NEW FDI REGULATION GUIDE SETS PATH FOR DEALMAKING

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Legal Briefings – By **Veronica Roberts, Ruth Allen and Ali MacGregor**

In this first edition published by the GCR our experts share their views on what lies ahead for deals and the changing face of national security.

While the appetite – and necessity – for outside capital remains unabated, increasingly this is running into national security concerns, as well as stricter regulations on mergers. Although controls on foreign direct investment were already in place before covid-19, the pandemic and a growing shift towards protectionist economic policies have brought these concerns into sharper focus for governments. The *Foreign Direct Investment Regulation Guide* – edited by Veronica Roberts – provides practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment. The Guide draws on the wisdom and expertise of distinguished practitioners globally to provide essential guidance on subjects as diverse as the evolving perspective on deals with China to the changing face of national security.

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INTRODUCTION: KEY CURRENT TRENDS – GLOBAL OVERVIEW

Against a backdrop of increasing global protectionism, foreign direct investment (FDI) regulation has become a critical piece of the regulatory jigsaw in recent years. Careful consideration now needs to be given to the potential application of FDI rules to cross-border M&A from the outset, alongside merger control and other regulatory clearances. Many countries traditionally open to foreign investment (including the United States, Australia, the United Kingdom and a number of other European countries) have seen a significant shift towards stricter scrutiny, both in terms of policy frameworks for screening inward foreign investment and the way in which they are applied. This has resulted in a number of high-profile deals being recently blocked or unwound, including *Kunlun/Grindr* (US), *Couche-Tard/Carrefour* (France) and *Mengniu Dairy/Lion Dairy and Drinks* (Australia). Yet, at the same time, a contrasting approach has been taken in a number of Asian countries wishing to encourage inward FDI, which have progressively opened parts of their economies to FDI and streamlined their screening processes (albeit subject to some temporary restrictions in response to the covid-19 pandemic).

Understanding the global trends at play, and staying on top of frequent and fast-moving changes in the FDI rules applicable in individual jurisdictions, is critical to navigating this increasingly fluid and uncertain environment for foreign investment. In this introductory chapter, we set out an overview of the key global trends, each of which is then explored in more detail in subsequent chapters of this guide. We highlight some notable examples of these trends in action in particular jurisdictions and offer practical guidance for investors seeking to minimise deal risk. In doing so, we emphasise the importance of recognising that the overall picture is one of significant structural change. The pandemic has undoubtedly resulted in an additional layer of concern surrounding opportunistic acquisitions by foreign buyers, particularly in the healthcare sector, and some recent amendments to individual FDI regimes directly in response to the pandemic may ultimately prove to be temporary; however, the majority of recent amendments are permanent and independent of the pandemic, and enhanced FDI scrutiny of transactions seems likely to continue in the longer term.

THE EVOLVING CONCEPT OF ‘NATIONAL SECURITY’

National security is well established as the pre-eminent public interest justification for state intervention in foreign investment. However, as explored in more detail in Chapter 1, the scope of sectors and technologies considered by policy makers to fall within this concept in the context of FDI regulation has evolved in recent years to become much broader than simply military and defence interests. Based on recent government interventions in transactions, the concept of ‘national security’ now includes critical infrastructure (including energy networks and ports), communications assets and advanced technology and data, and potentially extends still further to other businesses that are crucial to keeping public life running smoothly, from airports to hospitals.

For example, the Committee on Foreign Investment in the United States (CFIUS) has intervened in transactions involving digital maps for the automotive industry (*Navinfo/HERE Technologies* (2017)) and digital apps (*Beijing Kunlun Tech Co Ltd/Grindr LLC* (2019) and *Beijing ByteDance Tech Co Ltd/Tik Tok* (2020)), in light of concerns about foreign access to, and storage of, personal information. In Australia, new powers to intervene in transactions on national security grounds were recently used to effectively prohibit a takeover of building contractor Probuild, in light of concerns that the proposed acquisition by state-owned China State Construction Engineering Company could give Chinese intelligence services access to information about Australian critical infrastructure. In France, the *Couche-Tard/Carrefour* transaction was prohibited on the ground of food security. As discussed further below (and in more detail in Chapter 3), concerns surrounding foreign investment in the healthcare sector have also recently come to the fore against the backdrop of the pandemic, with increased scrutiny of foreign investment in businesses deemed critical to the national response to the pandemic.

