

Public interest or protectionism?

Navigating the new normal



Freshfields Bruckhaus Deringer

Your key public interest and foreign investment contacts

Nigel Blackaby
Disputes, Litigation and Arbitration Partner, Washington DC
E nigel.blackaby@freshfields.com

Heiner Braun
Global Transactions Partner, Frankfurt
E heiner.braun@freshfields.com

Shawn Cooley
Special Counsel – Foreign Investment, Washington DC
E shawn.cooley@freshfields.com

Pascal Cuche
Global Transactions Partner, Paris
E pascal.cuche@freshfields.com

John Davies
Antitrust Partner, London and Brussels
E john.davies@freshfields.com

Michele Davis
Antitrust Partner, London
E michele.davis@freshfields.com

Bruce Embley
Global Transactions Partner, London
E bruce.embley@freshfields.com

Natasha Good
Global Transactions Partner, London
E natasha.good@freshfields.com

Kathleen Healy
People and Reward Partner, London
E kathleen.healy@freshfields.com

Juliane Hilf
Disputes, Litigation and Arbitration Partner, Düsseldorf
E juliane.hilf@freshfields.com

Thomas Janssens
Antitrust Partner, Brussels
E thomas.janssens@freshfields.com

Christine Laciak
Special Counsel – Foreign Investment, Washington DC
E christine.laciak@freshfields.com

Mary Lehner
Antitrust Partner, Washington DC
E mary.lehner@freshfields.com

Alastair Mordaunt
Antitrust Partner, Hong Kong
E alastair.mordaunt@freshfields.com

Sylvia Noury
Disputes, Litigation and Arbitration Partner, London
E sylvia.noury@freshfields.com

Richard Perks
Global Transactions Partner, Hong Kong
E richard.perks@freshfields.com

Jérôme Philippe
Antitrust Partner, Paris
E jerome.philippe@freshfields.com

Piers Prichard Jones
Global Transactions Partner, London
E piers.prichardjones@freshfields.com

Julian Pritchard
Global Transactions Partner, London
E julian.pritchard@freshfields.com

Frank Röbling
Antitrust Partner, Berlin
E frank.roebing@freshfields.com

Noah Rubins
Disputes, Litigation and Arbitration Partner, Paris
E noah.rubins@freshfields.com

Christiaan Smits
Head of EU Regulatory and Public Affairs, Brussels
E christiaan.smits@freshfields.com

Arend von Riegen
Global Transactions Partner, Frankfurt
E arend.vonriegen@freshfields.com

Alan Wang
Global Transactions Partner, Beijing
E alan.wang@freshfields.com

Kaori Yamada
Antitrust Partner, Tokyo
E kaori.yamada@freshfields.com

Hazel Yin
Antitrust Partner, Beijing
E hazel.yin@freshfields.com

Gian Luca Zampa
Antitrust Partner, Rome
E gianluca.zampa@freshfields.com

Many thanks to the following contributors:

Bowmans
T +27 11 669 9000

Shakti Wood
Competition Partner, Johannesburg

Brunswick Group
T +32 2 235 6510

Sir Jonathan Faull
Partner and Chair of European Public Affairs, Brussels

Philippe Blanchard
Managing Partner, Brussels

Clayton Utz
T +61 2 9353 4000

Kirsten Webb
Competition Partner, Sydney

Rory Moriarty
Corporate Partner, Sydney

Matthew Battersby
Senior Associate, Sydney

Introduction

Public interest and foreign investment screening is nothing new. All of the largest economies have had some form of review process in place for many years. However, recent times have seen a rapid intensifying of these controls: since 2015, 11 G20 countries, including all of the G7, have enacted or set in motion more restrictive public interest or foreign investment measures.

As a result global M&A is more complex and deal execution risk is higher than ever. A tricky regulatory process can have a huge impact on deal value, whether through delays to closing or reducing expected deal synergies.

In our experience, although the impact of public interest or foreign investment restrictions can greatly increase uncertainty for companies, it is possible successfully to navigate these issues by building them into deal planning from the outset. It can be helpful to engage with the relevant authorities at an early stage, and it may be necessary to take a creative approach to remedy planning by building it into the intended deal structure.

