

## Insights

# FDI REGULATION IN THE US, UK, FRANCE & GERMANY

## KEY POINTS FOR INVESTORS

Mar 29, 2023

## SUMMARY

The regulation of foreign direct investment (“**FDI**”) has become an increasingly important feature of the regulatory landscape for investors. Globally, there is a trend towards greater FDI restrictions although the degree and nature of regulation varies significantly across jurisdictions.

In the below we highlight key aspects of FDI regulation in the United States (“**US**”), United Kingdom (“**UK**”), France and Germany.

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## TYPES OF DEALS REVIEWED

### US:

- The Committee on Foreign Investment in the United States (“**CFIUS**”) has jurisdiction to review:
  - Covered Transactions”: which include any transaction through which a foreign person may gain control of a US business, or certain transactions where a foreign person obtains particular “triggering rights” in a US business; and

- “Covered Real Estate Transactions”: which include the acquisition by a foreign person of certain property rights in real estate located: (i) within or operating as part of certain airports or maritime ports; (ii) within identified government /military installations; (iii) within identified counties /geographic areas; or (iv) within identified military installations located within the territorial sea of the US.
- Parties to transactions that are subject to CFIUS’ jurisdiction but that are not subject to mandatory reporting (see below) have the option to submit the transaction for review.
- Parties to certain transactions involving “TID US businesses” (entities performing certain functions with respect to critical technology, infrastructure or sensitive personal data of US citizens) must notify CFIUS before the transaction completes. With limited exceptions, CFIUS’ mandatory filing applies to (i) investments in a US business that produces, designs, tests, manufactures, or develops certain critical technologies that would require a license for export to the relevant foreign person; or (ii) investments that result in a foreign government obtaining a substantial interest in a US business that: (a) produces, designs, tests, manufactures, or develops “critical technologies”; (b) performs certain functions with respect to “covered investment critical infrastructure”; or (c) maintains or collects certain categories of sensitive personal data of US citizens.
- To the extent that a transaction involves the acquisition of rights in a US business, even if that business exists solely for the purpose of holding real estate, that transaction may be subject to CFIUS’ general jurisdiction.

## UK:

- The National Security and Investment Act 2021 (“**NSIA**”) regime has broad jurisdictional reach, including with respect to minority acquisitions of non-UK targets where the target carries on activities in the UK or supplies goods or services to people in the UK. The regime is acquirer agnostic and will also apply to acquisitions by UK entities.
- The regime gives the Secretary of State (now the Chancellor of the Duchy of Lancaster (“**CDL**”)) the power to ultimately prohibit transactions outright, or to clear transactions subject to conditions.
- The regime requires mandatory notification of certain transactions involving entities active in one or more of 17 “sensitive areas” of the economy. The following areas are likely to be of most relevance to real estate clients: (i) transport; (ii) civil nuclear / energy; (iii) data infrastructure / communications; and (iv) critical suppliers to Government (including sites with Government tenants where the landlord or manager holds UK security clearance). The mandatory regime does not apply to asset acquisitions.

- The NSIA also gives the Secretary of State/CDL the power to “call in” for review any transactions that may raise national security concerns, even those that sit outside of the mandatory notification regime. This includes acquisitions of shares and assets, including land and properties, although the Government expects to intervene very rarely in asset acquisitions (and this appears borne out to date). The risk of “call in” in respect of land or property acquisitions is likely to be increased where the site may be regarded as sensitive or is close to a sensitive site (such as critical national infrastructure, military sites or other government buildings). Transactions that are not covered by mandatory notification can be called in for review up to 5 years after completion.
- Although acquirers do not need to tell the UK government about a transaction that is not subject to mandatory notification, they may choose to notify voluntarily a transaction for clearance if there is a potential call in risk.

