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McKenzie.**

# **Annual Corporate Compliance Conference 2020**

7 September - 9 October 2020



# Increased Focus on Foreign Investment Review

Thursday 24 September, 3.45 - 4.45 pm BST



# Speakers



**Sunny Mann**

Partner (Chair), London



**Rod Hunter**

Partner, Washington D.C.



**Sylwia Lis**

Partner, Washington D.C.



**Anahita Thoms**

Partner, Dusseldorf



**Karoline Phillips**

Senior Associate, London



**Alexander Ricketts**

Associate, London

# 01 | Introduction

The background is a dark, deep blue gradient. In the lower right quadrant, there is a curved, glowing trail of teal and light blue particles, resembling a comet tail or a data stream. The particles are small, bright dots of varying sizes, creating a sense of motion and depth.

# Background



Rising protectionism and nationalism have threatened to erode the existing pro-free trade and investment consensus across many regions



COVID-19 crisis has shone a light on the fragility of many critical supply chains



Geopolitical shifts playing out in an increasingly restrictive attitude towards foreign investment internationally



Certain countries have long established FIR regimes (e.g., CFIUS in US) – other jurisdictions are now introducing similar regimes or tightening their existing rules

**02**

**UK**

# Current UK Regime

No dedicated FIR notification process

Public interest includes "*national security*" (no precise definition)

Share of supply and turnover thresholds must be met in most cases, before the Government can legally intervene

Government can intervene based on "*public interest*" grounds set out in the Enterprise Act 2002

... and, most recently, maintaining UK capability to combat / mitigate the effects of public health emergencies

Substantial reform, introducing a standalone notification system, expected in autumn 2020

# Looking Ahead

## Wider interventionist trend

-  Clear politicisation of UK national security interventions
  - Until 2018 = 5 interventions
  - From 2018 = 5 interventions
-  Undertakings extracted from parties arguably going beyond national security (**Melrose/GKN, Cobham, Inmarsat**)
-  US buyers have also been subject to review, including PE / financial investors
-  Sharpened scrutiny of inbound foreign investment following COVID-19 crisis

# Looking Ahead

## National Security & Investment Bill – the controversy



No jurisdictional thresholds



"*Trigger events*" = loose concepts of ownership and control

- 25% or more of an entity's shares or votes, or over 50% of an asset
- Significant influence or control over an entity or asset
- Further acquisitions of significant influence or control over an entity beyond the above thresholds



Non-UK entities and assets could be caught



All sectors of economy in scope but "*core areas*" likely to be the focus



Voluntary notification process (with a 6 month "*call-in*" window)



Focus on sensitive acquirers



Prohibition on closing if the deal is "*called in*"

# Industry Focus Areas

## At present

- Defence
- Critical communications
- Military or dual-use goods
- Certain computing hardware
- Quantum technology
- Advanced materials
- Cryptographic authentication technology
- Artificial intelligence

+ *Public health emergencies*

## Likely future reforms – National Security & Investment Bill (expected late 2020)

### National infrastructure

- Defence
- Military or dual-use goods
- Civil Nuclear
- Communications
- Energy
- Transport

### Advanced technologies

- Advanced materials and manufacturing science
- Artificial intelligence and machine learning
- Autonomous robotic systems
- Computing hardware
- Cryptographic technology
- Nanotechnologies
- Networking and data communication
- Quantum technology
- Synthetic biology

### Critical direct suppliers to the Government and emergency services

- Suppliers that directly provide goods/services that are intrinsic to the delivery of Government and/or emergency services

+ *Public health emergencies*

# 03 | EU Framework

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# New Screening Framework

 **13 September 2017:** Proposal for new EU framework for screening FDI raising **security or public order concerns**

 **Entered into force 10 April 2019, will be applied from 11 October 2020**

 **Review of FDI by EU Commission:**

- On the grounds of security and public order which affect projects of "*Union interest*"
- Projects involving substantial EU funding or in relation to critical infrastructure, critical technology or critical inputs

