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WHITE PAPER

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Foreign Investment Control Heats Up: A Global Survey of Existing Regimes and Potential Significant Changes on the Horizon

Mergers and acquisitions by multinational companies require attention to foreign investment controls around the world, and such controls vary widely. For example, requirements for determining whether such controls apply, the areas and industries of focus, and the notification and review processes differ by jurisdiction. In addition, potential significant changes to foreign investment controls are looming. Ultimately, information available in the various jurisdictions surveyed in this article suggests that it is relatively rare for foreign investments to be blocked or abandoned due to foreign investment controls.

This Jones Day *White Paper* surveys the foreign investment control regimes, as well as certain potential significant changes, in more than 15 major jurisdictions, including, Africa, Australia, Brazil, Canada, China, the European Union, France, Germany, Italy, Japan, Mexico, the Netherlands, Russia, Spain, the United Kingdom, and the United States.

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As discussed in further detail below, foreign investment controls vary widely across the globe. For example, some countries impose mandatory foreign investment notification requirements, while others allow for voluntary notification or some combination of both. In those countries with voluntary regimes, foreign investors typically conduct a risk-based analysis to decide whether or not to submit a voluntary notification. Often, the risk of not submitting a voluntary notice is that the government can retroactively seek to prohibit or impose conditions on a particular foreign investment.

In addition, the focus of foreign investment controls around the world varies. For example, some countries, such as the United States, focus on how foreign investment could affect national security and critical infrastructure, while other countries focus only on impacts to certain industries, such as residential real estate, agriculture, broadcasting and newspapers, health services, airlines, gambling, telecommunications, electricity and other utilities, and transportation. In addition, some countries consider the impact that a foreign investment could have on the economy, while other countries do not consider economic issues when reviewing potential foreign investments.

Also, in some countries: (i) the nationality of the foreign investor can affect whether an investment is subject to foreign investment controls; (ii) additional requirements apply if the foreign investor is state owned; (iii) monetary thresholds can affect whether an investment is subject to foreign investment controls; (iv) parties are required to pay fees in connection with the foreign investment review process; and (v) criminal penalties can apply in the case of noncompliance with the applicable foreign investment control regime.

Further, the notification process, as well as the timeline associated with review, varies around the world. For example, parties may be required to notify different governmental authorities in a particular country depending on the nature of the foreign investment. In addition, review periods can vary from 30 days to four months or longer.

To complicate matters further, potential significant changes to foreign investment controls are on the horizon. For example, as discussed in further detail below, members of U.S. Congress recently introduced legislation that would significantly change the foreign investment review process in the United States. In addition, the United Kingdom is considering changes to its current foreign investment control regime. Also, the European Union is considering whether to adopt a foreign direct investment ("FDI") control regime. This could require amendments to the current foreign investment controls that certain EU Member countries already have in place, while also requiring other EU Member countries that currently do not impose foreign investment controls to adopt such controls. Further, the Netherlands is considering whether to adopt a foreign investment control regime, while efforts to encourage foreign investment are underway across Africa.

In most countries, information relating to investments subject to foreign investment control regimes typically is not made publically available. That being said, information available in the various countries surveyed below suggests that, similar to the foreign investment control regime in the United States, it is relatively rare for foreign investments to be blocked or abandoned because of applicable foreign investment control regimes.

Our focus here is on foreign investment review laws of general applicability. In addition to these regimes, many, if not all, countries impose limitations on foreign ownership in specific industries (such as air transport, telecommunications, and insurance) under other more narrowly focused laws. These additional limitations need to be considered when making investments in the particular industry affected by them.

SURVEY OF CURRENT FOREIGN INVESTMENT CONTROL REGIMES

Australia

The foreign investment approval process in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 and the Foreign Acquisitions and Takeovers Regulations 2015. The applicable foreign investment controls can be broken down into transactions involving: (i) residential real estate; (ii) so-called "notifiable actions"; and (iii) so-called "significant actions."

Every acquisition of residential real estate by a foreign person must be notified to and reviewed by the Australian Tax Office, unless specifically exempted (for example, if the investor is a New Zealand citizen, holds an Australian permanent visa, or is a spouse of an Australian citizen when purchasing as a joint tenant with his or her spouse).

Apart from residential real estate transactions, the Australian foreign investment control regime draws a distinction between "significant actions" and "notifiable actions." A significant action is any action to acquire interests in securities, assets, or land, or otherwise take action in relation to corporations and unit trusts that meets a specific threshold. A notifiable action is a proposed action that meets the specified threshold and is an acquisition of: (i) a direct interest in agribusiness; (ii) a substantial interest (that is, an interest of at least 20 percent) in Australian entities; or (iii) an interest in Australian land.

The relevant threshold for significant actions varies based on: (i) the type of investment (i.e., sensitive business, including media, telecommunications, transport, defense and military-related industries and activities, encryption and securities technologies and communications systems, the extraction of uranium or plutonium, and the operation of nuclear facilities); (ii) particular circumstances (such as whether the target is an agribusiness or media company); and (iii) if the investor is from a partner country. Broadly speaking, partner country investors (Chinese, Japanese, New Zealand, South Korean, and United States investors, except foreign government investors) have a monetary threshold of A$1.094 billion for nonsensitive business investments. All other investors, as well as investments in sensitive businesses, generally are subject to a A$252 million monetary threshold.

Notifiable actions must be notified to and approved by the Treasurer, acting on the recommendation of the Foreign Investment Review Board, before they can proceed. For significant actions that are not also notifiable actions, notification of the proposed action is voluntary. However, because the Treasurer is entitled to issue a range of orders, including asset disposal orders, in relation to significant actions that are not notified, foreign investors ordinarily provide notice of all significant actions as a matter of commercial practice and prudent risk management.

The notification process is completed online through portals to either the Treasury or the Australian Tax Office (depending on the nature of the proposed acquisition). The Treasurer normally has 30 days to consider the notice and make a decision. This can be extended by an additional 30 days if the Treasurer requests further information, which usually occurs. Once considered, the Treasurer may issue an order prohibiting the action or issue a no-objection notification with or without conditions. Application fees are payable upon submission of the notification, regardless of the final decision made. These fees, which are capped at A$100,000, are calculated based on the value of the property being acquired.

If a foreign investor does not obtain required approval or breaches any conditions imposed on any such approval, civil penalties up to A$45,000 for individuals and up to A$225,000 for companies may be imposed. Criminal penalties, including imprisonment, also can be imposed. The Treasurer also has broad powers to deal with unapproved acquisitions, including selling the assets without providing proceeds to the investors.

Brazil

Brazil imposes restrictions on foreign ownership in certain sectors, such as press and broadcasting, financial services, and airlines. In addition, Brazil limits the amount of rural lands that a foreign person can own. The Brazilian government generally applies the restrictions using objective criteria, which are set forth in the Brazilian Constitution or specific legislation, and consideration of national interest or national security issues is secondary.

Press and Broadcasting. In the press and broadcasting sector, companies must be exclusively owned by either Brazilian-born citizens, foreign nationals who have held Brazilian citizenship for more than 10 years, or companies established under Brazilian law with headquarters in Brazil. Also, at least 70 percent of the total share capital and voting capital must be owned directly or indirectly by Brazilian-born citizens or foreign nationals who have held Brazilian citizenship for more than 10 years. Moreover, such persons must be exclusively responsible for programming and editorial responsibilities.

