robert S. Mueller III's investigation of the Russian government's efforts to interfere in the 2016 presidential election.

Charles Capito
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In the National Security space, Charles has significant experience counseling clients on the complex and evolving considerations related to CFIUS. He frequently helps investors and U.S. businesses through every aspect of the CFIUS process, from understanding and allocating CFIUS risk on the front end, to presenting cases before the Committee, to negotiating appropriate mitigation measures, and ultimately to implementing and complying with mitigation agreements after the fact. Charles' experience includes securing clearances for some of the largest and most sensitive cases reviewed by CFIUS, as well as dozens of more discreet transactions and investments.

Joseph Benkert
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Joseph advises clients on critical national security matters pertaining to CFIUS, export controls, and various regulatory and compliance issues. He previously served as a leading civilian official in the Department of Defense (DoD) from 2003-2009 under both the Bush and Obama administrations, including as Assistant Secretary of Defense for Global Security Affairs after being nominated by President Bush and confirmed by the Senate. While at the DoD, Joseph led the department's involvement in numerous complex matters before CFIUS. He oversaw more than 400 CFIUS cases and represented DoD in CFIUS deliberations determining whether a foreign investment in a U.S. company or its operations represented a national security risk.

Presenters

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Nicholas co-chairs firm's National Security Practice. He has over 30 years of in-depth experience in advising clients on a wide range of U.S. national security matters in the context of cross-border investments, acquisitions, joint ventures and commercial transactions. Nicholas advises clients on U.S. foreign investment approvals (CFIUS); Department of Defense foreign ownership, control and influence mitigation under the National Industrial Security Program; and U.S. sanctions and embargoes (OFAC), including certain enforcement matters, relating to a broad range of industries, products and transactions.

Dr. Felix Helmstädter
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Felix possesses more than a decade of experience in complex regulatory counselling, compliance, and litigation. He advises major companies, public sector entities, and innovative businesses on EU and German regulatory law, with a particular focus on foreign trade, government contracts, and competition. His clients span a range of industries, including telecoms, digital economy, media, technology, financial services, healthcare, energy, and transportation. Felix is particularly experienced in advising on foreign direct investment and economic sanctions. He regularly represents international clients, including Asian and U.S. investors in foreign investment control clearance proceedings, and other complex matters involving cybersecurity or further national security concerns.

Marie-Claire Strawbridge
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Drawing on over 14 years of experience, including in relation to national security interventions under the UK's merger control regime, Marie-Claire assists clients in navigating the complexities of the UK's new national security regime (introduced in January 2022). She has experience on merger control and FDI aspects of complex global transactions and has an extensive background in broader antitrust issues, including antitrust counselling and investigations. She has advised corporate clients and financial investors across a range of sectors including technology, energy, retail, healthcare, sports rights and industrials.

Presenters

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Nozomi serves as co–head of Morrison Foerster's Asia Private Equity practice. Her practice focuses on cross-border public and private M&A, joint ventures, strategic investments, and capital markets transactions. Nozomi also regularly advises on a wide range of Japanese regulations, including securities, financial, and fund regulations, merger review, and healthcare and life sciences regulations. Nozomi previously spent two years with Japan's Financial Services Agency (FSA) as a deputy director of the corporate disclosure department, where she participated in the drafting of the FSA's regulations on disclosures regarding private placement offerings and director compensation.

Fumihiko Hori
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Fumihiko's practice covers a wide range of Japanese regulatory and policy matters, including regulations and policies on information and communications, energy, and import/export control. He also regularly advises on matters in the renewable energy industry, including other energy-related transactions. In the field of IT, Fumihiko advises clients on outsourcing transactions, consumer transactions and other internet-based commercial transactions. He represents a variety of corporations, both in Japan and overseas, focusing on international commercial transactions. Before starting his law career, Fumihiko spent six years working for the Ministry of Economy, Trade and Industry of Japan (METI).

Moderators

Stan Yukevich
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Stan's practice is focused on mergers and acquisitions, joint ventures, investments and other strategic transactions involving Japan, both out-bound (Japanese companies in their transactions globally), and in-bound (U.S. and other global companies in their transactions in Japan). Stan works with clients across a range of industries, with significant experience advising technology companies. Stan is recommended as a leading M&A lawyer in Japan by *Chambers Global, Chambers Asia Pacific, IFLR1000,* and *The Legal 500 Asia Pacific*. Stan is also recognized by the Japan edition of *Best Lawyers* in the categories of Corporate and M&A and for Private Equity, Private Funds and Venture Capital.

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Jeremy's practice focuses on cross-border mergers, acquisitions, disposals, spin-outs, and joint ventures. His practice covers alliances between multinationals to greenfield corporate and venture investments. Jeremy is recommended as a leading lawyer in Japan by independent guides to the legal profession, including *Chambers & Partners*, *The Legal 500*, and *IFLR*. Clients comment that he is "*exceptional for cross-border transactions…and an absolute pleasure to work with*" (*Chambers 2020*), and "*the single best lawyer I have worked with in 30 years of M&A experience…courteous, ruthless on behalf of the client in negotiations, very smart, a creative solution finder, and has pragmatic common sense*" (*Chambers 2019*).

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