In practice, the concept of 'national security' as the basis for intervention pursuant to FDI regulation is arguably becoming more akin to a broader notion of 'national interest'. However, only a handful of developed countries – most notably Australia, France and Canada – have formally opted for a wider 'public interest' test for government intervention in foreign investment; in the majority of jurisdictions the focus remains on national security, albeit broadly interpreted and not usually clearly delineated or expressly defined in legislation. Indeed, significant reforms that took effect in Australia from 1 January 2021 have resulted in a renewed focus on sensitive national security-related businesses under the Australian FDI regime. Similarly, in the context of the recent passage of the new UK National Security and Investment Act 2021 through the parliamentary approval process, the UK government expressly rejected calls for the new regime (which comes into force on 4 January 2022) to be used to justify intervention in transactions on broader national interest grounds concerning industrial policy or protection of jobs in the United Kingdom.

A further related trend is an increased political focus on the effects of consolidation of international value chains where this is perceived to work against the interests of countries that have nurtured the targeted industries (in particular in advanced manufacturing, research intensive and technology sectors). However, the real concern here is often not the implications for national security (even broadly defined) but rather the intentions of acquirers with rationalisation and relocation of value-adding activities in mind. In such cases, it may be possible to put forward remedies to address these concerns outside the formal FDI (or public interest merger control) regime. This may take the form of voluntary undertakings or non-binding pledges on issues such as maintaining domestic investment or employment (as illustrated by *Canyon Bridge/Imagination* (2017, UK))[2] or careful structuring of the transaction in a way that alleviates concerns combined with pro-active engagement with the process of securing political support (as illustrated by *Piraeus Port/Cosco* (2016, Greece)[3] and *Fincantieri/STX* (2017, Italy)).[4] Where more formal commitments are required, but no real national security concerns arise, it may still be possible to agree these without a formal FDI or public interest intervention, as illustrated by the approach taken to the acquisition of UK mobile technology company Arm by Japanese firm Softbank in 2018, in which the UK government sought and received formal post-offer undertakings to keep Arm's headquarters in the United Kingdom and to double the UK workforce.

A WIDENING FOCUS BEYOND CHINA

Historically, there has been a particular focus in many jurisdictions on the perceived risks of Chinese investment (or investment viewed as influenced by China) to national security. For example, all four deals blocked by CFIUS under the Trump administration in the United States involved Chinese acquirers,[5] as did both deals blocked to date under the German FDI regime.[6] This trend has also been seen in the United Kingdom, where the government intervened on national security grounds in two acquisitions involving Chinese investment in late 2019,[7] and in Australia, where much of the recent focus has been on acquisitions by companies based in Hong Kong (due in large part to concerns about China's influence over Hong Kong).[8]

However, it is clear that the focus of government intervention in relation to foreign investment is now increasingly widening beyond China: 85 per cent of acquisitions reviewed by CFIUS in 2020 involved non-Chinese purchasers,[9] as did a majority of the most recent interventions on national security grounds in the United Kingdom. In the two cases that are not still currently pending (as at October 2021),[10] namely the proposed acquisition of British satellite operator Inmarsat by a private equity-led consortium (including equity funds based in Canada) and the proposed acquisition of defence and aerospace manufacturer Cobham by US private equity group Advent International, it ultimately proved possible to deal with the concerns by agreeing undertakings relating to the maintenance of strategic capabilities and the protection of sensitive information. However, dealmakers should not assume this will necessarily be the case, nor underestimate the effects of the review and approval process. A notable contrasting example is the prohibition by the French government in December 2020 of the acquisition of the French company Photonis (which develops applications with military uses) by the US group Teledyne (the first publicly announced refusal of FDI authorisation in France).[11] Intra-EU investments are also attracting additional scrutiny. In *Vienna Insurance Group/Aegon*, the parties are (as at the time of writing) in the process of appealing the Hungarian Ministry of the Interior's decision to veto the sale of the Dutch insurer's local operations to the Austrian group. This trend is explored further in Chapter 2.

