



**Baker
McKenzie.**

Export Controls and Sanctions

4 October - 8 October 2021

Annual Compliance Conference



Foreign Investment Review: Global Developments

Thursday 7 October

4.00 - 5.30 pm BST / 5.00 - 6.30 pm CEST / 11.00 am - 12.30 pm EDT



Annual Compliance Conference 2021

- **Anti-Bribery and Corruption**
- **Antitrust Compliance**
- **Customs, Brexit and Beyond**
- **Supply Chain, Product and ESG
Compliance and Liability**
- **Export Controls and
Trade Sanctions**

Speakers



Sunny Mann
Partner,
London (Chair)



Zhi Bao
Partner,
Beijing



Rod Hunter
Partner,
Washington D.C.



Samantha Mobley
Partner,
London



Eric Thianpiriya
Partner,
Sydney



Anahita Thoms
Partner,
Dusseldorf

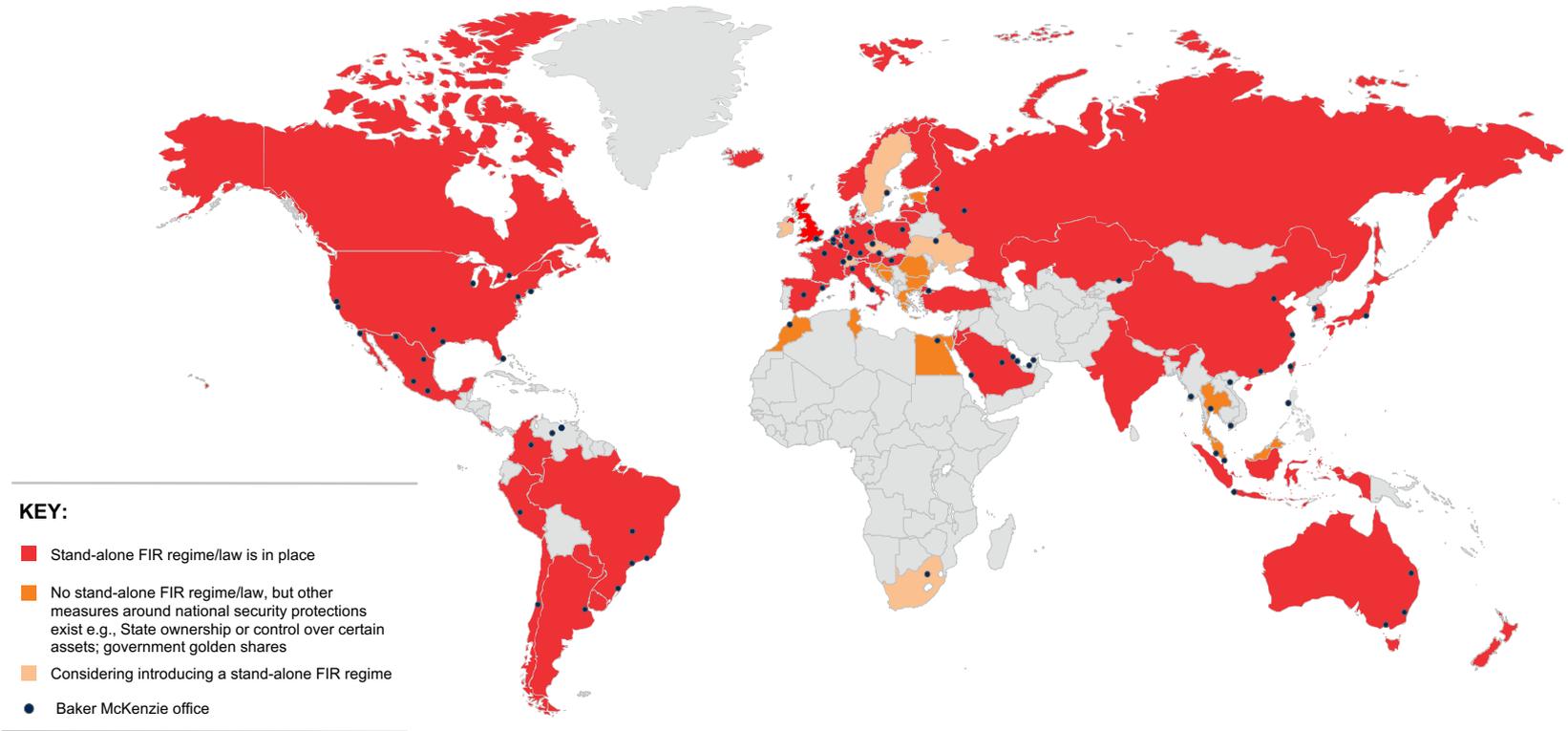


**Alexander
Rickets**
Associate,
London

Global Spread of FIR

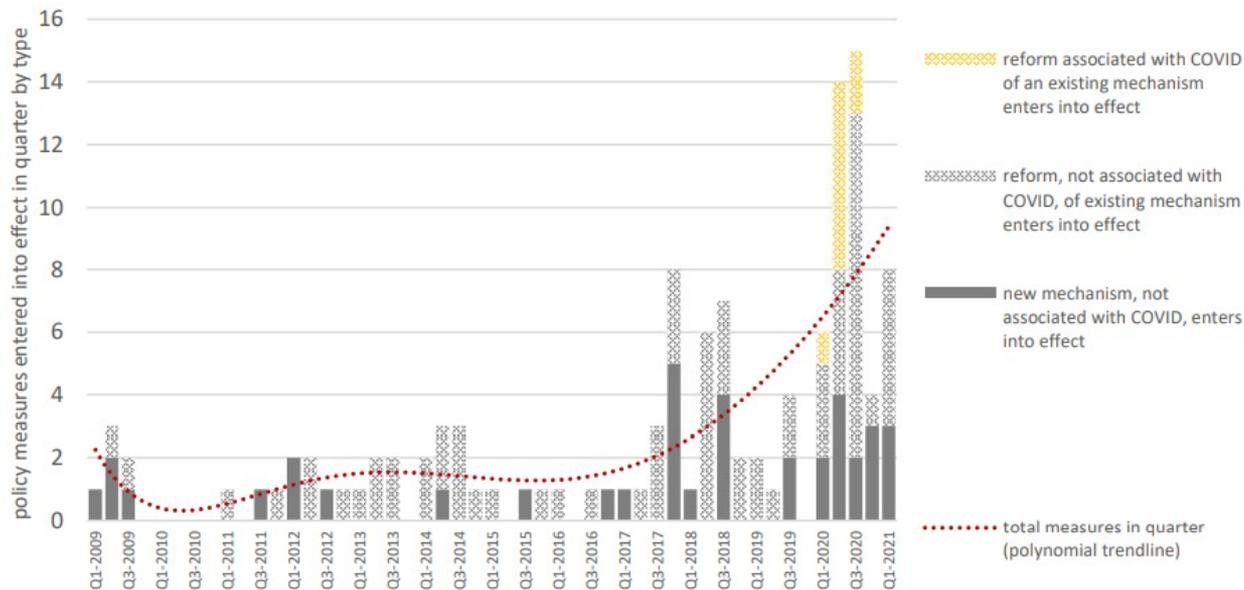
The background of the slide is an abstract, digital-style composition. It features numerous thin, parallel lines that are slightly wavy and curved, creating a sense of motion and depth. The color palette is vibrant, consisting of various shades of cyan, magenta, and purple, all set against a dark, almost black background. The lines appear to flow from the top right towards the bottom left, with some lines curving back towards the right. The overall effect is reminiscent of a data visualization or a stylized representation of global connectivity.