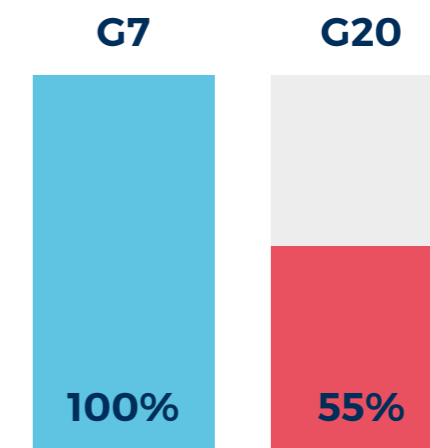
Although regulatory processes vary greatly across jurisdictions, there are many common concerns. In this guide we have taken a thematic approach to share some of our lessons learned, also drawing on insights from some of the firms we have worked with on major cross-border matters in recent years. We have chosen the themes based on those issues that we have seen giving rise to public interest and foreign investment concerns more frequently, either in response to new challenges (such as the rapid development of technology), or due to the cross-fertilisation of existing ideas across a much wider spread of jurisdictions. This guide does not cover areas where sector-specific regulation is already mature and widespread (such as telecoms), or media plurality, which will already be familiar territory (as seen in the Comcast and Fox tussle for Sky in the UK, which trod a well-worn path).

Instead we have focused on those themes where the landscape for merging companies has changed significantly over recent years and, based on our experience, how this new landscape can be successfully navigated within a deal timetable.

Key trends

Not only are more countries introducing public interest and foreign investment controls, but the sectors and types of transaction those rules address are also expanding in response to political pressure:

- a wider range of investors is becoming affected. The rise of protectionist sentiment and a rapidly changing economic and geopolitical environment mean that screening rules are being applied against investors from any third country, not just those from jurisdictions perceived to be particularly ‘risky’, and including domestic acquisitions in some cases;



Countries that have recently strengthened, or are considering new, measures on foreign investment

- the range of industry sectors affected is growing. On the target side, public interest or foreign investment screening increasingly targets deals that are outside the 'obvious' national security and defence sectors. The list of critical sectors in many jurisdictions can be extensive, although the detailed nature of the products and services covered may not be clearly defined. This can make predicting whether and where a target may provoke scrutiny difficult for acquisitive companies, particularly in the early planning stages, without full access to the target's business people;
- a wider range of transactions is triggering interest. Public interest and foreign investment regimes will often have lower thresholds than 'traditional' merger control (seen in the recent UK changes, which catch acquisitions of targets in particular sectors with more than £1m of turnover, compared to £70m for all other sectors) or have no thresholds at all (as in Germany or the US, where there is no minimum turnover requirement). They also often capture minority shareholdings (eg under its existing authority the Committee on Foreign Investment in the United States (CFIUS) has reviewed acquisitions of as low as 10 per cent of shares,¹ and pursuant to recently enacted reforms could review an investment of almost any size in certain critical or sensitive businesses);
- we are seeing authorities learn from each other across jurisdictions and cross-fertilise ideas in order to expand the scope of their own regimes. For instance, we have seen authorities look to the experience of their counterparts in other jurisdictions in expanding the lists of technologies considered to be sensitive.

Similarly, the proposed UK reforms would allow the government to intervene in an acquisition of assets that might pose a risk to national security purely through their proximity to sensitive sites (a concept that is already applied in the US, as seen in CFIUS' intervention in Ralls Corporation's acquisition of a wind farm project near to a Department of Defense site); and

- overall, the trend is for governments to be more willing to intervene, backed by a rise in protectionist sentiment and perceived risks to national security or the public interest around the globe. Although the core rationale for most controls is national security, in practice the scope of what constitutes a threat to that security appears to be increasing.

The impact of these trends is clear. On our own major M&A mandates, we have seen a more than 30 per cent increase in deals affected by public interest or foreign investment considerations in recent years. In addition, whereas companies are generally well versed in merger control processes, public interest or foreign investment reviews bring new challenges for acquirers and targets alike, including the following.

- **Timing delays** caused by a combination of understaffed agencies and more in-depth investigations. This can be a gating issue for transactions with no antitrust issues, particularly given the longer timescales (and, in some cases, lack of formal time limits) applicable to public interest or foreign investment reviews.



Protectionism seems to be a trend worldwide. Governments strengthen their screening powers to protect sensitive assets and businesses. This results in a step change in the number of deals being impacted by foreign investment control considerations. These risks must be handled right from the outset – even more so as the underlying concepts of national security and public order are ever evolving and not agnostic to policy considerations.