Financial Industry. In the financial industry, the admission of foreign participants into the Brazilian market is subject to prior approval by Brazilian authorities, which involves a presidential decree that the proposed investment would be consistent with the Brazilian government's interest.

Health Services. Brazil recently lifted the ban on participation of foreign companies or capital in the health services industry, and Brazil now allows foreign companies and capital to participate, directly or indirectly, including as controlling stockholders, in legal entities whose corporate purpose is to install, operate, and explore hospitals and clinics and family planning actions and research. Brazilian law also allows foreign individuals and companies to own and participate in companies incorporated in Brazil that operate private health care plans.

Domestic Airlines. Domestic airlines must be based in Brazil and directed by Brazilian nationals. Foreign investors cannot own more than 20 percent of a domestic airline, and the sale of voting shares must be approved by the Brazilian government. There are indications that the Executive Branch may soon propose legislation lifting this restriction completely and opening the market to foreign investors.

Rural Land. The limitation on foreign ownership of rural lands previously was interpreted to apply only to natural persons and, as such, corporations or other entities organized in Brazil with foreign ownership were not subject to the restriction. In 2010, the limitation was reinterpreted to also apply to entities controlled by foreign persons. There has been some recent discussion regarding overturning that interpretation because Brazil is trying to encourage foreign investment. Under Brazil's rural land foreign ownership restrictions, foreign nationals cannot own more than 25 percent of an area of a municipality, each foreign nationality cannot account for more than 40 percent of the area, and Brazilian companies controlled by foreign nationals must obtain prior approval from the government to complete a purchase.

National Interest. The concept of "national interest" is used to limit the scope of financing from public financial institutions, such as the National Bank for Economic and Social Development, to foreign-controlled companies, which can be granted only when it involves investment in sectors or regions where a "high national interest" is involved. The concept of "high national interest" is interpreted broadly and includes public services infrastructure involving energy exploitation, energy generation, transmission, and distribution; telephony; port and transport systems; sanitation; and investments in the petrochemical, mining and metallurgy, car making, agro-industry and forestry, capital goods, electronics, tourism, and lease of capital goods industries.

National Security. The Brazilian government employs the concept of "national security" to limit foreign investors from acquiring areas near the international borders of Brazil, which are deemed indispensable to national security and must be authorized by the National Defense Council. This is a different and distinct limitation from the acquisition of rural land by foreign nationals described above.

Canada

The foreign investment control regime in Canada is mandatory and generally can be broken down into economic-focused reviews and national security-focused reviews. The primary governing authority is the Investment Canada Act ("ICA") and its regulations. The ICA applies when non-Canadians acquire control of an existing Canadian business or when non-Canadians establish a new Canadian business. The ICA applies even in situations where the Canadian business to be acquired is not currently Canadian-controlled.

Economic-Focused Review

Certain transactions within the jurisdiction of the ICA require pre-closing review and approval, while others require only a post-closing notification. Various factors, such as the structure of the transaction, the size of the Canadian business, and financial thresholds, are used to determine whether a pre-closing review or a post-closing notification is required. The relevant financial threshold differs depending on the nationality of the foreign party.

For example, a direct acquisition by a national of a specified free trade party (the United States, the European Union, Mexico, Chile, Colombia, Honduras, Panama, Peru, or South Korea) is subject to a pre-closing review only if the enterprise value of the Canadian business exceeds C$1.5 billion. On the other hand, investments by investors from a World Trade Organization ("WTO") member state are subject to a pre-closing review if the enterprise value exceeds C$1 billion. For investors that are not nationals free trade partners or WTO members, the threshold is C$5 million for a direct acquisition and C$50 million for an indirect acquisition. If a pre-closing review is required, the transaction cannot close until the Minister of Innovation, Science, and Economic Development ("ISED") rules that the transaction will yield a net economic benefit to Canada. If a transaction does not trigger a pre-closing review or involves the establishment of a new business, a post-closing notification must be filed.

For transactions subject to a pre-closing review, an application must be filed with the Investment Review Division ("IRD") prior to implementation of the investment, and the parties must allow time for review by the IRD and the Minister's office before closing. The Minister has 45 calendar days (which may be increased by an additional 30 days) to review the investment. The review period may be extended beyond 75 days, which is determined by agreement between the IRD and the investor. The median review time from April 1, 2016, to March 31, 2017, was 74 days.

Following a review, the investment will either be referred to the Governor in Council with a report on the review and recommendations or the investor will be notified that no further action will be taken. If the investment is referred to the Governor in Council, the Governor in Council may stop the investment by issuing an order directing the investor to fully divest itself. The less drastic alternative is that the Governor in Council may impose conditions on the investment.

National Security-Focused Review

In addition to the above-described parameters that trigger an economic-focused review by the Canadian government, transactions involving foreign investment in certain sensitive sectors may experience increased scrutiny. Those sectors include financial services, transportation services, uranium production, and certain sectors that could affect Canadian national security, such as aerospace, defense, network and data security, telecommunications, and sensitive technology sectors. In 2016, the Minister of ISED issued guidance regarding the circumstances under which the government of Canada could initiate a national security review. According to the guidance, the Canadian government has broad authority to review investments where the government deems a "reasonable ground to believe" that a foreign investment "could be injurious to national security."

There is no dollar value threshold that triggers a national security review. It is the responsibility of the Minister of ISED, in collaboration with the Minister of Public Safety and Emergency Preparedness, to decide whether an investment could injure Canada's national security. The non-Canadian investor and other parties involved with the transaction are provided with the opportunity to make representations to the Minister, and the Minister may require (in a time and manner specified by the Minister) additional information that the Minister determines relevant for such a review.

After the Ministers of ISED and Public Safety and Emergency Preparedness determine whether a foreign investment could injure Canada's national security, they must decide whether to take additional action or refer the investment to the Governor in Council. In the latter scenario, the Governor in Council has three options: (i) authorize the investment with conditions; (ii) disallow the investment; or (iii) require the investor to divest control of the Canadian business.

Canada instituted the national security review provisions in 2009. Since then, Canada has reviewed more than 4,500 transactions. During this time, 13 transactions have been subject to a national security review, with nine resulting in an order to the non-Canadian investor to divest itself of control over the Canadian business. In the remaining four reviews, the investment was authorized, subject to the imposition of conditions to mitigate possible national security risks.

China

Foreign investment into China, whether through formation of a new foreign-invested entity ("FIE") or acquiring the assets or equity of an existing Chinese company, is subject to a mandatory foreign investment control, regulatory approval, and filing regime.

China regulates foreign investment based on the industry sector, generally divided into two categories: (i) industries where foreign investment may benefit from special incentives ("Encouraged Category") and (ii) industries included on a "Negative List," which are subject to special restrictions. The Negative List is further split into two sections: (i) industries in the "Prohibited Category" and (ii) industries in the "Restricted Category."

China prohibits foreign investment into industries in the Prohibited Category, while permitting foreign investment in the Restricted Category, subject to additional restrictions, such as maximum foreign shareholding limits and requirements to obtain preapprovals (rather than making filings) with certain responsible authorities. By contrast, any foreign investment in an industry that is not on the Negative List (and so is in the Encouraged Category) is subject to a streamlined notice procedure instead of the more rigorous preapproval procedures. The current Negative List contains 35 restricted items and 28 prohibited items. By way of example, investments in media, natural resources, and the military sectors generally are under the Prohibited Category, while telecommunications, transportation, energy, utilities, banks and financial institutions, agriculture, and some less-sensitive media businesses generally fall under the Restricted Category.