## FRANCE:

- Transactions are reviewed which concern investments:
  - realised by (i) a person of foreign nationality, (ii) persons of French nationality who are not domiciled in France, (iii) any entity governed by foreign law and (iv) any entity governed by French law controlled by persons, or entities, mentioned in (i), (ii) and (iii);
  - constituting a transaction which includes (i) the acquisition of control of an entity governed by French law, (ii) the acquisition of all/part of a branch of an entity governed by French law and (iii) crossing the threshold to hold 25% of voting rights in an entity governed by French law, or, until 31 December 2023, 10% where the investment targets companies listed on a regulated market (if the investor is outside the EU).
  - participating in the exercise of public authority or are involved in (i) activities likely to undermine public or national security and (ii) the research, production or marketing of weapons, ammunition, and explosive substances.
- More specifically, these activities include those which are sensitive in nature (involving weapons, ammunition, gambling, etc.), relating to infrastructure, goods or services which are essential to the preservation of national interests (energy, water, transport, space operations, electronic communications, law enforcement missions, operation of installations or structures of vital importance within the meaning of the Defence Code, public health, food safety and the press), and those relating to research and development on critical technologies.
- Deals that meet the definition of foreign investment must be notified prior to the implementation of the transaction.

## GERMANY:

- German law differentiates between cross-sector and sector-specific screenings:
  - **“Cross-sector Screenings”**: if the target is active in the field of armaments and defense, any acquisition by a non-German investor of at least 10% of the target’s voting rights is subject to a mandatory filing obligation to the Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz - BMWK*) (the **“Ministry”**).
  - **“Sector-specific Screenings”**: in accordance with the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz – AWG*) an acquisition in any of the 27 economic sectors (e.g. energy, water, finance, healthcare or transport, telecommunications, cloud computing services, telematics or certain providers in the media industry) mentioned and designated as “critical infrastructure” by a non-EU or non-EFTA investor is subject to mandatory filing obligation with the Ministry if the voting rights threshold (10% or 20%) is met.

## NOTIFICATION PROCESS

### US:

- There are two types of filings: a notice or a short-form declaration. Both require substantial information from the US business and the foreign person, including information on the ultimate beneficial owners of the foreign person.
- Timelines commence once CFIUS formally accepts a filing.
- Short-form declaration: an abbreviated filing that triggers a 30 day review by CFIUS. Following review of a declaration, CFIUS may request a formal notice.
- Notice: once CFIUS accepts a formal notice, it has 45 days to conduct an initial review (extendable by an additional 45 days, and again (under extraordinary circumstances) by a further 15 days). If CFIUS determines the proposed transaction raises a national security concern, it will seek an agreement with the parties to mitigate that concern. If national security concerns cannot be resolved within the available period, CFIUS may request the parties withdraw and refile the notice, or recommend to the President that the transaction be blocked, or other action be taken to address any national security risk. If referred to the President, there is a 15 day window to announce whether such action will be taken.

### UK:

- From acceptance of a notification, there is a review period of 30 working days during which the decision will be made whether to clear the transaction, or whether to “call it in” for a more detailed assessment.

- Where the transaction is called in, this triggers an additional 30 working days from the call in date. The clock stops to respond to information notices and the timetable is extendable by up to a further 45 working days. By the end of the assessment, the Secretary of State/CDL will assess whether the transaction can proceed (the Final Notification), whether it will be blocked, or if any conditions(i.e. structural changes to the deal, or the imposition of 'behavioural' requirements) are needed to address national security risks (the Final Order).
- The Secretary of State/CDL and the acquirer can mutually agree to further timeline extensions.

## FRANCE:

- From the date of receipt of a completed application, the administration has 30 working days to inform the investor whether the investment is subject to foreign investment control and if it is authorised unconditionally. If it is not authorised unconditionally, a further 45 working day examination will be conducted to determine whether preservation of national interests requires conditions to be placed on the investment.
- Where the investment is targeting a company listed on a regulated market, the administration has 10 days (following a completed application) to decide whether the operation should be subject to an examination.
- If the ultimate investor, or an entity in the investor's chain of control, is outside of the EU, a supplementary form must be submitted to the European Network. This form must be attached to the French application.

## GERMANY:

- In both Cross-Sector Screenings and Sector-Specific Screenings, the Ministry has 2 months from the date it becomes aware of the completion of a transaction to decide whether to initiate formal proceedings or to approve the transaction.
- If the Ministry does not proceed with a second-phase investigation within 2 months, the transaction is deemed to be approved by the Ministry. Where a second-phase investigation is launched, the Ministry has an additional 4 months to reach a decision on whether to permit the transaction, or to prohibit or impose restrictions or obligations concerning the transaction.
- In situations where a filing is voluntary, parties may apply for a certificate of non-objection to obtain legal certainty on the envisaged transaction from the Ministry.