IMPACT ON FDI REGULATION: OVERVIEW

The global trends explored above have cumulatively resulted in significantly enhanced scrutiny of FDI in many jurisdictions in recent years. This has manifested itself in a number of different ways.

EXPANSION OF THE SECTORS IN WHICH FDI REGULATION APPLIES

As discussed above, the scope of many FDI regimes now extends well beyond military and defence matters and also encompasses transactions concerning critical infrastructure, communications assets, advanced technology and data, among other sectors. Although the expansion to acquisitions in the healthcare sector in a number of jurisdictions is largely a response to the coronavirus pandemic, much of the recent expansion of the sectors to which FDI regulation applies has been undertaken on a permanent basis, independent of considerations relating to the pandemic response. For example:

- The list of ‘sensitive sectors’ to which FDI regulation applies in France was expanded with effect from 1 January 2019 to include space operations and research and development (R&D) activities linked to sensitive technologies and activities (cybersecurity, artificial intelligence, additive manufacturing and semi-conductors). Subsequent amendments have added production, transformation and distribution of certain agricultural products (in cases where certain food safety objectives apply to the products in question), publishing, printing and distribution of media, including online media services and R&D activities linked to quantum technologies, energy storage and biotechnology.

- Canadian guidelines issued on 24 March 2021 added acquisitions of Canadian businesses that have access to sensitive personal data, use sensitive technology or are involved in producing critical minerals to the areas that could raise national security concerns.

- In Germany, significant reforms to the German FDI regime announced in May 2021 include new filing obligations focused on acquisitions of high-technology enterprises, including companies developing automated or autonomous driving functions, specific nanoelectronic components and certain smart meter gateways.

- Spain significantly tightened its FDI regime permanently with effect from 17 March 2020, requiring acquirers who are not within the European Union or the European Free Trade Association (EFTA) to obtain prior approval for an acquisition of a shareholding of 10 per cent or more, or a management right, in a Spanish company in a very broad range of sectors, including critical infrastructure and technology, healthcare, communications, energy and transport, media, the supply of key inputs such as energy, raw materials and food security, as well as any other sector with access to sensitive information (in particular personal data).

- In the United Kingdom, the new mandatory notification regime introduced by the National Security and Investment Act 2021 (which will come into force on 4 January 2022) will extend to qualifying acquisitions of control of target entities that carry out specified activities in the United Kingdom in one or more of 17 specified sectors. In July 2021, the UK government issued near-final draft definitions of the specified activities for the 17 sectors, including energy, transport, communications, artificial intelligence, data infrastructure and a number of other tech-related sectors.

DIFFERENTIATION BASED ON THE IDENTITY OF THE INVESTOR

Many jurisdictions are increasingly subjecting FDI to different levels of scrutiny depending on the identity of the investor, as a means of balancing the economic importance of inward FDI from ‘friendly’ countries against a desire to ensure enhanced scrutiny of potentially hostile foreign investment. This sort of targeted approach has been a feature of regimes such as those of Canada and the United States for some time,[12] but it is now being extended further as a means of adopting a stricter approach to certain types of investors.

Within the European Union, there is trend towards stricter scrutiny of non-EU/EFTA investors and foreign investors directly or indirectly controlled by foreign governments, as illustrated by the recent reforms in Spain discussed above, and an amendment to the intervention threshold in Germany for non-EU investments so as to require only that the foreign investment is 'likely to affect' public security or public order, rather than requiring an 'actual threat' to public safety or order.[13] The Canadian government has made clear that enhanced scrutiny will apply to all foreign investments by state-owned enterprises or private investors assessed as being closely tied to or subject to direction from foreign governments. In India, restrictions introduced in April 2020 require any foreign investment by a non-resident based in a country that shares a land border with India to be approved in advance by the government (irrespective of the sector in which the investment is made).[14]

A similar approach, albeit implemented in a slightly different way, can also be seen in the United States, where reforms expanding the jurisdiction of CFIUS with effect from 13 February 2020 included identifying 'excepted investors' with substantial ties to friendly countries (currently designated as Australia, Canada and the United Kingdom), who are exempt from filing requirements that would otherwise apply to certain non-controlling 'covered' investments in US businesses (rather than identifying counties from which inward investment will be subject to stricter scrutiny).