FIR: The Global Picture



Restrictions on the Rise

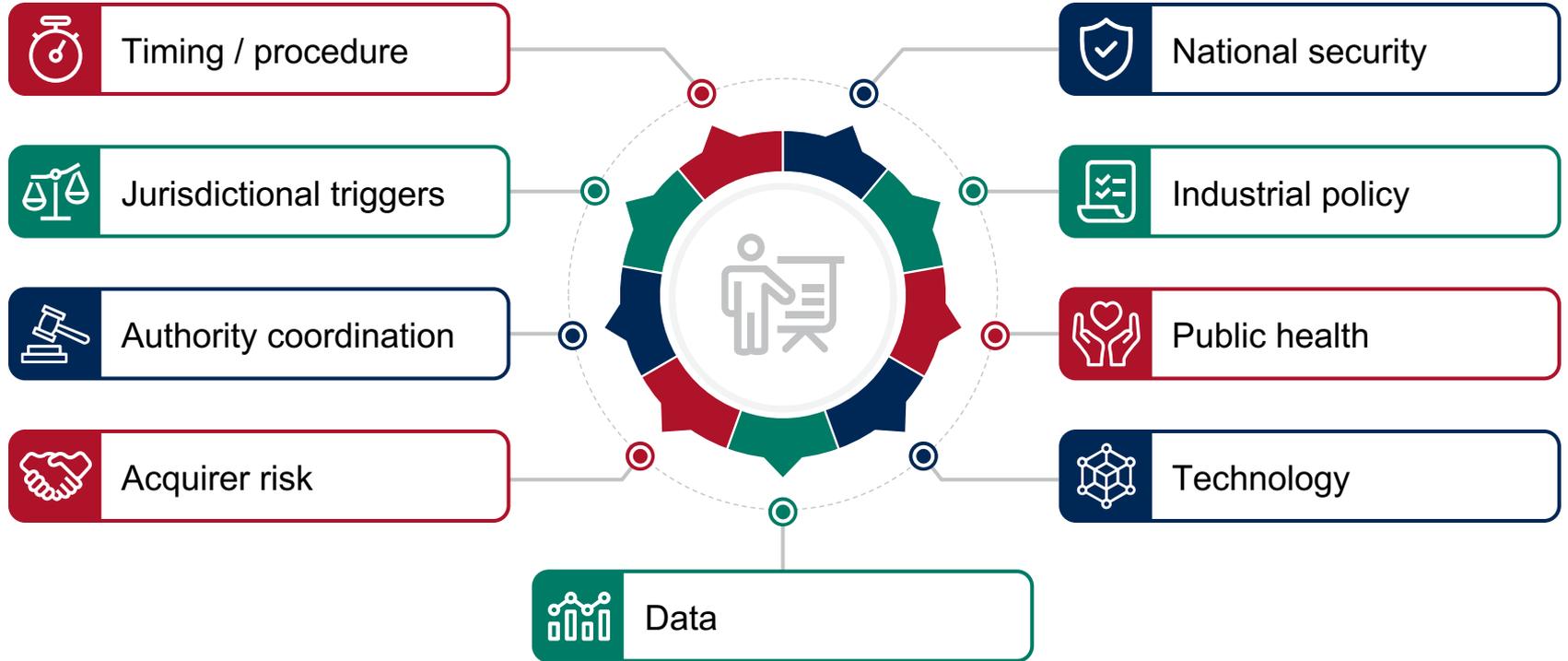
Figure 3: Introduction or reform of investment policies in G20 members to safeguard essential security interests, Q1-2009 to Q1-2021.



Note: Extensions of the duration of measures that were initially time-limited are not counted as additional measures.

Source: OECD/UNCTAD monitoring reports on G20 investment measures 2009-2021.

Hot Topics and Trends





Key Issues for Global Investments

Acquirer Risk



- Acquirer risk to be assessed case-by-case
 - Rules ostensibly not focused on nationality, but acquirers from **China (+Russia)** likely to face closer scrutiny, as are SOEs and SWFs
 - Some scrutiny of longer term intent and investment in target – including PE and Funds investors
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- Acquirer risk to be assessed case-by-case
 - Acquirer may have to mandatorily notify the acquisition
 - Separately, acquirer faces risk that government subjects acquisition to restrictions or in extreme cases prohibits it
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- Acquirer risk to be assessed based on characteristics of buyer, target and rights acquired
 - Indirect investments and financings captured
- Pre-closing filings required for certain technology, infrastructure and data businesses
- CFIUS may intervene in a transaction pre- or post-closing – the President may block or unwind a transaction, no time limit
- Acquirers from sensitive countries (e.g., China) and foreign government-affiliated investors face closer scrutiny

Acquirer Risk



- Acquirer risk to be assessed on a case-by-case basis
- Higher monetary thresholds apply to FTA partner countries, before approval is required
- Foreign government investors (FGIs) face a higher level of scrutiny and are subject to a 10% interest (potentially lower) threshold and a \$0 monetary threshold
 - FGI is widely defined. Includes foreign governments, foreign government agencies, state owned enterprises, SWFs, government pension plans, public / nationalised banks, some public university endowment funds etc. Many PE funds are also FGIs due to the composition of their LPs
- Sensitivity around FGIs from certain jurisdictions. FGIs from “five eyes” jurisdictions generally considered favourably



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- Acquirer risk to be assessed on a case-by-case basis
 - Investments by specific nationalities, or by SOEs and SWFs are not specifically addressed under PRC national security review (NSR) regime
 - Principle of reciprocity - Article 40 of the Foreign Investment Law (FIL)