Juliane Hilf

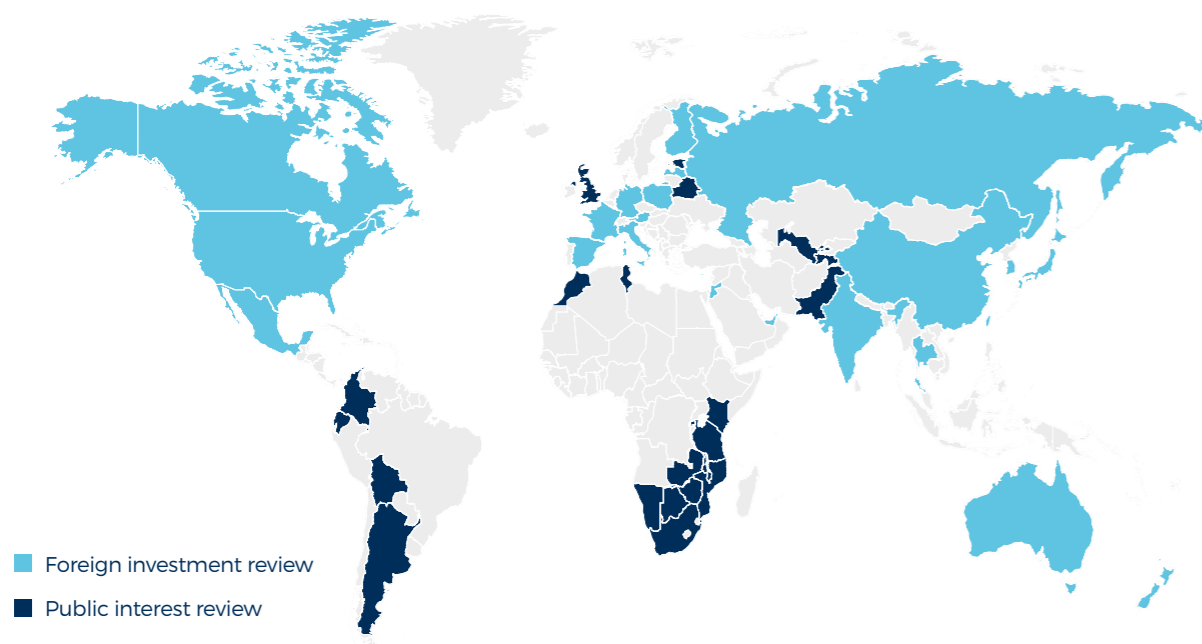
¹ CFIUS reviewed the proposed 10 per cent joint investment by NavInfo, Tencent Holdings and GIC Pte proposed in HERE International. The investment ultimately was abandoned in response to CFIUS opposition.

- **Deal execution risk** is growing for all types of businesses and investors, and there is a greater need for parties to be protected against the unpredictability that is particularly acute where public interest or foreign investment issues arise. Many regimes are voluntary, but the possibility of calling in a transaction for review after closing (for example, up to five years in Germany and indefinitely in the US) raises the prospect of continued uncertainty even after completion and therefore incentivises parties to notify.
- **Extensive disclosure requirements** mean that companies can expect detailed questions on the target's activities and the buyer's chain of ownership and future intentions for the target, taking up significant management time and requiring substantial co-operation from the target business.
- **More public scrutiny**, especially where the target is a household name or an important local employer, means that a co-ordinated public affairs and communications strategy is vital.
- **Increased risk of regulators talking to each other** on transatlantic cases in the manner of what we have seen in antitrust review in the past decade but with even less procedural transparency (perhaps the most notable example being Fujian's proposed acquisition of Aixtron where the German government withdrew its clearance, reportedly after a tip-off from US intelligence services²).

We would like to thank contributors from Bowmans, Clayton Utz and Brunswick Group for their enthusiastic assistance with this publication, and in particular our colleague Olivia Hagger for leading this project.

If you are interested in learning more about any of the issues covered, please get in touch via your usual contacts or those in our public interest and foreign investment group.

At least 108 jurisdictions now have investment laws



² <https://global.handelsblatt.com/companies/berlin-faces-spat-over-blocked-chinese-takeover-633473>.



At the moment, when compared to antitrust review processes, foreign investment and public interest reviews are far less predictable, even if remedies can be devised. They are also often less transparent and can provoke communications challenges. Thorough planning is needed to maximise the chances of navigating a way through.

John Davies



As governments continue to learn from each other and co-ordinate more in relation to national security and other related risks, it is becoming increasingly important for investors to take a globally co-ordinated approach to their strategy on foreign investment controls in their cross-border deal-making.

Alastair Mordaunt

Global themes

1. National security and defence	11
2. Innovation, R&D and critical technologies	17
3. Protection and creation of employment	23
Public interest and foreign investment controls in the G20	28
4. Critical infrastructure and natural resources	31
5. Structuring deals to negotiate uncertainty	37
6. Reciprocity and trade	43
7. Engaging with all stakeholders	49
Conclusion	52

1.

National security and defence

Even countries that generally have free and open trade policies scrutinise the potential impact of foreign investments on national security, using frameworks separate from those used to evaluate the economic impact of such deals. For example, the US enacted legislation in 1988 – the so-called Exon–Florio Amendment – that enables foreign investments to be reviewed and blocked if they threaten to impair national security,³ while the EU permits investments to be limited on public security grounds even by other member states.⁴ National security, though, is in the eye of the beholder, and applicable legislation tends not to draw bright lines around what constitutes a national security threat. This flexibility may be considered critical to protecting national security as it provides regulators the agility to address a changing threat environment. But the lack of certainty is also criticised for permitting an unbridled and opaque expansion of what can or should constitute a national security threat.