 No obligation on Member States to adopt national screening systems

 Member States may take into account if the foreign investor is state controlled, including through significant funding

 Easier to prohibit Chinese and other FDI that fall short of acquisitions of control

# EU Rules For Investors with Foreign Subsidies?



Non-EU investors acquiring control in EU companies might face a new EU-level review (in addition to merger control and national FDI reviews)

- Concerns that non-EU companies are using state funding to win business in Europe, defeating EU companies that don't benefit from such financial support



3 modules

- Review of foreign subsidies that may distort competition in the Internal Market
- Role of subsidies in facilitating foreign companies to buy EU assets
- Review of foreign subsidies in EU public procurement procedures



Thresholds to be determined

# 04 | Germany

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# Scope of Application



## Cross-sector

## Sector-specific

### Target company

- All domestic companies
  - In case of potential threat to the public order or security in Germany resulting from an acquisition now defined in more detail by providing a specific catalogue, in particular critical infrastructure
- Domestic target companies active in the following sectors:
    - War weapons
    - Gears and engines for military utility vehicles
    - Certain products with IT security functions
    - Certain products on the export control list

### (Direct) acquirer scope

- All non-EU acquirers (EFTA = EU)
  - Also acquirers resident in the EU in case of circumvention
  - Direct or indirect acquisition of 10% / 25% of the voting rights
- All foreign acquirers
  - Also domestic acquirers in case of circumvention
  - Direct or indirect acquisition of 10% of the voting rights

### "Notification"?

- Generally voluntary
  - **Mandatory** for a multitude of specific transactions (in particular critical infrastructure)
- Mandatory approval

# Recent Reforms



## 2018: New review threshold of 10% of the voting rights for:

- Companies within the scope of the sector-specific review
- Companies that are operating in one of the mentioned fields of the cross-sector review



## 2018: Extension of the cross-sectoral review to media companies

- Regulator can review media industry transactions where companies have a significant impact on public opinion



## 2020: Pandemic-related changes and implementation of the EU screening framework

- More **healthcare companies** were added to the catalogue of particularly sensitive companies, e.g. companies producing personal protective equipment
- Transactions that have to be notified will be **provisionally invalid** until FIR clearance
- Review is possible not only if transaction is "*endangering*" but already if transaction is "*probably impairing*" the public order or security of Germany or **another EU member state**

# Cross-sector Review – "*Critical Infrastructure*" and "*Critical Technologies*"



Particularly relevant is the reference to "*critical infrastructure*", a legal term defined as institutions or parts thereof that:

- Belong to the energy, information technology, telecommunication, transport and traffic, health, water, nutrition, finance or insurance sectors; and
- Are of great importance to the functioning of the community as their failure or impairment would result in serious supply shortages or considerable disruption to public safety
- Industry specific thresholds determine if a certain level of supply is considered critical / significant



The German government has announced extending the scope of application to companies operating in the field of certain "*critical technologies*", e.g. artificial intelligence, robotics, semiconductors, biotechnology and quantum technology

- Will be subject to the 10% threshold and notification requirement

# 05 | CFIUS Highlights

The background is a dark, deep blue gradient. In the lower right quadrant, there is a bright, glowing stream of teal-colored particles or light, resembling a comet tail or a data stream, that curves upwards and to the left. The overall aesthetic is futuristic and high-tech.