In general, any foreign investment in China (whether in the Restricted or Encouraged Category) must go through a number of approval or filing procedures, including:

- If the new FIE or acquired business is engaged in manufacturing activities, approval by or filing with the National Development and Reform Commission or its local counterpart ("NDRC");
- Registration with the Ministry of Commerce ("MOFCOM") or its local counterpart (for investments under the Restricted Category, preapproval by MOFCOM is required);
- Registration with the State Administration for Industry and Commerce ("SAIC") or its local counterpart, pursuant to which the SAIC will issue a business license recording the FIE formation or acquisition; and
- Registration with other relevant government agencies, such as the State Administration of Foreign Exchange, the state and local tax bureau, customs, the technical supervision bureau, public security bureau, labor, finance, and statistics authorities.

Normally, each authority takes one to two weeks to approve or register an application for foreign investment, although some processes can be completed simultaneously. The entire approval and registration process for setting up a FIE can take four to eight weeks to complete. In addition to completing approval or filing processes upon establishment of an FIE or in connection with an acquisition, the ongoing operation of a FIE is subject to approval and filing requirements.

In addition, acquisitions by foreign investors of military enterprises or that result in foreign control over key domestic enterprises also are subject to a national security review. If an acquisition by a foreign investor is likely to trigger "national security" concerns, the foreign investor should notify MOFCOM of the transaction. Upon receiving a notification, if MOFCOM determines that a national security review is required, it will establish an inter-ministerial panel, principally run by NDRC and MOFCOM, to conduct the review and issue a decision within 100 to 120 working days. Depending on the sensitivity of the transaction, the inter-ministerial panel will conduct a "general review" or "special review." If the inter-ministerial panel determines that the transaction is likely to have a major impact on national security, MOFCOM will require the applicant to either terminate or restructure the transaction. If an acquisition by foreign investors has closed and an inter-ministerial panel determines that the transaction is likely to cause material negative impact on national security, MOFCOM can order that the transaction be terminated or that the parties modify the transaction (including transferring back equity interests or assets) to eliminate the negative impact on national security.

Reforms launched by the State Council in October 2016 converted China's above-described foreign investment control regime from a rigorous preapproval-based system to a more streamlined filing-based system for investments not on the Negative List. Although these reforms are positive for foreign investors, there is still scope for further reform. For example, certain foreign investment laws and regulations have been revised and promulgated since October 2016, while others have not, so there are some conflicting provisions still in effect.

France

Article L. 151-3 of the French Monetary and Financial Code requires that certain foreign investments in France receive prior authorization depending on the activities of the French target company. Prior authorization generally is required for both EU and non-EU investments in sensitive activities related to the following (interpreted broadly, especially item 12 below):

1. Gambling;
2. Private security services;
3. Research and development or manufacture of methods intended to prevent the illegal use, in the framework of terrorist activities, of pathogens or toxic substances and to prevent its public health consequences;
4. Mail interception and wiretapping;
5. The audit and certification of security provided by products and information technology systems;
6. The security of information systems of public or private operator managing critical facilities;
7. Dual-use products and technologies;
8. Activities and services relating to cryptology;
9. Activities carried out by companies holding classified information and national defense secrets;
10. Research, development, and sale of weapons, ammunition, explosive powder, and explosive substances used for military and war purposes;
11. Activities carried out by companies that entered into design or supply agreements with the French Defense Department in the industry areas listed in 1 through 3; and

12. Foreign investment in activities essential to France's interests in matters of public order, public security, and national security, especially when they involve the integrity, security, and continuity of: energy supply; water supply; transportation networks and services; operation of electronic communications networks and services; the functioning of an establishment, installation, or facility representing a key military, economic, or security interest, or that is environmentally sensitive; and the protection of public health.

If the parties are unsure whether a transaction requires prior authorization, they can initiate a voluntary procedure with the French Ministry of the Economy ("French MINEFI"). The French MINEFI has two months to respond. However, failure to respond has no real consequence, since the foreign investor must still file a formal prior authorization if otherwise required to do so.

EU and non-EU investments require prior authorization if they result in either: (i) the direct or indirect acquisition of a controlling stake in a company having its registered office in France; or (ii) the acquisition of all or part of a line of business of a company whose registered office is located in France. Also, for non-EU investors, the acquisition of more than 33.33 percent of the stock or voting rights of a company having its registered office in France, even if not a controlling stake, triggers the prior authorization requirement.

To receive prior authorization, a foreign investor files an application with the French MINEFI that includes information regarding the purchaser (corporate and business information), the transaction (description of structure, timing, and main terms), and the target (including a description of the sensitive activities carried out). The French MINEFI must complete its review of the proposed transaction within two months from the time the application is complete, which means that any requests for supplemental information renew the two-month period the foreign investor has to reply. Theoretically, if the French MINEFI fails to reply within two months, the authorization is deemed to be granted. However, in practice, the French MINEFI asks for additional information, so the procedure is complete only when the French MINEFI is satisfied with the overall level of information received. The full two-month period or more often is required to complete the review.

The French MINEFI will either approve, refuse, or approve under conditions designed to: (i) continue the line of business; (ii) protect public health; (iii) protect the integrity, security, and continuity of the supply chain; or (iv) honor contractual obligations of the target company. If necessary, a letter of undertakings is entered into with the French MINEFI to protect French state interests by guaranteeing supply and mitigating foreign ownership influence and control, which extends the time period by several more weeks at a minimum. In total, the prior authorization period typically takes a minimum of three to four months. Depending on the nature of the transaction, more time may be required.

In the case of noncompliance, the French MINEFI may issue an injunction, after formal notice to answer within 15 days. Failure to comply also is subject to criminal sanctions, including up to five years' imprisonment, seizure of the investment, and a fine of up to twice the amount of the investment originally made. Furthermore, failure to comply with prior authorization requirements also renders any undertaking, related agreement, or provision entered into by the investor null and void.

Germany

The German FDI screening mechanism is governed by the Foreign Trade and Payments Law (*Außenwirtschaftsgesetz*, "AWG") and the Foreign Trade and Payments Regulation (*Außenwirtschaftsverordnung*, "AWV"). The AWG and the recently amended AWV provide for two different review procedures for foreign investors wishing to acquire 25 percent or more of the voting rights of a German company. Both procedures, known as the sector-specific review procedure and the cross-sectoral review procedure, include mandatory filing obligations and may negatively affect a transaction even though the German government has not yet prohibited a transaction. An in-depth review by the government also may lead to a mitigation order. The German rules do not require a prior clearance decision for foreign investments. However, the government has ample powers to unwind a prohibited transaction in Germany.

The sector-specific review procedure applies to investments by any non-German company in a German company active in weapons of war, engines and gearboxes used for armored vehicles, information technology security products used for processing classified information, and products falling within the scope of special foreign trade regulation, such as products that may be used for military purposes. Any such acquisition must be notified to the German government. The transaction may be cleared by a formal clearance decision issued during the three-month in-depth investigation period that the government has at its disposal following such a notification. Also, the transaction may be deemed to be approved if the government does not start an in-depth investigation within three months after receiving the notification. The government is not allowed to prohibit a transaction if it does not issue a decision within three months after receiving all information necessary for an in-depth investigation. A transaction may be prohibited if it negatively affects substantial German national security interests (for instance, in the case of an acquisition of a decisive part of the German defense industry).