It is notable, however, that the new national security screening regime that will come into force in the United Kingdom on 4 January 2022 does not make any formal distinction between different types of investors and, indeed, applies in principle to both non-UK and UK investors alike (although the government has acknowledged that UK investors will be inherently less likely to give rise to national security concerns in practice). The UK Secretary of State published a final statement on 2 November 2021 about how the government intends to exercise the call-in power under the National Security and Investment Act. This expressly states that the government does not regard state-owned entities, sovereign wealth funds, or other entities affiliated with foreign states, as being inherently more risky from a national security perspective. Similarly, the EU FDI Regulation (which became fully operational on 11 October 2020) is 'nationality neutral' insofar as it applies equally to all FDI in EU Member States by non-EU investors (although the review framework set out therein does not apply to EU investors, and so does involve an important degree of differentiation in that regard).

INCREASED USE OF MANDATORY NOTIFICATION REQUIREMENTS

Mandatory notification for certain transactions (combined with a corresponding prohibition on completion prior to clearance) has long been a feature of FDI regimes in some jurisdictions, such as France and Japan. However, a number of FDI regimes that have been based historically on a largely voluntary notification system (combined with powers for the relevant authority to 'call-in' for review transactions that trigger the relevant thresholds) have recently moved towards – or are considering moving towards – a (wider) mandatory notification system.

This is well illustrated by recent reforms in Germany, where a major revision of the FDI regime initiated in March 2020 has significantly expanded the scope of mandatory filing requirements to a much wider range of business activities (with further expansion of the sectors covered announced in May 2020 – see above). Mandatory notification for certain transactions in specified sectors is also a key feature of the new UK national security screening regime and draft proposals for a broader screening regime for foreign investment in the Netherlands (both regimes will also have retroactive effect, that is to say they would apply to notifiable transactions completed after a particular date). This trend also extends beyond Europe: for example, in a departure from previous CFIUS practice, the implementing regulations of the Foreign Investment Risk Review Modernization Act of 2018 that took effect on 13 February 2020 impose mandatory filing requirements for certain ‘covered investments’ in US businesses that deal in critical technology, critical infrastructure or sensitive personal data.

LOWERING OF NOTIFICATION THRESHOLDS

Stricter scrutiny of foreign investment has also been achieved in a number of jurisdictions by lowering the shareholding or turnover thresholds that trigger a notification requirement (often in conjunction with one or more of the other means of tightening restrictions discussed above).

For example, the threshold for notification of investment by non-EU investors in a French company active in a sensitive sector was lowered from 33.3 per cent to 25 per cent of share capital or voting rights from 1 April 2020 (and subsequently temporarily lowered further, to 10 per cent, for acquisitions by non-EU investors of shareholdings in strategic French listed companies until at least 31 December 2021). In Japan, the threshold for notification and pre-transaction approval was lowered with effect from 7 June 2020 from 10 to just 1 for foreign investment in Japanese listed companies active in a wide range of regulated sectors deemed relevant to national security.

In Australia, a similar approach has been adopted in relation to financial, rather than shareholding, thresholds: from 29 March 2020 to 1 January 2021, the financial threshold for review in terms of a target’s valuation was temporarily lowered to A$0 (largely as a response to the pandemic). This was a particularly significant change for investors from countries that have free trade agreements with Australia (such as the United States), which otherwise benefit from a threshold of approximately A$1.2 billion for investment in certain (non-sensitive) sectors. Monetary thresholds have since been restored to pre-pandemic levels, although a A$0 threshold applies to notifiable national security transactions.

INCREASED POWERS TO IMPOSE SANCTIONS FOR NON-COMPLIANCE

Enhanced scrutiny of foreign investment has been accompanied by increased powers to impose sanctions for non-compliance in many jurisdictions: these can include both significant monetary fines (which may be up to the value of the transaction, as seen in the United States, or calculated as a percentage of worldwide turnover, as seen in the United Kingdom), and criminal sanctions for individuals (as introduced in Germany and due to be introduced in the United Kingdom).