Trigger Events – Share Acquisitions



- Acquisitions of shares / voting rights in the 17 industry sectors resulting in holding over 25%, over 50%, or 75% or more trigger mandatory, suspensory notification
- "Trigger events" that are not subject to mandatory notification can be notified voluntarily if there are national security concerns



- An acquisition of at least 10% of the voting rights in a German entity active in a listed sector or industry deemed particularly sensitive
- An acquisition of at least 20 % of the voting rights in a Germany entity active in a listed sector or industry deemed sensitive
- An acquisition of at least 25% of the voting rights in a German entity in all other cases by a foreign investor
- Includes some atypical acquisitions, e.g., veto rights in in strategic business or personnel decisions



- No investment thresholds -- CFIUS has jurisdiction over: (i) any transaction in which a foreign person gains "control" of a US business; (ii) certain non-controlling investments in TID (Technology, Infrastructure, Data) US business; (iii) certain real estate transactions
- Mandatory prior review:
 - Acquisition by certain foreign government-affiliated investors of 25%+ direct or indirect voting interest in a TID US business; and
 - Controlling and certain non-controlling investments in TID US businesses that develop, produce, or test "critical technologies"

Trigger Events – Share Acquisitions



- Rules complex and there are various exceptions. However, generally, the acquisition of a 20% (or more) interest in an Australian entity requires approval if the consolidated gross assets of the entity are A\$281 million (or more)
 - Lower percentage thresholds may apply – for example, if the target business is a "national security business"
 - Increases in a percentage interest if already above 20% will generally also require approval
-



- Under the FIL, a wide range of investments are considered as "foreign investment" that falls under the NSR regime, including share acquisitions, without % threshold
- Investments in 9 strategically important sectors in addition to military and defence and related sectors are caught provided that they result in control
- Control under the NSR regime ought to correspond to "control" under the merger control regime. A case-by-case analysis is required, in particular acquisition of minority interests

Trigger Events – Asset Acquisitions



- Asset acquisitions are not subject to mandatory notification but voluntary notification may be advisable
 - Regime scope covers a right/interest in (or relating to) an asset that enables the acquirer to use the asset, or direct or control how the asset is used to a greater extent than before
 - Relevant assets include land, tangible moveable property or any ideas, information or techniques with industrial, commercial or economic value
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- Asset acquisitions are equally subject to the German FIR regime like share deals, if the assets acquired qualify as a separable business unit of the target entity or comprehend all essential assets of the separable business unit or the German target entity as a whole
-



- CFIUS has jurisdiction if a transaction involves assets that constitute "US business" plus certain real estate transactions (whether or not "US business" is involved)

Trigger Events – Asset Acquisitions



- Notification isn't generally mandatory in relation to an asset acquisition, save in certain circumstances, for example if certain types of land are being acquired or if the acquirer is an FGI
- Note that entering into an option to acquire an interest in an asset is generally considered to be an acquisition of an interest in that asset



- Under the FIL, a wide range of investments are considered as "foreign investment" in China and accordingly the NSR may apply if, for example:
 - Foreign investors acquire shares, equity, assets or other similar interest in Chinese domestic enterprises; and
 - Foreign investors, independently or jointly with other investors, invest in new projects or set up enterprises in China

Key Industry Sectors



- 17 sensitive industry sectors where mandatory notification applies
 - Industry sector definitions have been subject to a detailed consultation process
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- Particularly sensitive industry sectors include Telecommunications, Energy, Transport, Water, Nutrition and Healthcare: acquisition of at least 10 % of voting rights or fulfilment of specific criteria
 - Sensitive industry sectors include Artificial Intelligence, Robotics, Automated Driving, Optoelectronics, Robotics and Cybersecurity: acquisition of at least 20 % of voting rights
 - Triggers mandatory notification requirements, transactions may be reviewed and ultimately restricted
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- Focus on TID (Technology, Infrastructure, Data) US businesses:
 - "Critical technologies" (defined by reference to US export control regimes)
 - Critical infrastructure
 - Sensitive personal data