The cross-sectoral review procedure applies to investments by non-EU/European Free Trade Association companies. Acquisitions concerning critical infrastructure, software serving the operation of critical infrastructure, telecommunications and surveillance technology, computing, and telematics require a notification to the German government. Irrespective of the notification requirement, the government may conduct an in-depth investigation of any transaction that may endanger public order or safety within three months of becoming aware of it or within five years from the signing of the agreement associated with the transaction. The parties to a transaction are able to shorten this time period of uncertainty by submitting a request for a certificate of non-objection. A certificate of non-objection is deemed to be issued if the government does not start an in-depth investigation within two months after the request. Any government decision to block a transaction or to require changes must be taken within the in-depth investigation period, which the government may initiate in response to a notification or a request for a certificate of non-objection. Such an in-depth investigation may take up to four months following receipt of all necessary information. If the government does not issue a decision within this period, the government is not allowed to prohibit the transaction. A transaction may be prohibited if the transaction endangers Germany's public order or security. If an in-depth investigation does not end with a decision to block a transaction or to require changes to the transaction, the acquirer will receive a formal decision only if the acquirer also requests a certificate of non-objection.

Italy

Foreign investments in Italy are subject to two main sets of regulations: the reciprocity principle and the so-called "golden powers" that the Italian government can exercise on Italian companies operating in certain strategic industries. In addition to those main regulations, which are briefly summarized below, specific restrictions, rules, and procedures may apply to qualified investments in Italian companies operating in certain other industries, such as aviation, banking, and insurance, or in publicly listed companies.

Pursuant to the reciprocity principle, a non-EU national (including both natural persons and legal persons) enjoys the same civil rights granted to Italian citizens provided that an Italian citizen would be entitled to the same rights in the country of the non-EU national. Consequently, if the laws of the country of a proposed non-EU investor in an Italian target would restrict the rights of an Italian national to invest in a similar target in that country, then Italy could impose similar restrictions on the proposed investment by the non-EU investor. The reciprocity principle, however, does not apply to countries that have a bilateral investment treaty with Italy.

Also, Italy has adopted a system of so-called "golden powers" under which the Italian government can, among other things, veto or impose conditions on acquisitions of Italian entities operating in certain industries deemed strategic for Italy. Examples of conditions that have been imposed by the Italian government include the requirement that one or more officers of the target entity be Italian nationals acceptable to the Italian government and the commitment to maintain productivity levels and quality standards consistent with past practice.

The golden powers of the Italian government in the defense and national security sector apply to Italian entities performing activities deemed of strategic importance for the national defense and security system and can be exercised in the case of threat of a serious prejudice to the fundamental interests of defense and national security. The golden powers of the Italian government in the energy, transportation, and communications sectors apply to Italian entities operating assets of strategic national importance in such sectors, such as networks, infrastructures, and plants, including those necessary to ensure minimum levels of supply and the provision of essential public services. In

October 2017, the Italian government issued Law Decree No. 148/2017 (converted into Law No. 172 of December 4, 2017), which, among other things, extended the scope of the golden powers to "high-tech" companies, such as those dealing with data storage and processing, artificial intelligence, robotics, semiconductors, dual-use technology, and space/nuclear technology.

The terms and the procedure for the exercise of golden powers in all sectors are substantially the same. That being said, the golden powers outside of the defense and national security sector apply only to non-EU investors and generally are more narrow than those applicable to the defense and national security sector, which apply to any investor, regardless of nationality, and can be exercised in the case of threat of a serious prejudice to the public interest; the security and performance of networks, infrastructures, and plants; or supply continuity.

In short, the process requires that notice be given to the Italian government regarding the proposed transaction. The government then has 15 business days (which can be extended once by an additional 10 business days) to exercise the golden powers, failing which the transaction may be completed. Compliance with golden power regulations is mandatory, and noncompliance results in significant fines and other sanctions.

Based on publicly available information, over the last five years, the Italian government has exercised its golden powers in connection with seven proposed acquisitions of Italian entities performing strategic activities in the defense and national security sector. In one case, the government vetoed the transaction, while in the remaining six cases, the government imposed conditions. Recent foreign investments in certain Italian strategic targets have led to an intensification of the Italian government's scrutiny, considering that three out of the seven cases in connection with which golden powers were exercised took place in the second half of 2017.

Japan

Under Japanese law, any foreign investor that makes an inward direct investment in Japan must file a prior notification or a post-closing report to Japanese government authorities.

A "foreign investor" is any of the following: (i) a nonresident individual; (ii) a company established pursuant to foreign laws or having its principal office in a foreign country; (iii) a Japanese company of which 50 percent or more voting rights are held, directly or indirectly, by investors described in (i) and (ii); or (iv) a Japanese company in which nonresident individuals constitute the majority of the officers or officers having the authority to represent the company.

"Inward direct investment" includes: (i) an acquisition by a foreign investor of shares in a Japanese unlisted company from a person or entity that is not a foreign investor;[1] (ii) an acquisition by a foreign investor of shares in a Japanese listed company, where such foreign investor's shareholding ratio becomes 10 percent or more post-acquisition; and (iii) certain loans made by a foreign investor to a Japanese company for a period exceeding one year.

A prior notification is required if an inward direct investment by a foreign investor falls under one of the following categories:[2]

- The target company operates in certain industries, such as:

    a. Manufacturing of: (i) weapons, aircraft, satellites, rockets, nuclear reactors, nuclear source material or nuclear fuel material (including parts and materials specially designed for manufacturing of the foregoing), and programs specially designed for the foregoing; or (ii) advanced technology materials, machines, tools, and electronic devices, with a high probability of conversion to conventional weapons; and

    b. Electricity, gas, communications, broadcasting, transportation, biological drugs, agriculture, forestry, fishery, and oil;

- The investment is to be made by a foreign investor whose home country is not on the list of permitted countries or areas (generally, countries that are not on the list are those that do not allow Japanese nationals to perform the same types of investments in their countries); and

- Certain types of investments by an Iran-related party in a Japanese company engaging in a nuclear-related business (in order to ensure that Japan fulfills its obligations under the United Nations Security Council Resolution).

The foreign investor must file a prior notification through the Bank of Japan to the Minister of Finance and the minister in charge of the relevant industry within six months before the date of closing of the contemplated transaction. As a general rule, the foreign investor is subject to a 30-day waiting period, and the foreign investor is prohibited from completing the inward direct investment during the waiting period. The waiting period may be shortened by the minister. In most cases, the waiting period is shortened to two weeks. On the other hand, the waiting period may be extended up to four months if the minister considers that it is necessary to examine whether or not the inward direct investment is likely to impair national security, disturb the maintenance of public order, hinder the protection of public safety, or cause a significant adverse effect to the smooth management of the Japanese economy.