In addition, in jurisdictions where a 'standstill' obligation applies, preventing completion prior to clearance, breach of this obligation may result in the transaction being deemed void – either as a result of a decision by the relevant authority (as is the case in, for example, the United States and Australia) or automatically (as will be the case in the United Kingdom for certain transactions once the National Security and Investment Act 2021 enters into force, unless retroactive validation can be obtained successfully).

ADDITIONAL SCRUTINY RESULTING FROM THE COVID-19 PANDEMIC

The unprecedented economic fallout of the pandemic has resulted in many governments seeking to protect companies – particularly those critical to the domestic response – from opportunistic acquisitions by foreign buyers. Spain was one of the first countries to act, significantly tightening its FDI rules from 18 March 2020 (see above), but this move was soon followed by similar enhanced scrutiny in France, Italy and Germany, as well as a number of non-European jurisdictions, such as Australia, Canada and – in a marked contrast to its previous direction of travel towards relaxation of FDI rules – India.

As noted above, in many countries, stricter rules have been introduced permanently, with the pandemic accelerating an existing trend towards increased global protectionism, rather than amendments being tied solely to the pandemic temporarily. However, even where enhanced scrutiny is intended to be permanent, some amendments are clearly directly linked to the pandemic, most notably the extension of FDI regulation to the healthcare sector in many jurisdictions. EU-level guidelines on FDI screening published by the European Commission on 25 March 2020 specifically identified healthcare – including production of medical or protective equipment and medical research – as a sector considered to be particularly vulnerable to increased exposure to FDI (and deserving of protection) in light of the pandemic. This was reflected in specific amendments made to the FDI regimes of a number of EU countries during the early stages of the pandemic, including Spain,[15] Italy[16] and Germany.[17] A similar trend has emerged outside Europe, as illustrated by changes to the Japanese FDI regime in June 2020, which extended stringent notification requirements to the manufacture of pharmaceuticals for infectious diseases and the manufacture of certain medical devices (such as heart–lung machines and ventilators).[18]

The impact of the pandemic on FDI regulation is explored in more detail in Chapter 3.

A CONTRASTING APPROACH IN ASIA

Despite the overall global trend towards increased protectionism, it is notable that a contrasting approach has emerged in a number of Asian countries – at least prior to the pandemic – where policy-making activities have been heavily weighted towards measures intended to liberalise FDI regulation, including opening up more sectors to foreign investment and streamlining the process for approval. This approach is illustrated well by the Foreign Investment Law that came into effect in China on 1 January 2020, implementing a significant overhaul of the previous regime. Similar strategies have been pursued in India and Vietnam, and these efforts appear to be being reflected in the numbers, with record levels of inward investment being recorded in these countries in recent years (pre-pandemic).

It remains to be seen to what extent this trend will be derailed by the impact of the pandemic. Concerns surrounding the risk of opportunistic acquisitions by foreign investors as a result of the pandemic have also surfaced in many Asian countries, and a number of additional restrictions have been introduced that go against the previous move towards increased liberalisation: for example, in April 2020, the Indian government announced tighter FDI rules that were expressly stated to be connected to the pandemic and a desire to protect Indian companies from acquisition by foreign buyers (with a particular focus on China).

PRACTICAL GUIDANCE FOR INVESTORS

Enhanced scrutiny and stricter enforcement mean that it is now more important than ever before that deal parties and their advisers consider early in the transaction planning process what investment screening issues may arise, how these might be addressed, and whether they may ultimately threaten the viability of the transaction.

The first step should always be to consider carefully the potential for criticism of the transaction on national security and national interest grounds at the outset. In some cases, the political sensitivity of an acquisition may well be obvious: for example, transactions involving military or dual-use products or – especially recently – transactions involving healthcare providers or other businesses critical to the domestic response to the pandemic. However, it is also important to think beyond the established legal parameters for blocking foreign investment in considering why an acquisition might be politically contested. State backing (whether direct or indirect) or the acquisition of critical infrastructure, technologies or sensitive data will always be ‘red flags’, even if carefully managed. Extensive rationalisation or consolidation plans, which may incentivise a deal for investors on paper, can also look like corporate social irresponsibility to political stakeholders. In the current mood, anticipating this kind of objection is essential, followed by proactive and sensitive engagement with the process of securing political support. In some jurisdictions, including Austria, France and the United Kingdom, it may be possible to seek informal confidential guidance prior to notification as to the likelihood of issues being identified. In others, the assessment will involve taking into account previous interventions, current regulatory trends and the political context.