# CFIUS: Regulatory Highlights



## Mandate

- Review of foreign investments (and certain other transactions) on national security grounds
- "*National security*": not defined (vulnerability (US business) + threat (foreign investor))



## Jurisdiction

- Controlling investments ("*control*" = ability to direct or decide important matters (open-ended, broad discretion))
- Non-controlling investments in TID (technology, infrastructure, data) US businesses
- Certain real estate transactions (even where no "*US business*" is involved)



## Filings

- Mandatory pre-closing filings (short-form declarations or longer notices):
  - Investments (controlling or certain non-controlling) in "*critical technologies*" US businesses involved in/with 27 enumerated industries
  - Acquisitions of "*substantial interest*" in TID US business by foreign government-affiliated investors
- Voluntary filings (short-form declarations or longer notices)



CFIUS' clearance = safe harbour; no time limit for review of un-notified deals



President, assisted by CFIUS, may block, condition, or unwind a transaction

# CFIUS: Some Trends



FIRRMA (Foreign Investment Risk Review Modernization Act) – the most recent & most significant change to CFIUS regime:

- Expanded jurisdiction and imposed mandatory pre-closing filings
- Technology, infrastructure and data (TID) focus



Close allies get scrutiny too – CFIUS is not just focused on China



Increased CFIUS budget: more staff, more reviews, more scrutiny across the board



Frequent flyers get smoother reviews



It is not just the technology, but where the technology is developed

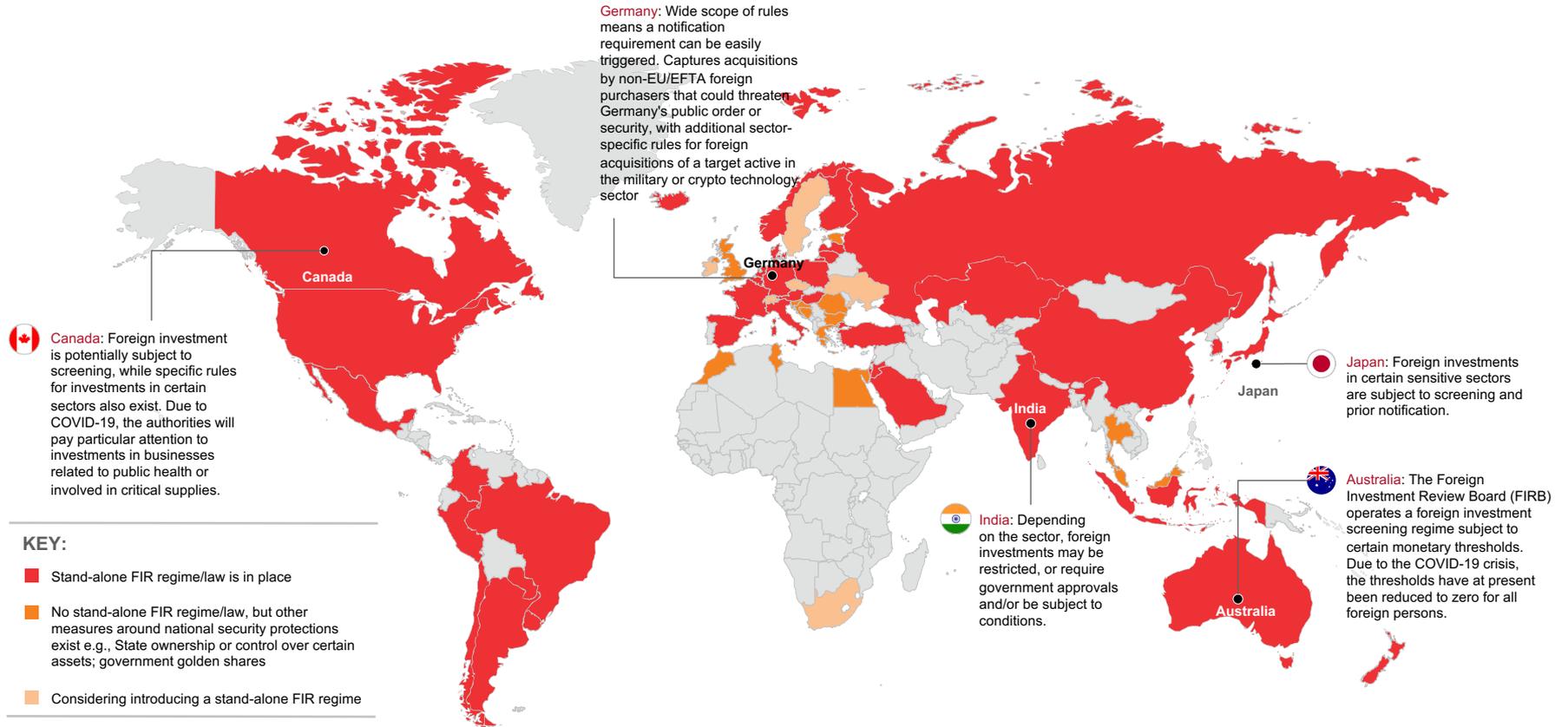


No specific COVID-19 developments so far (but CFIUS has tools within its current mandate)

# 06 | Global Developments

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# FDI Screening: Global Spread



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# 07 | Lessons and Strategy

# FIR Takeaway Messages



Critical path in multi-jurisdictional transactions



Address early in deal structuring, negotiation and implementation



Can impact investments in broad range of sectors

- Focus on tech, infra and data – every business is now a data business
- Range of investment forms captured – M&A, financings, fund investments, reorgs etc



Approach systematically as with merger control filings analysis



Can impact investments from allied countries

# Deal Execution



## Due diligence

- Determine Target business and asset locations
- Identify Target security vulnerabilities / other concerns
- Assess sensitivities associated with the investor
- Consider broader political and regulatory context