During the extended review period, if the minister finds that the inward direct investment is likely to cause one of the above-described situations to arise, the minister will send a notice of proposed changes to the transaction or require termination of the transaction in the form of a "recommendation" to the foreign investor. The foreign investor then is required to notify the minister whether the investor intends to accept the "recommendation." If the foreign investor accepts the "recommendation," the foreign investor may make the inward direct investment in accordance with the terms of the "recommendation." If the foreign investor does not accept the "recommendation," the minister may issue an order to enforce the proposed changes or termination against the foreign investor. The foreign investor would be subject to penalties, including potential criminal penalties, if it does not comply with these orders.

To date, the minister has not yet recommended changing a transaction, although the minister has recommended terminating one transaction. In 2008, the minister ordered The Children's Investment Master Fund, a UK investment fund, to stop additional acquisitions of shares in Electric Power Development, an electric power wholesaler and listed company in Japan, because it was likely to disturb the maintenance of public order.

Mexico

In Mexico, the Foreign Investment Law ("FIL"), enforced by the Foreign Investment Commission, regulates foreign investment. As a general rule, the FIL allows foreigners to own equity in Mexican companies and to purchase fixed assets. Foreign investors may own 100 percent of the capital stock of Mexican companies, except for the following five strategic areas:

1. Activities reserved for government ownership:

- Exploration and extraction of petroleum and other hydrocarbons;
- Planning and control of the national electrical system, as well as the public service of transmission and distribution of electrical energy;
- Generation of nuclear energy;
- Radioactive minerals;
- Telegraph, radiotelegraphy, and mail services;
- Issuance of coining currency; and
- Control, supervision, and security of ports, airports, and heliports.

2. Activities reserved for Mexican nationals or for Mexican companies:

- National land transportation of passengers, tourism, and cargo (but not including courier and messenger services);
- Development banking institutions; and
- The provision of certain professional and technical services (e.g., medical profession).

3. Activities in which foreign investment is restricted to a specific percentage of equity interest:

- Up to 10 percent in production cooperative companies; and
- Up to 49 percent in:
  - Manufacture and commercialization of explosives, firearms, cartridges, ammunition, and fireworks (not including the acquisition and use of explosives for industrial and extractive activities nor the preparation of explosive mixtures for such activities);
  - Printing and publication of newspapers for exclusive circulation in Mexico;
  - Certain shares of companies that own agricultural, cattle-raising, and forestry lands;
  - Fishing in freshwater, coastal waters, and the exclusive economic zone of Mexico (not including aquaculture);

- Integral port administration;
- Port services for piloting vessels to carry out inland navigation operations;
- Shipping companies dedicated to the commercial use of vessels for inland navigation and coasting, with the exception of tourist cruises and the use of dredges and naval artifacts for the construction, conservation, and port operation;
- Supply of fuels and lubricants for vessels, aircraft, and railroad equipment;
- Broadcasting (subject to reciprocity principle); and
- Regular and non-regular national air transport service, non-regular international air transport service in the air taxi mode, and specialized air transport service.

4. Activities that require a prior resolution from the Foreign Investment Commission when the foreign investor intends to own more than 49 percent of the capital stock of a company:

- Port services to vessels to carry out their internal navigation operations, such as towing, rope lashing, and mooring; and
- Shipping companies dedicated to the exploitation of vessels exclusively in high-seas traffic; and
- Concessionary or permitting companies of public aerodromes; and
- Private services of pre-school, middle-school, high-school, superior (college), and combined education
- Legal services; and
- Construction, operation, and exploitation of railways and the provision of public railroad transportation services.

5. Acquisition by foreign investors of more than 49 percent of the equity interest in a Mexican company where no resolution from the Foreign Investment Commission is required, provided that the total value of the assets of such company does not exceed the thresholds established annually by the Foreign Investment Commission and the target company does not perform a restricted activity under the FIL. The monetary threshold for 2017 was approximately MEX$899 million.

Also, under the FIL, the following foreign investments in Mexico must be registered at the Foreign Investment Registry: (i) Mexican companies in which foreign investment participates in the capital stock of the company; (ii) foreigners who regularly perform economic activities in Mexico; and (iii) relevant trust agreements in favor of foreign investors. Such activities must be registered within 40 business days from the date of the respective incorporation, formalization of corporate documents of the foreign company, or the execution of the relevant trust agreement. Parties required to register must renew their registration certificate annually. Foreign investors that do not register their investment are subject to administrative fines.

Russia

The Russian Federal Law No. 57-FZ "On the Procedure for Making Foreign Investments in Business Entities with Strategic Value for the Defense of the Country and Security of the State" dated April 29, 2008 (as amended) ("Russian Strategic Law") restricts investments by foreign investors (i.e., entities ultimately controlled by foreign persons, including foreign citizens and Russian citizens holding any other citizenship) in Russian strategic entities (i.e., entities engaged in at least one of the so-called "strategic activities" listed by the Russian Strategic Law[3]), by requiring such investors to obtain prior clearance before, or to submit a post-transaction notification after, entering into certain transactions or, in some cases, prohibiting such investments.

As a general rule, a prior clearance from the Russian Governmental Commission for Control over Foreign Investments ("Governmental Commission") is required before foreign investors acquire direct or indirect control over Russian strategic entities (i.e., (i) more than 50 percent of votes in the share capital of strategic entities or at least 25 percent of votes in the share capital of strategic entities undertaking operations at subsoil sites of federal importance ("Strategic Subsoil Users"); or (ii) acquiring contractual control rights (e.g., extensive veto rights and the right to appoint the Chief Executive Officer of the strategic entity)). Prior clearance is also required before foreign investors acquire 25 percent or more of the assets of a Russian strategic entity. If an acquisition does not trigger the prior clearance requirements because the relevant thresholds are not achieved, a foreign investor must provide a post-closing notification if it acquires at least 5 percent of votes in the share capital of a strategic entity.

Foreign investments in Russian strategic entities by foreign states, international organizations, or persons controlled by them ("Foreign State-Owned Investors") are subject to more stringent rules that prohibit Foreign State-Owned Investors from acquiring control over Russian strategic entities or acquiring 25 percent or more of the main production assets of any strategic entity. Also, the prior clearance requirements apply to the acquisition by Foreign State-Owned Investors of more than 5 percent of votes in the share capital of a Strategic Subsoil User and more than 25 percent of votes in any other strategic entity. In addition, effective July 1, 2017, the same, more stringent rules apply to offshore entities incorporated in one of the jurisdictions "blacklisted" by the Russian Ministry of Finance, such as the Cayman Islands, the British Virgin Islands, Gibraltar, the United Arab Emirates, Monaco, Panama, and Hong Kong. These restrictions currently are interpreted broadly as also applying in cases where the offshore entity acts merely as an intermediate holding company in the chain of ownership within the foreign investor group.

In addition to the regulations applying to foreign investments in strategic entities, effective January 1, 2015, the Russian Federal Law No. 2124-1 "On Mass Media" dated December 27, 1991 (as amended) restricts foreign ownership of any Russian media company to 20 percent. Further, July 2017 amendments to the Russian Federal Law No. 160-FZ "On Foreign Investments in the Russian Federation" allow the Russian Prime Minister, as the chairman of the Governmental Commission, to require the prior approval of any transaction carried out by a foreign investor in relation to any Russian company (not just a Russian strategic entity) in the manner prescribed by the Russian Strategic Law. This authority may be exercised by the Russian Prime Minister to protect national defense and state security. At this stage, it remains unclear how this new authority will be implemented in practice.