From a practical perspective, where filing and approval requirements are triggered, notification and – where applicable – 'standstill' requirements should be carefully factored into deal planning. Where completion is not suspended pending clearance, it is important to consider which party will take the regulatory risk and what the timing implications will be (particularly when various different FDI and merger control review processes are running in parallel). Consideration should also be given to whether there are likely to be any active complainants and whether reverse break-fees reflecting regulatory risk are warranted.

If it is clear that national security concerns are likely to arise, it is also advisable to consider possible remedies up front. These could be behavioural, such as restrictions on access to data, or structural, such as divestments. Consideration should also be given to adapting the structure of the transaction to assuage concerns, for example through the inclusion of domestic co-acquirers or a reduction in the level of control acquired. Moreover, acquirers should be careful that, in agreeing these types of remedies, they reasonably believe that they will be able to comply with them. In January 2021, Volkswagen was formally warned by the French Minister of the Economy (referencing both potential civil and criminal liability) to respect its existing commitments with regard to its French subsidiary, MAN Energy Solutions (a strategic supplier to the French Navy specialising in emergency engines for submarines) in light of the fact that Volkswagen was considering massive redundancies at MAN following unsuccessful sale attempts. These issues, and examples of remedies imposed in recent cases, are discussed in more detail in Chapter 4.

Finally, it is vital to take a global approach to assessing national security considerations and securing any necessary FDI clearances. Although there are formal protocols in place for the exchange of information between competition authorities in the context of merger control cases, cooperation between FDI agencies and the relevant national governments tends to be a lot more informal and opaque. However, a number of countries have started to coordinate between their competition authorities and FDI regulators. In Austria, for example, a recent amendment to the competition law includes a provision that obliges the competition authority to forward merger notifications to the Federal Minister for Digital and Economic Affairs (which oversees FDI notifications). The authors are also aware of informal cooperation between merger control and FDI authorities taking place in the context of competition merger filings in other countries. Finally, a consistent approach to all FDI agencies, including in more sensitive cases offering up any remedies that are acceptable to the parties, will be invaluable when trying to navigate numerous regimes in a cross-border transaction.

NOTES

1. Veronica Roberts is a partner and Ruth Allen and Ali MacGregor are senior associates at Herbert Smith Freehills LLP.

2. When reviewing the acquisition of UK chip designers Imagination by China-backed

private equity group Canyon Bridge, the UK government focused on the implications for jobs, research and development, and the headquarters of the company, but did not require any legally binding commitments in this regard.

3. Chinese firm Cosco was initially limited to acquiring a 51 per cent stake in Piraeus Port, with a subsequent increase to 67 per cent conditional on the company completing its local investment programme.

4. Italian ship maker Fincantieri was permitted to take a 51 per cent controlling stake in French naval shipbuilder subject to 1 per cent of the equity being 'borrowed' from the French government. The government retained the option of taking back that stake, and control of the company, should the Italian company fail to meet its pre-acquisition commitments, which included the protection of jobs.

5. The acquisition of money transfer company Moneygram by Ant Financial Services Group (part of Chinese conglomerate Alibaba) (January 2018), the acquisition of Qualcomm by Broadcom (March 2018), the acquisition of dating app Grindr by Chinese conglomerate Beijing Kunlun Tech Co (May 2019), and the acquisition of the Musical.ly video app (later merged into TikTok) by Beijing ByteDance Tech Co (August 2020). It should be noted that in June 2021, the Biden administration revoked the August 2020 Executive Order and called on US authorities to implement a more 'rigorous, evidence-based' process for identifying entities that pose 'unacceptable or undue risks' to US national security. While this action does not signal a shift in US authorities' focus, one of its immediate effects is to eliminate the prohibitions on certain transactions with ByteDance contained in the August 2020 Executive Order.