Key Industry Sectors



- Lower thresholds apply for agribusinesses / agricultural land
- Certain "sensitive businesses" are not eligible for the higher FTA threshold. These include media, telecommunications, transport, security or encryption technologies businesses, amongst others
- National security businesses subject to lower thresholds (10% interest, \$0)
 - Generally includes "critical infrastructure" and businesses with defence / intelligence ties
 - Definition of "critical infrastructure" currently limited to large port, water, electricity and gas infrastructure. Definition proposed to be expanded to include certain assets in the following industries: communications, data storage and processing, defence, financial services and markets, food and grocery, higher education and research, health care and medical, transport, energy, space technology and water and sewerage
- Any assets relating to data are particularly sensitive

Key Industry Sectors



- Military / defence, and those supporting sectors with a bearing on national defence and security
 - In practice, this may include dual-use technologies and products (where one potential use pertains to military)
 - Foreign investments in locations in the periphery of military and defence facilities also trigger the NSR
- Other sectors deemed strategically important include: (1) important agricultural products, (2) important energy and resources, (3) significant equipment manufacturing, (4) important infrastructure, (5) important transportation services, (6) important cultural products and services, (7) important information technology and Internet products and services, (8) important financial services, (9) key technologies, to the extent the foregoing has a bearing on national security and foreign investors may acquire actual control
 - No clear guidance on what to consider in respect of determining whether a concerned business would be considered "important"
 - Probably subject to shifting of China's industry and technology policies

Notification Process / Requirements



- Acquirer submits notification form via digital portal
 - Mandatory, suspensory filing in sensitive sectors – voluntary notification may be advisable outside these sectors where there may feasibly be national security concerns
 - 30 working day **Phase 1** initial screening, 30 working day **Phase 2** in-depth review with possible extensions up to 45 working days
 - If imposed, remedies may include restricting share ownership, access to commercial information or sensitive sites
 - Government can issue freezing orders for in-progress deals; civil and criminal penalties for failure to notify
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- A mandatory filing requirement applies where the German target entity fulfils the applicable threshold values for critical infrastructure or criteria of otherwise (particularly) sensitive industry sectors
- Upon notification, government has 2 months to decide on Phase 2 review (for which in principle it has 4 months)
- Inclusion of conditions precedent generally advisable where filing, mandatorily or voluntarily, is made

Notification Process / Requirements



- Both voluntary and mandatory filings with CFIUS are joint submissions of the seller and buyer.
- Two filing options:
 - Declaration: 30 day review but CFIUS can require parties to submit a full notice
 - Notice: 45 day review + possibly another 45 day investigation (+ draft period)
- Potential outcomes of CFIUS's review:
 - Clearance without or with conditions
 - No action (as a result of a declaration)
 - Finding of a national security concern that cannot be mitigated (in which case parties withdraw or CFIUS formally makes a recommendation to the President)

Notification Process / Requirements



- Acquirer prepares an application and an online application form
- Application fees apply, and can be as high as A\$500,000
- 30 day statutory deadline – this is usually extended. Very simple applications can take around one month. The most sensitive applications can take up to six months
- Foreign Investment Review Board consult with a variety of government departments / agencies, including the ATO and ACCC
- Tax RFIs and approval conditions are common
- Data conditions becoming increasingly common – e.g., requirement to keep certain sensitive data in Australia, and for it to only be accessible from within Australia
- Civil and criminal penalties for failure to notify (which can extend to advisers)
- Treasurer recently given "call-in" and "last resort" powers