Flexible US approach

US national security review legislation does not define national security, but rather includes a non-exhaustive list of factors to be considered by the relevant regulatory agencies that conduct the review. The original list focused on defence requirements and the protection of defence products and technologies. Over time the list of factors has grown both by legislative changes and as a matter of policy.⁵

For example, following 9/11, the national security impact of foreign investment in critical infrastructure and critical technology was added

as a factor to be considered by CFIUS. Initially in 2003, the US Department of Homeland Security – the agency responsible for protecting critical infrastructure – was added as one of the agencies designated to review foreign investment. Critical infrastructure and critical technology explicitly were added as national security factors through legislation adopted in 2007 following the proposed acquisition by Dubai Ports World of P&O, the US portion of which failed to obtain CFIUS approval.⁶

More recently the US has used its national security review regime to address concerns related to the acquisition by foreign persons of large, sensitive data sets regarding US persons,⁷ and of businesses located near to sensitive defence facilities.⁸ CFIUS had signalled its developing concerns in these areas by listing them among the considered national security factors in annual reports. The reformed legislation now explicitly authorises CFIUS to review (i) investment of nearly any level in US businesses involved in sensitive data sets; and (ii) acquisitions of undeveloped real estate located near sensitive defence facilities.⁹ It also enables CFIUS to review investment of nearly any level in ‘emergent and foundational technology’. This to-be-defined category is reportedly meant to focus going forward on national security factors arising from acquisitions involving, among others, artificial intelligence, robotics and biotechnology. More broadly, in the Broadcom/Qualcomm transaction, the US president acted to block the deal to ensure Qualcomm’s leadership in 5G technology, which was viewed as essential to US national security (see Chapter 2).¹⁰

³ 50 USC § 4565.

⁴ For example, in November 2017 the Italian government used its ‘golden power’ rules to block the acquisition by Altran Italia, an Italian subsidiary of a French company, of Next AST, an Italian engineering services company. Next AST provided software to Italian defence contractors.

⁵ For example, CFIUS, the US government agency responsible for conducting the national security review of foreign investment, includes in its annual report a general list of the national security factors raised by transactions reviewed during the year. Disclosure of a new factor on this list often signals a growing area of concern.

⁶ See Foreign Investment and National Security Act of 2007.

⁷ For example, China’s Ant Financial abandoned its proposed acquisition of MoneyGram International after failing to receive CFIUS clearance reportedly over security concerns related to personal data. See www.sec.gov/Archives/edgar/data/1273931/000119312518000668/d517771d8k.htm.

⁸ See Order Signed by the President regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, dated 28 September 2012, available at <https://obamawhitehouse.archives.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

⁹ See Foreign Investment Risk Review Modernization Act of 2018.

¹⁰ See Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, dated 12 March 2018, available at www.whitehouse.gov/presidential-actions/presidential-order-regarding-proposed-takeover-qualcomm-incorporated-broadcom-limited/.

National security screens around the world

Other jurisdictions also apply national security screens, many of which continue to evolve. Canada, which had long applied a net benefit test to foreign investment, introduced a separate national security review regime in 2009. In 2016, the Canadian government issued guidance on the factors it considers under that regime, including a focus on defence capabilities, production of defence goods and protection of critical infrastructure.¹¹ The Canadian list already anticipates the current US legislative focus on outbound transfers of sensitive technology and know-how, but also includes a focus on the supply of 'critical goods and services' to the Government of Canada or to Canadian citizens.

France, Germany and Russia similarly have foreign investment screens based on national security and defence rather than economic considerations. The French regime reviews foreign investment in certain strategic sectors on national interest grounds. Many of these sectors have analogues in the US and Canadian frameworks, including consideration of

export-controlled products and defence industry suppliers. The list of sectors was extended in 2014, while in February 2018 the French government announced its intention to further extend the list to cover artificial intelligence, space, data storage, semiconductors and financial infrastructure. The German sector-specific review regime protects essential security interests and reviews investments in companies engaged in particularly sensitive areas of war weapons, engines or gears to drive military vehicles, IT security related to classified information, certain satellite data and other key defence technologies. Since July 2017, Germany has provided a non-exhaustive list of sectors, acquisitions in which may present a 'danger to public order or security', which includes operators of critical infrastructure in specific industries such as energy and information technology, health and water.¹² These transactions are now also subject to a mandatory filing regime. Russia has a list of 'strategic activities' and reviews acquisitions of entities that conduct one or more of 46 regulated activities that range from defence to fishing.