The foreign investment review filing in Russia is made by foreign investors to the Governmental Commission through the Russian Federal Antimonopoly Service ("FAS"). The initial review period by FAS and the Governmental Commission is approximately three months but may be extended by an additional three-month period. Transactions made without approval of the Governmental Commission, if one was required, are void. Violations of the Russian investment control regime may also result in other sanctions set out by Russian law (e.g., deprivation of voting rights, challenging in court of transactions made by a respective Russian strategic company, and fines in the amount of up to 1 million Russian rubles (approximately US$17,000)).

In June 2017, FAS announced that in the nine years of the application of the Russian Strategic Law, 465 petitions were submitted by foreign investors, 221 of which were considered by the Governmental Commission, and in only 13 cases approval of the transaction was refused.

Spain

Generally, foreign investment is not subject to specific review in Spain other than for statistical purposes. Every foreign investment and divestment must be notified to the Foreign Investments Registry of the Spanish Ministry of Economy, Industry, and Competitiveness through standard forms that must be filed within one month following the execution of the transaction. In addition, there is an ongoing obligation to file annual reports if the Spanish company into which the investment is made has a share capital or net equity higher than €3,005,060.52 and: (i) the total foreign investment is equal to or greater than 50 percent of the share capital or the total voting rights, or (ii) one sole foreign investor owns a stake equal to or greater than 10 percent of the share capital or the total voting rights. Foreign investment and divestment involving tax haven countries[4] require submission of a prior notification. Additionally, Spanish residents receiving foreign economic investments (whether in the form of investment, loan, or payment of services) also must notify such investments to the Bank of Spain annually or quarterly (depending on the volume of the investments receipt).

There are certain exceptions to the general principle of free foreign investment in Spain, including the following.

- Investments in activities subject to prior approval by the Spanish Council of Ministers, such as activities directly related to the national defense[5] and real estate investments from non-EU Member States for their diplomatic premises. In these cases, the foreign investor must file an application with the Defense Ministry (national defense activities) or, as the case may be, the Foreign Affairs Office (diplomatic premises), which then submit a proposal to the Spanish Council of Ministers (with prior report of the Investment Committee in the case of national defense activities). The Spanish Council of Ministers must complete its review within six months (lack of resolution within that time period is considered a tacit rejection of the request if related to national defense activities).

- Regulated activities[6] (although there is no broad prohibition against foreign investment in those industries, the activities of certain industries must be carried out by a local or EU entity).
- Restrictive measures that apply in the case of investments from certain countries subject to sanction programs (such as Iran, Syria, or North Korea).

Furthermore, the freedom to carry out foreign investments may be suspended by resolution of the Spanish Council of Ministers or specific regulation if the investment may affect the exercise of the public authority, security, public order, or public health.

United Kingdom

The United Kingdom has a limited voluntary foreign investment notification regime. The UK government, through the Secretary of State, may intervene in a transaction on public interest grounds by issuing an intervention notice and asking the Competition & Markets Authority ("CMA") to assess the transaction. If the transaction is a "relevant merger situation," it can be reviewed if it could give rise to concerns regarding media plurality, financial stability, or national security (the defense sector). For a relevant merger situation to exist: (i) either the target must have had annual sales to UK customers in the previous financial year of more than £70 million, or both the target and the entire corporate group to which the buyer belongs supply or purchase the same category of goods or services in the United Kingdom, and between them account for at least a 25 percent share of such supply; and (ii) the deal must either not have completed, or completion was made public or otherwise came to the CMA's attention no more than four months before the United Kingdom asserted jurisdiction on public interest grounds.

Where there is no relevant merger situation, the Secretary of State can intervene only where the target is either a significant broadcaster or supplier of newspapers in the United Kingdom or a "relevant government contractor," meaning that the government has notified it that it holds confidential, classified defense information.

Where a transaction does not fall within any of the parameters above, if the target has contractual arrangements with the UK government, the government may intervene directly by indicating that it intends to exercise its contractual right to vary or cancel the contract. The UK government may also review whether existing export licenses should continue following a foreign investment transaction.

The CMA undertakes a Phase I review—typically 40 working days—and advises whether the transaction may be expected to operate against UK public interest. The Secretary of State may accept that recommendation or ignore it. If the Secretary of State retains concerns about the deal, they will refer it back to the CMA for a Phase 2 investigation. The Phase 2 investigation lasts up to 24 weeks and can be extended to 32 weeks. Following this, the Secretary of State has 30 working days in which to decide whether to make an adverse public interest finding and what, if any, remedies are appropriate.

United States

Introduction to CFIUS

CFIUS is an interagency committee of the U.S. government[7] that has the authority to review so-called "covered transactions," which include transactions by or with any foreign person that could result in control of a U.S. business by a foreign person. In that regard, in addition to having jurisdiction over the acquisition of a U.S.-based company by a foreign person, CFIUS also has jurisdiction over the acquisition of a non-U.S.-based company by a foreign person if the non-U.S.-based company has operations in the United States that constitute a U.S. business.

The U.S. Department of the Treasury chairs CFIUS and generally leads the CFIUS review process. Depending on the underlying concerns associated with a particular transaction, another one of the member agencies of CFIUS will co-lead a CFIUS review.

Under the regulations administered by CFIUS, "foreign person" means: (i) any foreign national, foreign government, or foreign entity; or (ii) any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity. A company organized outside of the United States is a "foreign person." "Control" means the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following matters, or any other similarly important matters affecting an entity: acquisitions or dispositions, opening or closing manufacturing or research and development facilities, treatment of non-public technical or proprietary information, and appointment and dismissal of officers and key employees.

As a practical matter, CFIUS is most interested when a transaction within its jurisdiction raises national security or critical infrastructure concerns. Such concerns may be raised in a variety of ways, such as if: (i) the U.S. business operates in an industry considered to be part of the critical infrastructure of the United States; (ii) the U.S. business manufactures or sells sensitive or export-controlled products; (iii) the U.S. business is a sole source provider or has contracts with the U.S. government; (iv) the U.S. business engages in classified work and maintains either personnel or facility security clearances; or (v) the U.S. business' facilities are located in close proximity to sensitive military facilities.

CFIUS also is authorized to impose and enforce agreements or conditions to mitigate any national security concerns. Mitigation measures can include:

- Ensuring that only authorized persons have access to certain technology and information, that only authorized persons have access to U.S. government, company, or customer information, and that the foreign acquirer not have direct or remote access to systems that hold such information;
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a U.S. government-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits;
- Establishing guidelines and terms for handling existing or future U.S. government contracts, U.S. government customer information, and other sensitive information;
- Ensuring that only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the United States;
- Notifying security officers or relevant U.S. government parties in advance of foreign national visits to the U.S. business for approval;
- Security protocols to ensure the integrity of goods or software sold to the U.S. government;
- Notifying customers regarding the change in ownership;
- Assurances of continuity of supply for defined periods, notification and consultation prior to making certain business decisions, with certain rights in the event that the company decides to exit a business line, and established meetings to discuss business plans that might affect U.S. government supply or national security considerations;
- Exclusion of certain sensitive assets from the transaction;
- Providing the U.S. government with the right to review certain business decisions and object if they raise national security concerns; and
- Notifying relevant U.S. government parties of any awareness of any vulnerability or security incidents.