Notification Process / Requirements

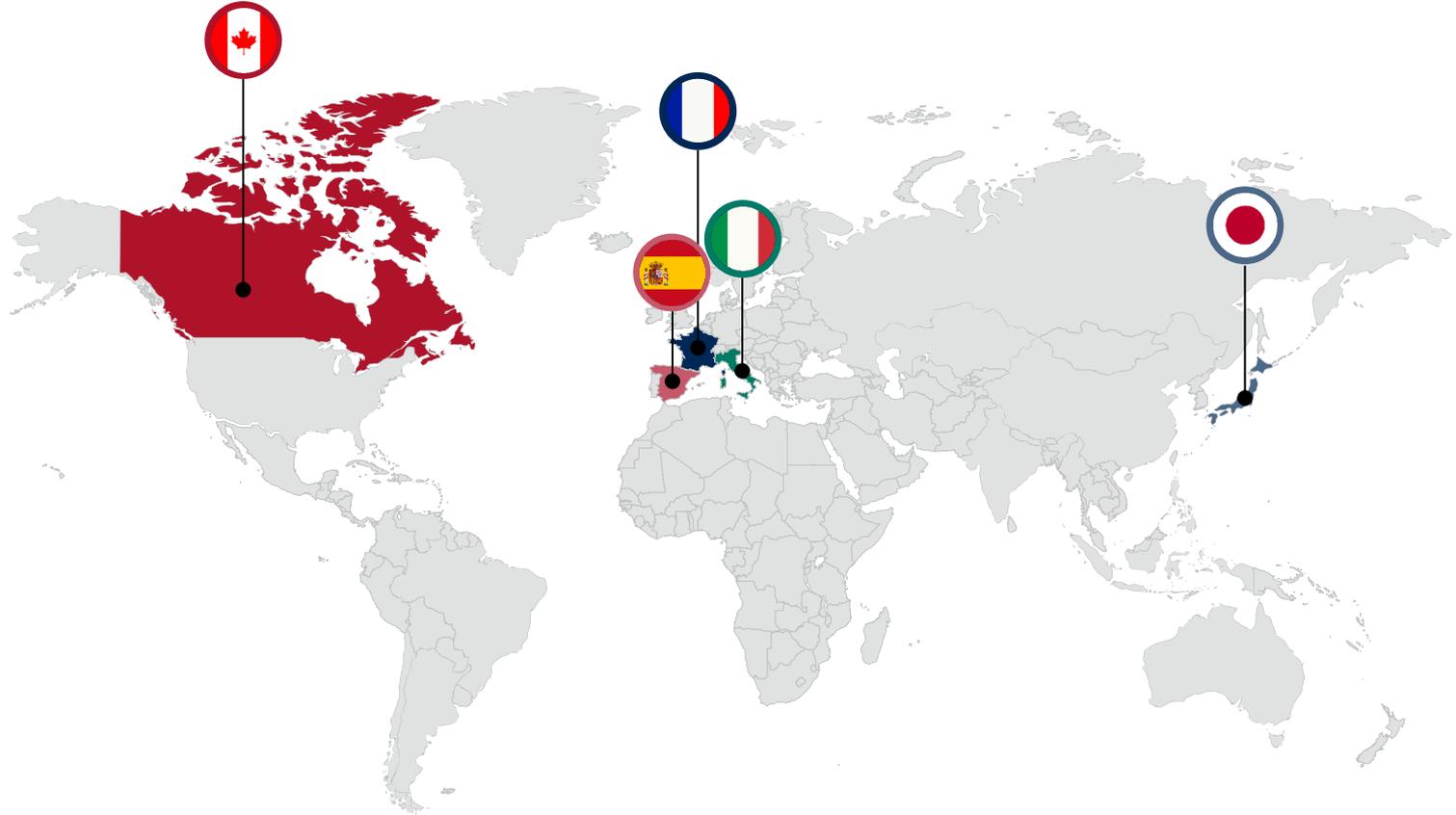


- Acquirer generally bears the responsibility for submitting the mandatory notification
- Short notification form with less detail than a merger control filing
- All notifications submitted via email/on-site to the authority
- No filing fees
- Three-stage review process (15+30+60 working days), and pre-notification consultation is available
- Clock stops once RFIs sent and until responses deemed complete, which is different from the current merger control regime in China
- The process generally takes at least 3 months+, exceptionally 10-12 months+
- No monetary penalties or criminal liabilities, but risk of claw-back (without being subject to prescribed time limits) and a negative record in the national credit information system (multi-agency joint sanctions) in case of procedural violations
- The parties' ignorance of/non-compliance with the "claw-back" order or gun-jumping risks unwinding order if any national security concerns

Other Key Jurisdictions

The background of the slide is a dark, almost black, space filled with numerous thin, flowing lines. These lines are primarily in shades of cyan, magenta, and purple, with some lines appearing to have a metallic or glossy sheen. The lines are arranged in a complex, organic pattern that suggests movement and connectivity, similar to a network or data flow. The overall effect is a vibrant, futuristic aesthetic.

Other Key Jurisdictions



The background features a complex, abstract pattern of glowing, wavy lines in shades of cyan, magenta, and purple. The lines are dense and layered, creating a sense of depth and movement. The overall effect is reminiscent of a digital or data visualization theme.

Resources

FIR Resources



FIRE Tool

<http://fire.bakermckenzie.com/>

Foreign Investment Review Evaluation (**FIRE**) is a Baker McKenzie analysis platform which answers 54 detailed questions on foreign investment review regimes across 39 jurisdictions.