## Regulatory engagement

- Coordinate filings - content and sequencing
- Consider communications and government affairs campaign
- Engage early and often with regulators
- Expect detailed disclosures



## Transaction planning

- Map regulatory thresholds, considerations and timelines
- Consider impact on deal structure and timing
- Anticipate potential mitigation measures
- Allocate regulatory risks and responsibilities

# BM Resources

## [Foreign Investment and National Security Blog](#)

Foreign Investment Review Evaluation ([FIRE](#)) is a Baker McKenzie analysis platform which answers 49 detailed questions on foreign investment review regimes across 24 jurisdictions. It is updated in real time and provides depth and legal certainty.

Not only is it the most comprehensive database on the substantive law, it also captures Baker McKenzie's field experience around enforcement practice. It provides a road map to regulatory timetables, risks and barriers that you can promptly feed into your corporate strategy and planning processes.



# Agenda

Tuesday 29 September  
2.00 - 3.00 pm BST

## **Product and Supply Chain Compliance: The Claims You Make**

Chair: Graham Stuart, Partner, London | Jessica Mutton, Senior Associate, London | Aurella Smith-Anthony, Senior Associate, London | Adeel Haque, Associate, London

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Wednesday 30 September  
2.00 - 3.00 pm BST

## **The Claims You Make: Case Studies**

Chair: Graham Stuart, Partner, London | Francesca Richmond, Partner, London | Aurella Smith-Anthony, Senior Associate, London | Adeel Haque, Associate, London

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Thursday 1 October  
2.00 - 3.30 pm BST

## **Trends in Environmental, Human Rights and Sustainability Claims and Supply Chain Due Diligence**

Moderator: Jessica Mutton, Senior Associate, London | Moderator: Aurella Smith-Anthony, Senior Associate, London | Professor Robert McCorquodale of Brick Court Chambers | Susanne Stormer, Chief Sustainability Advisor, Vice President at Novo Nordisk | Graham Stuart, Partner, London

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Friday 2 October  
2.00 - 3.00 pm BST

## **New Frontiers in Product Liability and Regulation - AI, IoT and other emerging technologies**

Chair: Kate Corby, Partner, London | Trevor Callaghan, Director, Milltown Partners | Raj Choudhary, Independent Legal Consultant seconded in-house with a Fortune 500 technology & product development company | Ben Allgrove, Partner, London | Erin Maus, Partner, Chicago | Joanne Redmond, Senior Associate, London

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