Overview of the CFIUS Process

The CFIUS process is a joint, voluntary process that parties initiate based on the perceived risk that the President of the United States might require divestment post-closing if there are national security or critical infrastructure concerns associated with a particular covered transaction.[8] The risk of not submitting a CFIUS notice is that CFIUS could, following closing, request that the parties submit a CFIUS notice and review the transaction. CFIUS monitors public information regarding foreign investment in the United States to identify investments that were not notified to CFIUS, but that CFIUS believes could raise national security or critical infrastructure concerns.

The CFIUS process generally begins when parties to a potential transaction prepare and submit a draft pre-filing to CFIUS. This period provides CFIUS with an opportunity to ask questions and comment on the notice before the statutorily dictated review and investigation time periods begin. After CFIUS provides comments on the pre-filing and such comments are addressed by the parties, the formal notice is submitted to CFIUS. CFIUS then undertakes an initial 30-day review period. At the end of the initial review period, CFIUS will either clear the transaction or initiate an additional 45-day investigation. Over the past several years, more transactions have been subjected to the additional 45-day investigation period, due, in part, to an increase in the number of transactions that CFIUS reviews each year and increased concern by CFIUS regarding U.S. critical infrastructure and technology transfers, which generally results in a recommendation by interested U.S. government agency members of CFIUS to initiate an investigation. Moreover, CFIUS is required to initiate the additional 45-day investigation period in certain circumstances, such as when the buyer is a state-controlled entity or an entity that CFIUS perceives to be state-controlled. At the end of the additional 45-day investigation period, CFIUS must clear the transaction or, if it finds that there are national security risks that have not been mitigated, forward the notice to the President, who has 15 days to prohibit, suspend, or clear the transaction. In some cases, a transaction may be cleared by CFIUS prior to the end of the 45-day investigation period.

In addition to the recent increase in transactions that are subjected to the 45-day investigation period to clear national security concerns, as we previously reported here, there has been an increase in the number of parties withdrawing and refiling notices with CFIUS, which has the effect of restarting the statutory clock and providing CFIUS with additional time to review the transaction. If the parties decide not to withdraw and refile the notice, they have two options: (i) withdraw the notice and abandon the transaction or (ii) force CFIUS to send the transaction to the President for a decision. In the latter case, CFIUS would prepare a memorandum to the President recommending that the transaction be blocked.

CFIUS is experiencing an unprecedented number of filings. In that regard, through the middle of December 2017, CFIUS has initiated approximately 230 reviews, compared to 172 notices in all of 2016. In addition, CFIUS: (i) has taken longer to review and comment on draft voluntary notices; (ii) has asked more and different questions during the pre-filing stage and the formal review period; and (iii) is imposing typical and additional measures to mitigate national security concerns in an increasing number of reviews. Further, during the last year or so, two transactions have been blocked following a CFIUS review—one by President Obama and one by President Trump—and more transactions notified to CFIUS are being abandoned by parties due to the inability to mitigate national security concerns associated with the transactions.

POTENTIAL SIGNIFICANT CHANGES TO FOREIGN INVESTMENT CONTROLS ON THE HORIZON

Potential significant changes to foreign investment controls are on the horizon. For example, significant changes to the existing foreign investment control regimes in the United States and the United Kingdom are under consideration, while the European Union and the Netherlands are considering whether to adopt FDI screening mechanisms, and changes to encourage foreign investment are underway in Africa.[9]

United States

As we previously reported here, two pieces of legislation that could significantly change foreign investment review in the United States were recently introduced in Congress. The Foreign Investment Risk Review Modernization Act of 2017 ("FIRRMA") seeks to modernize and strengthen the CFIUS process to more effectively guard against the risk to U.S. national security posed by certain types of foreign investment. In particular, FIRRMA would, among other things: (i) expand the scope of transactions within the jurisdiction of CFIUS; (ii) make notifications for certain types of transactions mandatory, rather than voluntary; (iii) extend the CFIUS review period; and (iv) codify and expand the factors that CFIUS may consider in connection with its national security reviews. In addition, the United States Foreign Investment Review Act of 2017 ("USFIRA") would create a new process whereby the economic effects of certain proposed foreign investments in the United States would be reviewed by the U.S. Department of Commerce.

With reported bipartisan support and expected endorsement from President Trump, FIRRMA, which reportedly was developed in consultation with key Trump Administration officials, appears to have a good chance of becoming law. On the other hand, USFIRA seems to have less support, and we believe it is less likely to become law.

United Kingdom

The UK government is considering the scope of transactions subject to public interest review. The government's proposals are divided into short- and long-term plans. In the short term, the government proposes amending the existing jurisdictional thresholds for mergers in the military and dual-use (items used for civilian purposes that may have military applications) sectors, and parts of the advanced technology sector. For these areas, together with media and financial sector deals, the government proposes to lower the UK turnover threshold from £70 million to £1 million and to remove the requirement for an increase in the share of supply, meaning that the target alone could trigger the 25 percent share of supply threshold. New legislation may be in force by early 2018.

In the longer term, the government intends to undertake what it describes as a comprehensive reform, focusing on whether foreign investment in businesses essential to the United Kingdom raises any national security concerns. Two potential reforms have been identified: (i) an expanded version of the "call-in" power, which will allow the government to use the current voluntary notification regime to scrutinize a broader range of transactions of national security concern than it can review at present; and (ii) a mandatory notification regime for foreign investment into identified key parts of the economy, or into specific businesses or assets. The consultation on these longer-term reforms ends on January 9, 2018. At this stage, it is not possible to predict the shape of these final reforms, but the government will likely need to strike the right balance between protecting UK jobs, know-how, and technology and encouraging inward investment in the wake of a possible departure from the European Union.

European Union

There currently is not an EU-wide FDI screening mechanism. While nearly half of the EU Member States currently have an FDI screening mechanism in place, the rest do not. In early 2017, the European Commission ("Commission") published a legislative proposal to establish an EU-wide screening framework for FDI that may affect security or public order in EU Member States. In addition to laying down the framework for reviews carried out by the Member States, the proposal includes the possibility for the Commission to review specific investments. Importantly, the proposal does not require Member States to adopt or maintain a screening mechanism for FDI.

The proposal seeks to create an enabling framework for Member States that already have or wish to put a screening mechanism in place, and to ensure that any such screening mechanism meets certain basic requirements. EU Member States would be required to inform other Member States and the Commission about any FDI they are screening. The Commission could issue a nonbinding opinion on such FDI screening measures. Other Member States can also raise concerns and provide comments.

Under the proposal, the Commission also could screen FDI that is likely to affect projects or programs of EU interest on the grounds of security or public order. In this context, the Commission could issue a nonbinding opinion addressed to the Member State where the FDI is planned or has been completed. The Member State in question would have to "take utmost account" of the Commission's opinion and provide it with explanations if the opinion is not followed. Finally, there is an anti-circumvention clause targeting situations in which an investment takes place by an EU investor who is owned or controlled by a foreign investor through artificial arrangements that do not reflect economic reality and are intended to circumvent FDI screening mechanisms.

The proposal will have to be adopted by the Council of the European Union and the European Parliament before it enters into force and could also be amended. Certain EU Member States, however, have already voiced their opposition to the proposal, so it is unclear whether and when it might be adopted.