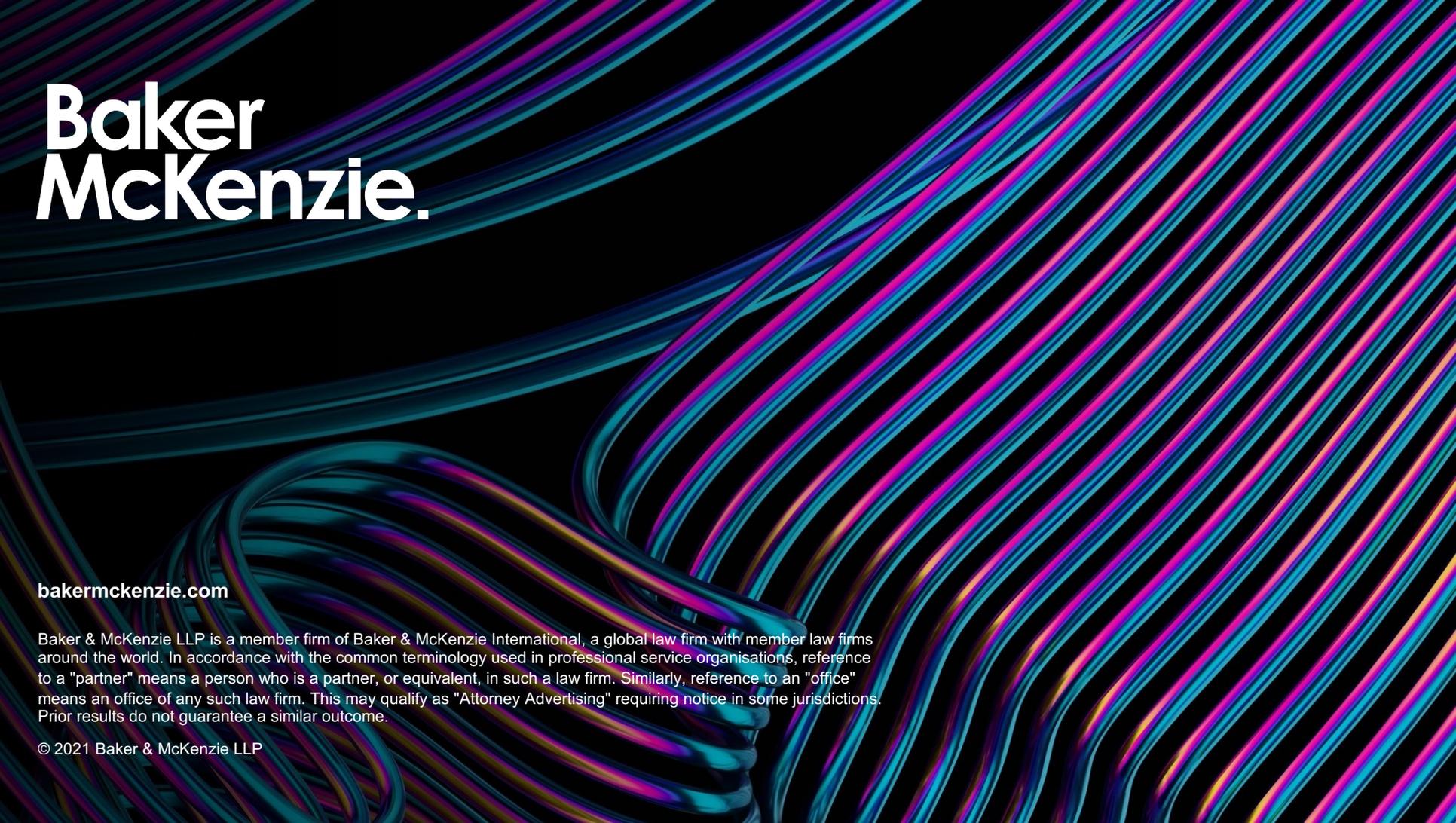
Foreign Investment Blog

<https://foreigninvestment.bakermckenzie.com/>

Our Foreign Investment and National Security blog provides you with the latest news and updates in respect of foreign investment review and national security trends and developments, keeping you up-to-date and informed about the legal and business risks impacting your next transaction.

The background features a complex, abstract pattern of glowing, wavy lines in shades of blue, cyan, and purple. These lines flow across the frame, creating a sense of motion and depth. The lines are most concentrated on the right side, where they form a dense, textured wall, and become more sparse and curved on the left side. The overall effect is reminiscent of a digital or data landscape.

Questions



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