The UK government recently strengthened its powers to intervene in transactions on grounds of national security and has proposed further significant reforms that will bring the UK's regime closer in line with other countries. In June 2018, changes to the UK's merger control and public interest regime came into force, which lowered the thresholds for government intervention in acquisitions of businesses active in three areas: (i) the development or production of items for military or military and civilian use ('dual use'); (ii) the design and maintenance of aspects of computing hardware; and (iii) the development and production of quantum technology. These 'short-term' reforms are, however, likely to be replaced by a new regime, which will significantly increase the UK government's screening powers over a broad range of transactions and sectors. Proposals published in a white paper in July 2018 provide for voluntary notification and extensive call-in powers for acquisitions of control or significant influence over any entities or assets that could raise national security concerns. Deals involving national infrastructure, advanced technology,

critical suppliers to government and emergency services, and the military and dual-use sectors are likely to be caught, but this is not an exhaustive list. The UK government has made clear that technological, economic and geopolitical changes mean that national security concerns could arise in an increasingly wide range of sectors and the new regime must be sufficiently flexible to deal with these new and challenging risks.

Finally, European Commission President Jean-Claude Juncker announced in September 2017 a proposal for a European regulation establishing a framework for screening foreign investments that raise 'security and public order' concerns,¹³ which would allow for an in-depth discussion between member states and the European Commission. Politically, there is a focus on foreign investment coming from entities controlled by a foreign government. The earliest the regulation could come into force is early 2019, although member states are pushing for a delayed implementation that may push its entry into force into late 2020.

'While Europe has taken a rather lenient approach to public interest and foreign investment in the past, we are now seeing increased scrutiny of such transactions and even, in some rare cases, prohibitions. Chinese investors face heightened risk, but investors from other regions, such as North America, may also be required to agree to burdensome mitigation measures. The sheer volume of reviews has not been matched by increases in resources for reviewing agencies, leading to lengthy review processes even in relatively straightforward cases.'

Frank Röhling

'Twelve out of 28 EU member states currently have national security review mechanisms in place, and the European Commission has been under pressure to harmonise these processes. The proposed EU framework will see an increased advisory role for the Commission – which will likely expand timelines for companies. The framework will also lead to member states exchanging information with each other on individual transactions, which may eventually lead to a more harmonised approach across Europe, and continued attention for screening in countries that don't have a mechanism themselves yet.'

Christiaan Smits

¹¹ Guidelines on the National Security Review of Investments, available at www.ic.gc.ca/eic/site/ica-lic.nsf/eng/1k81190.html.
¹² The Ninth Regulation Amending the Foreign Trade and Payments Regulation entered into force on 18 July 2017.

¹³ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union dated 13 September 2017.

CASE STUDIES

How can buyers deal with national security concerns?

These variations notwithstanding, it is clear that national security review regimes should not be construed to be narrowly focused on defence contractors. A buyer may not easily be able to identify at the early stages of a transaction whether a target's business implicates national security considerations, and whether national security review regimes may apply. In the case of a direct supplier to the defence industry, the implications may be apparent, but the dual uses of a particular technology might not. Further, indirect suppliers (tier 2 or 3 suppliers and those further down the supply chain) are typically difficult to identify but may raise analogous security concerns. Conducting due diligence on a counsel-to-counsel basis is typically the most effective way to evaluate the national security considerations. Particular difficulties arise if the target's information on defence-related projects is classified and may not even be known to in-house counsel. In such cases, issues may arise quite late in the process.

If a data room exercise is the only option, it is important to think broadly about the potential national security profile of the target business. Given that national security analysis is a two-way analysis, it is also important for a target to diligence the ownership and control structure of the buyer.

If national security concerns arise, parties need to consider how they might be addressed. Similar to the merger control context, divestiture of a particularly sensitive business is an option that has been used successfully in a number of cases.¹⁴ Sometimes, less drastic measures may be sufficient. CFIUS includes in its annual report a summary of the types of mitigation measures it adopted in a particular year – examples include requiring firewalls or other security measures or making supply commitments. In Germany, typically, behavioural remedies laid down in so-called security agreements between Germany, the investors and the target are the method of choice to resolve concerns about potential threats to public order or security.

'The line between protecting national security and establishing industrial policy is increasingly blurred as the concept of national security evolves and expands in light of technological and geopolitical changes. In this rapidly changing environment, there are no excluded sectors and investors will need to quickly identify potential issues through targeted due diligence and stakeholder engagement much earlier in the process.'

Shawn Cooley

¹⁴ For example, in December 2016 Kuka AG (Kuka) sold its aerospace division, Kuka Systems Aerospace North America, in connection with CFIUS' review of China-based Midea Group's proposed acquisition of Kuka.

Canyon Bridge/Lattice: US semiconductor prowess threatened

The deal Proposed acquisition by Canyon Bridge Fund I, a Chinese-backed private equity fund, of Lattice Semiconductor Corporation, a publicly traded US company that manufactures programmable logic devices (ie general purpose semiconductors that end users can program to provide functionality similar to microchips). The deal was valued at approximately \$1.3bn and was announced on 3 November 2016.