The Netherlands

Unlike many other EU Member States, the Netherlands does not have a formal FDI review procedure in place. However, the Netherlands is considering strengthening FDI screening on national security grounds. In particular, the Dutch government intends to decide on a sector-by-sector basis whether there is need for public law regulation to scrutinize FDI into the Netherlands. To this end, sector-specific inquiries are carried out to determine when FDI into the Netherlands constitutes a risk to national security and whether the existing legal instruments are adequate to mitigate such risk.

To date, one such inquiry has been completed, namely the inquiry with respect to the telecommunications sector ("Telecoms Sector Inquiry"). The outcome of the Telecoms Sector Inquiry shows that foreign takeovers in the Dutch telecommunications sector could potentially constitute a national security risk. In particular, according to the Telecoms Sector Inquiry, the continuity of telecommunications services for the general public, as well as essential governmental communication facilities, could potentially be compromised in the case of a foreign takeover.

Pursuant to the Telecoms Sector Inquiry, the Dutch government concluded that additional public law regulation is warranted to address the national security concerns in that sector. As such, in February 2017, the Dutch government issued a legislative proposal to prevent undesired control in the telecommunications sector ("Proposal"). The Proposal mandates that the Minister of Economic Affairs prohibit the holding or acquisition of predominant control in an entity engaged in the telecommunications sector if such control leads to relevant influence in the telecommunications sector and could endanger national security or public order. According to the Proposal, predominant control is deemed to exist if, for example: (i) a party, alone or together with persons acting in concert, directly or indirectly holds at least 30 percent of the voting interest; (ii) a party, whether or not by virtue of an agreement with others, alone or together with persons acting in concert, can appoint or dismiss more than half of the directors or the supervisory directors; or (iii) a party owns one or more shares with a special statutory right of control.

The public consultation procedure for the Proposal ended in March 2017, and the input received is currently under consideration. In accordance with the regular legislative procedure, the Proposal must be submitted to the Council of State for a mandatory advisory opinion and, subsequently, for deliberation in both Houses of Parliament. The Proposal, therefore, is not expected to enter into force before 2019.

Apart from the telecommunications sector, the Dutch government has identified the following sectors with vital infrastructure that might warrant FDI screening: information and communications technology, energy, defense, transport, chemical, water, drinking water, nuclear, financial, and public order and safety. Sector-specific analyses for these sectors are in the preparatory stage or ongoing.

The coalition agreement concluded by the Dutch governing parties on October 10, 2017, indicates that vital sectors should be protected by introducing mechanisms for the (conditional) approval of takeovers in these sectors or by adopting other protective measures. Furthermore, the governing coalition expressed its intention to examine whether a form of FDI screening also is necessary for foreign investments in agricultural land and certain regional infrastructural works.

Africa

With 52 different countries, Africa (including North Africa) has many differing perspectives regarding foreign investment and associated controls. For example, in South Africa, virtually all sectors are open to foreign investment. However, government approval is required for investments in certain areas, such as banking, energy, insurance, and mining. The South African government also scrutinizes mergers and acquisitions related to FDI for their impact on the local economy. Also, in Nigeria, almost all sectors are open to foreign investment, including up to 100 percent foreign ownership. However, foreign investment in the Nigerian petroleum sector is limited to joint ventures and production-sharing agreements. Further, in Kenya, although foreign investors receive largely the same treatment as local investors, a 2016 law added restrictions on certain investments in the minerals sector.

There are, however, some distinct trends, which can run in different directions, even within a single country. Virtually all African countries are aggressively seeking foreign investment and thus are attempting to promote and simplify foreign investment. Accordingly, efforts to reform and simplify laws, regulations, and processes that inhibit foreign investment are underway across the continent. On the other hand, other trends that could have a negative impact on foreign investment also are underway in Africa. For example, various countries, including, for example, Tanzania, are looking more critically at their mining laws, which could make foreign investments into that sector more difficult.

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Given the complexity and varying nature of the above-described foreign investment control regimes—as well as the potential significant changes to foreign investment controls, particularly in the United States—on the horizon, multinational companies engaging in merger and acquisition activity should pay close attention to foreign investment controls around the world.

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ENDNOTES

1 As of October 1, 2017, the transfer of shares in a Japanese unlisted company between foreign investors, which had not been regulated under Japanese law, is now regulated similar to inward direct investment. This amendment was intended to further control the potential transfer of sensitive information of a Japanese unlisted company through acquisition or investment to a foreign investor.

2 Otherwise, the foreign investor must file a post-closing report regarding such inward direct investment through the Bank of Japan to the Minister of Finance and the minister(s) in charge of the relevant businesses. The foreign investor must file the post-closing report by the fifteenth day of the month following the month on which the inward direct investment was made.

3 The following activities are considered strategic: certain activities involving mining exploration and/or exploitation of a subsoil plot of federal status, active influence on hydro meteorological and geophysical processes and phenomena, use of agents of infection, nuclear materials and radioactive substances, cryptographic and bugging devices, firearms, combat arms, military equipment and explosives, aviation equipment and space activities, television and radio broadcasting, printers, editors and/or publishers of a periodical exceeding a certain number of copies, services provided by natural monopolies, and entities holding dominant positions in certain markets.

4 Royal Decree 1080/1991 establishes the following as tax haven countries: Andorra, Netherland Antilles, Aruba, Bahrein, Brunei, Cyprus, United Arabic Emirates, Gibraltar, Hong-Kong, Anguilla, Antigua and Barbuda, Bahamas, Barbados, Bermuda, Cayman Islands, Cook Islands, Dominica, Granada, Fiji, Guernsey and Jersey Islands (Canal Islands), Jamaica, Malta, Malvinas Islands, Mann Island, Marianas Islands, Mauricio, Montserrat, Nauru, Salomon Islands, San Vicente and Grenadines, Saint Lucia, Trinidad and Tobago, Turks and Caicos Islands, Vanuatu, British Virgin Islands, U.S. Virgin Islands, Jordan, Lebanon, Liberia, Liechtenstein, Luxemburg, Macao, Monaco, Oman, Panama, San Marino, Seychelles, and Singapore.

5 Such as the production or distribution of weapons, munitions, explosives, war material, and dual-use products.

6 Such as activities in relation to the energy, telecommunications, private security, and pharmaceuticals.

7 CFIUS is comprised of the heads of the following nine departments and offices: U.S. Department of the Treasury (chair), U.S. Department of Justice, U.S. Department of Homeland Security, U.S. Department of Commerce, U.S. Department of Defense, U.S. Department of State, U.S. Department of Energy, Office of the U.S. Trade Representative, and the Office of Science & Technology Policy. The following offices also observe and, as appropriate, participate in CFIUS's activities: Office of Management & Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council. The Director of National Intelligence and the Secretary of Labor are non-voting, ex-officio members of CFIUS.

8 CFIUS exists due to a provision in the Defense Production Act of 1950, as amended, 50 U.S.C. § 4565, that allows the President of the United States to require a foreign acquirer to divest itself of a U.S. business if the transaction threatens the national security or critical infrastructure of the United States.

9 Also, the newly modified Trans-Pacific Partnership ("TPP") could impact foreign investment control requirements in participating countries. For example, in Canada, although there are several modifications that would be instituted upon ratification of the TPP, the primary change concerns the threshold for review of direct and indirect acquisitions of control by nationals of the participating TPP countries. This threshold would be increased to C$1.5 billion for TPP members, and an indirect acquisition of control by nationals of the participating countries would not be subject to foreign investment review.