6. The acquisition of Leifeld Metal Spinning AG by Yantai Taihai Corporation in August 2018 (ultimately abandoned prior to a formal prohibition decision) and the acquisition of IMST (a specialist in mobile communications, radar and satellite technology) by a subsidiary of the Chinese company Casic in December 2020. Prior to these prohibition decisions, the German authorities had also withdrawn their initial approval of the acquisition of Aixtron by the Fujian Grand Chip Investment Fund in late 2016, at US urging (although it was the US authorities that ultimately blocked the deal, a second review by the German authorities may have led to the same conclusion). In August 2018, political influence was also used to prevent State Grid Corporation of China from acquiring a 20 per cent minority stake in 50Hertz, one of Germany's four providers of high-voltage transmission systems.

7. The proposed acquisition of Impcross Limited (a UK manufacturer of parts for military aircraft) by Gardner Aerospace Holdings Limited (ultimately controlled by a Chinese-listed entity) and the proposed acquisition of Mettis Aerospace by Aerostar (a fund based in China). Both these transactions were ultimately abandoned.

8. For example, the proposed takeover of APA Group by Cheung Kong Infrastructure, which was blocked in November 2018.

9. CFIUS Annual Report to Congress CY2020. See Table I-13 on page 36 of the report: Covered Transactions by Acquirer Home Country or Geographic Economy 2018–2020.

10. At the time of writing, the following transactions are awaiting final decisions: Parker-Hannifin Corporation/Meggit plc, Perpetuus Group/Taurus International Ltd, Ultra Electronics Holdings Plc/Cobham Ultra Acquisitions Limited and NVIDIA/Arm.

11. Teledyne abandoned the proposed acquisition after the French government made it clear that FDI approval would be subject to extremely onerous conditions, which were unacceptable to Teledyne, including the French government retaining a 10 per cent shareholding in the target. In October 2020, it was reported that a new agreement in principle may have been reached in return for a 15 per cent price reduction, but the acquisition was formally prohibited on 18 December 2020.

12. For example, in Canada, the applicable financial thresholds differ depending on whether the investor originates from a country where Canada has a trade agreement or that is part of the World Trade Organization. The financial thresholds also differ depending on whether the foreign investor is a state-owned or non-state owned entity. In the United States, there is a legal presumption that any relevant investment by a state-owned acquirer should be subject to a more detailed 45-day review by CFIUS, subject to certain exceptions.

13. Pursuant to the amendment of the Foreign Trade and Payments Act (AWG) adopted by the German parliament on 18 June 2020.

14. Department for Promotion of Industry and Internal Trade, FDI Policy Section, Press Note No. 3 (2020 Series): Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic (17 April 2020). The new rules do not expressly specify the relevant countries, but it seems clear that prior approval will be required for investment into India from China, Nepal, Myanmar, Bhutan and Afghanistan, in addition to restrictions on investment from Pakistan and Bangladesh, which existed prior to the introduction of the new law.

15. Healthcare was expressly included in the list of sectors to which FDI reforms announced on 18 March 2020 apply.

16. On 7 April 2020 the Italian government extended its powers to review FDI to specifically in relation to acquisitions of 10 per cent or more by non-EU-controlled investors in a number of new sectors, including health.

17. Amendments to the German FDI regime passed on 20 May 2020 expanded the list of business activities that trigger a mandatory filing for FDI from non-EU investors above a 10 per cent voting right threshold to include personal protective equipment, various medicinal products and in vitro diagnostics.

18. Regulations implemented in June 2020 designated the manufacture of pharmaceuticals for infectious diseases and the manufacture of certain medical devices (such as heart–lung machines and ventilators) as both ‘Designated Businesses’ and ‘Core Businesses’ under the Foreign Exchange and Foreign Trade Act. This means that acquisitions of almost any shareholding in a Japanese company active in these markets

(1 per cent or more in a listed Japanese company, or any shareholding in a non-listed Japanese company active in these markets) must be notified to the Japanese government prior to completion, and then subject to a 30-day waiting period during which the government may review and raise objections to the planned investment. Classification as 'Core Businesses' means that most of the exemptions that may apply to other 'Designated Businesses' will not apply. This was stated to be intended to maintain domestic production capabilities in light of the pandemic.

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