The issue CFIUS was concerned about Chinese investment in the semiconductor industry. The US Department of Defense (DoD), a CFIUS member agency, in particular viewed the semiconductor industry as one in which it was important to maintain a technological edge and leadership position vis-à-vis China for national security reasons.

The outcome President Trump issued an executive order blocking the transaction on 13 September 2017.

Points to note The Canyon Bridge deal was one of a number of proposed acquisitions of semiconductor companies by Chinese acquirers between 2015 and 2017 following a Chinese government policy announcement in 2015 that China should enhance (among other things) its semiconductor capabilities. As noted above, the DoD in particular viewed Chinese advancement in the semiconductor space as a national security threat, and as a result, CFIUS opposed many of the proposed transactions. President Obama had issued an executive order blocking another semiconductor transaction – Fujian Grand Chip Investment Fund's proposed acquisition of Aixtron – on 2 December 2016, less than a year before the Canyon Bridge transaction was blocked.

BlackBerry/Secusmart: German government gets security guarantees

The deal In summer 2014, BlackBerry announced the acquisition of Secusmart, a German software encryption specialist.

The issue Secusmart provided to the German government encryption technology to protect devices (including mobile phones) of government officials. The German government feared that the takeover may enable the tapping of phone conversations and bugging of messages by other parties or intelligence agencies. With the encryption software, classified state information could be processed and was, thus, most likely licensed by the Federal IT Security Agency for this purpose. This made the whole transaction subject to a mandatory filing, and required approval by the German government in advance of closing.

The outcome In November 2014, the German government approved the transaction upon concluding a security agreement with BlackBerry. It was reported that the security agreement included certain control rights in favour of the German government, including access to the source code of Secusmart's software and certain 'no-spy' provisions that obliged BlackBerry not to disclose any information to foreign intelligence agencies.

Points to note Even small niche applications of the target's products can raise serious concerns of the government where there are possible security implications, and can hold up a deal considerably. Provisions in the security agreement, the method of choice to sort out concerns, may make it more difficult to run the target's business in the future or exit the investment a couple of years down the line.

2. Innovation, R&D and critical technologies

Digital disruption affects every industry. Technology has transformed sectors including telecoms, media and banking, while the fourth industrial revolution – the development of technologies such as software, robotics, 3D printing and data management – is set to revolutionise manufacturing. Deals involving the acquisition of automation and data technologies have increased as a result; China is leading the way, reflecting its desire to evolve to a tier-one manufacturing economy from its status as the world's largest low-cost, low-tech production hub. It announced in 2015 that it would spend \$1.3tn as part of its 'Made in China 2025' strategy, designed to foster domestic high-tech manufacturing.

In response, governments around the world have proposed a raft of public interest and foreign investment screening measures to protect high value, sensitive innovations and enable them to develop their own competitive base for advanced tech.

Moreover, although these issues are most acute for rapidly developing technologies, they also arise in R&D more generally, such as in the life sciences industries. With high values attached to intellectual property rights and patents, bids for such assets are being more closely scrutinised by governments that view them as essential to economic growth.

The political importance of such issues means that they do not only arise through formal processes. For instance, in Japan, where technology companies are considered particularly important for the economy, the Ministry of Economy, Trade and Industry (METI) has been known to bring pressure to promote Japanese solutions, over foreign bidders.¹⁵ It may, therefore, be necessary to make commitments outside formal public interest or foreign investment review processes, in order to appease governments or politicians.

US to extend screening of critical technology

CFIUS has always considered the national security impact from foreign investment in critical technology, but CFIUS' authority to review a transaction was limited to acquisitions of 'control' of a US business by a foreign person. Following the adoption of recent reforms, CFIUS will have the authority to review investment of nearly any level in a US business involved in critical technology.¹⁶ Furthermore, foreign government investment in such businesses will be subject to a mandatory notification requirement. Critical technology largely remains defined by reference to existing US export control laws. However, the US government will develop a new category of 'emergent and foundational technologies' (see Chapter 1) that will be subject to automatic licensing requirements, and foreign investment in companies involved in such technology will be closely scrutinised by CFIUS.

'Control over advanced technologies has become a key battleground for governments, who are increasingly expanding the scope of formal review processes to ensure that they can intervene in sensitive deals to the point, as has been the case in Italy, of blocking deals even of modest value given the wide discretion available.'

Gian Luca Zampa

¹⁵ METI can also, if needed, make use of foreign exchange and foreign trade laws to block foreign deals but would generally do so only where there is a link to national security.

¹⁶ In order to avoid CFIUS jurisdiction, investments would need the following restrictions: no access to non-public technical information; no access to financial data not available to other shareholders; no board or other advisory positions; and no substantive decision-making role for the investor.