## SANCTIONS FOR NON-COMPLIANCE

### US:

- Any person who fails to submit a mandatory filing or who violates CFIUS mitigation requirements may be liable for a civil penalty up to \$250,000 or the value of the transaction, whichever is greater. The actual amount of such a fine will be based on the nature of the violation.
- Providing false or misleading information to CFIUS may void the regulatory safe harbour afforded by CFIUS clearance and any person who makes a material misstatement, omission, or false certification to CFIUS may be liable for a civil penalty up to \$250,000 per violation, in addition to potential penalties under other US laws.

#### UK:

- Sanctions for completing a notifiable acquisition without gaining approval can be material (fines of up to 5% of worldwide turnover or £10M (whichever is the greater) and imprisonment of up to 5 years). Further, completed, non-notified transactions will be void.

#### FRANCE:

- An investment made without authorisation can result in the issuance of injunctions to file an application for authorisation, to undo the transaction, and to modify the investment. Penalties up to the higher of (i) twice the amount of the investment, (ii) 10% of the target's turnover and (iii) €5M can also be imposed.

#### GERMANY:

- The closing of a notifiable acquisition without gaining approval is considered temporarily invalid until the acquisition has been permitted by the Ministry.
- A standstill obligation was introduced for all transactions that are subject to a mandatory filing obligation. An intentional breach of this standstill obligation is considered a criminal offence, punishable by imprisonment for up to 5 years or a fine for the individuals responsible. Negligence is considered an administrative offence, punishable by a fine of up to €500,000. This concerns both sector-specific and cross-sector transactions.

## RECENT TRENDS AND DEVELOPMENTS

#### US:

- In September 2022, President Biden released an executive order highlighting specific risk areas that CFIUS ought to consider when assessing transactions, including: (i) supply chain resilience; (ii) US technological leadership in areas including, but not limited to, microelectronics, artificial intelligence, biotechnology and biomanufacturing, quantum computing, advanced clean energy, and climate adaptation technologies; (iii) cybersecurity

risks, particularly from those who already possess or who may obtain through a proposed transaction the capability and intent to conduct malicious cyber-enabled activity that may pose a risk to national security; and (iv) risks to US persons' sensitive data.

#### UK:

- The NSIA is still relatively new legislation and limited information is publicly available. The Government's first full-year annual report of the NSIA is expected to be published in Spring 2023. However, since 4 January 2022, 16 Final Orders have been published, resulting in 5 transactions being prohibited. The focus of these interventions have been predominantly in the energy or telecommunications sectors, and there appears to have been limited (if any) focus on real estate transactions. Of the 5 prohibitions, 4 involved Chinese or Hong Kong SAR buyers. Conditional clearances have involved a broader spectrum of acquirer nationalities.

#### FRANCE:

- From 1 July 2020, the EU Foreign Investment Screening Regulation brought two additional sectors within the scope of national FDI control being food safety, and activities related to the publishing, printing or distribution of political and press publications.
- Since February 2022, sample notification forms are available on the Treasury's Directorate General website.
- Prior to notification, the investor may submit a filing for a preliminary screening to determine whether the contemplated transaction falls within the scope. The Minister has 2 months to respond.

#### GERMANY:

- Germany became the leading destination country for inbound FDI, recording 1,537 projects in 2021. In 2021, Germany attracted more FDI than France and India combined and more than three times as much as Australia.
- In 2023, the respective Ministry published data on the German investment screening process on 306 national FDI screening cases for the second time. In 2022, 262 cross-sectoral and 44 sector-specific transactions were filed and of these 306 national filings, 37 investors were from China. 87% of the filings were decided in under two months and only 13% went to the second phase. Measures were taken in only 6 cases (2% of the filings).
- There are no particular restrictions on the acquisition and holding of real estate in Germany by foreign investors. However, the acquisition of real estate by a company from a non-EU country may be screened by the Ministry if it is part of an investment in a German company that may raise concerns in certain sectors, e.g. healthcare, data centres, critical infrastructure.