The EU follows suit

Many European countries have followed suit, although proposals are careful to maintain the conventional link to national security and public order in order to protect advanced technologies. The European Commission's proposed EU-level screening framework (see Chapter 1 for details) intends to account for the effects of acquisitions on critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual-use applications, cyber security, space and nuclear technology, as well as their impact on access to sensitive information. The prospect of tech deals impacting the EU economy has led the European Commission to justify the proposals as a way of ensuring that foreign companies do not gain access to these strategic assets 'to the detriment of the EU's technological edge'. However, the final decision-making power will remain with member states. The French government announced plans in February 2018 to introduce expanded screening mechanisms that are already in line with the proposed EU approach. In particular, France is to broaden the scope of the French foreign investment regime, extending it to various digital sectors in which it has some significant players in the fields of artificial intelligence, semiconductors, space and data storage.

In Germany, the government has expanded its powers to block the takeover of German companies amid growing concerns about the scale of Chinese deal-making in the German high-tech sector. In 2016, Chinese companies announced or completed purchases of German firms collectively worth €11.3bn, including the acquisition of Kuka, a German robotics manufacturer, by Midea, a Chinese appliance-maker (see case studies in Chapters 5 and 7 for the legal and communications perspectives). The changes represent a shift in approach from the German government, which had never previously prohibited a foreign investment. In addition to a new notification obligation applying to foreign investments across a range of critical infrastructure sectors (energy, IT and telecommunications, transport, healthcare, water supply, nutrition, finance and insurance), the new measures also capture companies developing software for such infrastructure as well as investments in providers of cloud computing, public healthcare data processing and telecommunications surveillance measures.

The foreign push for access to technology has also been felt in Italy. In 2016, the Chinese-European private equity fund AGIC Capital acquired the Italian robot toolmaker Gimatic. A year later, the Italian government proposed to extend its foreign investment screening measures to cover takeovers by non-EU companies in high-tech sectors. Acquisitions may only be prohibited on grounds of national security or public order, but the types of tech deals captured for review are extensive: critical or sensitive infrastructure (eg storage and management of data or fintech infrastructure), artificial intelligence, robotics and security of procurement for critical high-tech inputs, to name a few.

In the UK, short-term reforms lowering the thresholds for government intervention in deals involving multipurpose computing hardware as well as quantum-based technology, including related IP or components, came into force in June 2018. The reforms followed a number of controversial investments in UK companies, including the acquisition of the chip designer Imagination Technologies by Chinese-backed Canyon Bridge (which was itself blocked by the Trump administration from acquiring a US chipmaker, see case study in Chapter 1) and the acquisition of technology firm ARM Holdings by Japan's SoftBank for £24bn. It is notable that the commitments made by SoftBank to reduce political tension were made outside the UK's merger control or public interest regimes, which were not triggered by the transaction.¹⁷ The short-term reforms are intended to 'address risks in vital, emerging technology industries'. The UK's proposed new regime for national security screening identifies certain advanced technologies as a core area where acquisitions may pose a national security risk.

'Protection of the local scientific landscape has become an area of particular concern for national authorities, who wish to maintain their leadership at the frontier of developments in dynamic sectors.'

Pascal Cuche

R&D remedies to address innovation investment concerns

The political focus on innovation and the importance of R&D can also be seen outside the tech industry. Commitments from investors required to secure deal approvals increasingly relate to R&D.

For example, France's foreign investment regulation expressly states that the Minister of Economy can require commitments in relation to maintaining R&D capacity and associated know-how. Those commitments can be broad and can include maintaining the ownership of patent applications and relationships with leading universities or laboratories. General Electric, as part of its acquisition of Alstom in 2014, had to commit to maintain and develop R&D in France by carrying on Alstom's existing programmes, developing new ones and 'taking an active role in local innovation ecosystems'.

In practice, merging companies in R&D-intensive industries must anticipate the need to give R&D commitments at an early stage. It may be helpful to plan early meetings with the relevant authorities to assess what commitments may be required and how long they may last, given that this is likely to have an impact on a buyer's synergy analysis. Any undertakings concerning R&D need to be serious, adequate and consistent in order to persuade authorities that there is no cause for concern.

- 1
- 2
- 3
- 4
- 5
- 6
- 7

¹⁷ SoftBank was the first bidder to make use of the UK Takeover Code's post-offer undertaking (POU) regime. SoftBank included three binding POUs in its cash offer for ARM, committing to (i) keep ARM's Cambridge-based headquarters; (ii) at least double the UK employee headcount of ARM within five years; and (iii) grow the number of non-UK based ARM employees.

CASE STUDIES

Broadcom/Qualcomm: US fears losing to China in 5G race

The deal In November 2017, Singapore-based Broadcom announced a bid to acquire rival US chipmaker Qualcomm, ultimately raising its offer to \$117bn. The deal would have been the largest ever tech merger to date.