## OTHER POINTS FOR INVESTORS TO CONSIDER

### US:

- Subject to certain limitations, information and materials submitted to CFIUS are confidential and exempt from disclosure under the Freedom of Information Act.
- CFIUS may request information from parties on transactions that were not submitted to CFIUS for review.
- CFIUS actively reviews public sources for information on investments and may receive information from other government offices. CFIUS also solicits tips from the public.
- To expedite acceptance of notification to CFIUS, we recommend submitting a draft filing for review before formal submission. From 2020, CFIUS imposes a fee to review a notice, which is based on the value of the transaction and can range up to \$300,000 for transactions exceeding \$750M.

### UK:

- Acquisitions by sovereign investment funds or state owned entities do not automatically carry increased NSIA risk. However, where acquirers could be readily exploited, have links to hostile states or organisations, or illicit activities, there may be a heightened call-in risk. It is clear from the first years' worth of available data that acquisitions by purchasers connected with China and Russia are of particular interest from a national security perspective.
- To remove the risk of a deal being called in (and ultimately being rendered invalid or even subject to an unwinding order at a later stage), a prospective buyer may opt to notify the transaction voluntarily and obtain approval before completing. Given the broad reach of the NSIA regime, and the possible negative consequences of a missed filing or a later call-in, transaction parties and finance parties are frequently taking this approach.

### FRANCE:

- The information required to be disclosed in relation to the investment includes (i) a copy of any document evidencing a sufficiently mature investment project and (ii) a timetable for the completion of the transaction and any document evidencing the specified dates. As these can trigger confidentiality issues under any SPA, the parties should ensure that a suspensive clause conditioning completion of the transaction on obtaining an authorisation from the administration is included.
- Notification of a transaction under foreign investment rules is likely to be conducted in parallel with merger control notification requirements to the French Competition Authority. The



implementation of foreign investment is also subject to bilateral investment treaties between France and certain non-EU states such as China.

#### GERMANY:

- As the German FDI regime is subject to constant developments, a continuous review of the current legal requirements is essential to ensure compliance with German law. In addition, the Ministry is currently developing its administrative practice as an ongoing process.

## FINAL THOUGHTS AND PRACTICAL SUGGESTIONS

#### US:

- The current American administration has made clear its intent to continue to use the CFIUS authority as an instrument of foreign policy, and neither potential foreign investors nor the US targets of such investment can reasonably ignore the increased authority of CFIUS.

#### UK:

- Given the broad jurisdictional reach of the UK NSIA, the wide range of transactions that can be caught, and the material sanctions for non-compliance, parties to a proposed transaction should consider carefully whether the NSIA could apply. As with other jurisdictions, the NSIA operates independently of the UK's merger control regime, and the parties will need to consider whether a separate merger filing is required.

#### FRANCE:

- Foreign companies considering investment operations in France must be vigilant, as a number of sectors of activity are covered by French regulations particularly with regard to investments in infrastructure. The companies will also need to consider whether the transaction is subject to notification before the French Competition Authority under merger control regulations.

#### GERMANY:

- In Germany, at a first glance, it seems rather unlikely that pure real estate transactions would be subject to an assessment by the Ministry under the applicable German laws governing FDI. However, there are certain classes of real estate that may acquire special significance. These are land or buildings that are essential to infrastructure (e.g., land for internet nodes, water supply facilities) or the function of a state (such as certain government buildings or buildings in the immediate vicinity of certain state facilities). Such potential acquisitions require thorough assessment and could be subject to a filing requirement. In cases where it is not certain as to whether the transaction falls within the remit of the legislation, a voluntary filing

may be prudent in order for the parties to obtain a certificate of non-objection to proceed with the transaction without fear of prohibition by authorities.

We have created a [downloadable, table version of these points](#) for you to use

## **RELATED PRACTICE AREAS**

- Broker-Dealer and Investment Advisor Regulatory Enforcement, Disputes and Investigations
- Investigations
- Financial Regulation Compliance & Investigations

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