The issue The combination of Qualcomm and Broadcom would have created the world's third-largest maker of microchips behind Intel and Samsung but raised political concerns in the US.

The outcome In March 2018, President Trump signed an order blocking the transaction. Unusually, CFIUS' otherwise confidential letter to the parties disclosing its reasoning was released publicly, enabling a glimpse into CFIUS' concerns. In the letter, CFIUS reports that 'a weakening of Qualcomm's position would leave an opening for China to expand its influence on the 5G standard-setting process' and that 'a shift to Chinese dominance in 5G would have substantial negative national security consequences for the

United States'.* Further details reveal that CFIUS was concerned that Broadcom would stunt Qualcomm's ability to innovate, citing Qualcomm's unmatched R&D and technological leadership in standard-setting. CFIUS alleged that Broadcom would undermine those strengths by leveraging Qualcomm with debt and changing its licensing practices.

Points to note The US government's decision demonstrates the weight given by CFIUS to the ability of US companies to maintain technological leadership. The concerns cited by CFIUS were not rooted in Broadcom (which at the time was in the process of re-domiciling to the US) being a foreign entity – a domestic private equity firm might equally leverage Qualcomm or change its licensing practices. Thus, the decision appeared to be motivated more by a desire to maintain critical technological leadership than a concern with respect to risks posed by foreign investment per se.

*Committee on Foreign Investment in the United States letter to Broadcom and Qualcomm, 5 March 2018.

Pfizer/AstraZeneca: fears over loss of national R&D expertise

The deal Pfizer, the US drug maker, launched a bid to acquire AstraZeneca, its UK rival, in 2014.

The issue Pfizer's announcement of a non-binding cash and share proposal to take over AstraZeneca immediately provoked sharp reactions in the UK and created a swell of concern that a foreign takeover could lead to the erosion of UK scientific innovation, given the significance of the deal.

The outcome Pfizer announced that it would make significant and tangible undertakings, including committing to establish the combined company's corporate and tax residence in England, complete construction of the planned AstraZeneca Cambridge campus, create a substantial R&D innovation hub in Cambridge and base key scientific leadership in the UK in

order to 'lead all European and certain global R&D functions'. However, the acquisition was ultimately abandoned after repeated bids by Pfizer were rejected by the AstraZeneca board. The proposed transaction also ran into fierce opposition from politicians in Britain, Sweden and the US over fears that it would have a negative impact on jobs and R&D.

Points to note The whole process played out outside any formal merger control or foreign investment framework (which would only have been relevant later), showing the significance of political pressure. Pfizer and AstraZeneca executives were required to appear in front of parliamentary committees to answer questions about the bid, while Pfizer's proposed commitments were made in a letter to the prime minister.



Companies making an acquisition in the tech space need to be aware of the prospect for parallel notifications in numerous jurisdictions – even when buying small assets as revenue thresholds may be low or non-existent – to allow sufficient time and to build appropriate safeguards into deal documentation.

Natasha Good

3. Protection and creation of employment

Many countries seek to protect and sometimes even create employment on the grounds of 'public interest' when investigating M&A. These considerations are often not restricted to foreign acquirers.

The blending of competition analysis with other industrial, trade and socio-economic considerations has been relatively common in some African and Asian jurisdictions for some time. However, in recent years we have also seen an uptick in these concerns being raised as part of transaction reviews in Western economies, including, for example, in France, Germany and the UK.¹⁸ For example, in the wake of Melrose's bid for British engineering company GKN in 2018, calls were made for Melrose to give additional assurances to maintain GKN's existing employment levels. The German government may in certain high-profile cases consider guarantees to maintain German sites or to keep a minimum number of employees on the company's payroll in its foreign investment review. Merging parties will therefore need to consider, and where possible pre-empt, employment-related concerns.

'It is particularly important for large cross-border deals that the deal timeline takes into account any employee engagement and consultation processes that may be necessary, as these can be critical to the successful implementation (as well as clearance) of a merger.'

Kathleen Healy

Identify any Africa nexus early on

In many African countries, where unemployment is often worryingly high,¹⁹ it is not uncommon to see competition authorities formally tasked with factoring in employment as part of their consideration of mergers, or being empowered to take steps to prevent job losses resulting from deals. Take for example Namibia, where the promotion of employment (along with the advancement of the social and economic welfare of Namibians) is a stated purpose of the Namibian Competition Act.²⁰ In considering a merger, the Namibian Competition Commission may base its determination on any criteria that it considers relevant, including the extent to which the proposed merger would be likely to affect employment.²¹

Likewise in South Africa, the competition authorities consider whether a merger can be justified on substantial public interest grounds by assessing a range of factors, including the effect that the merger will have on employment.²² Other sub-Saharan African countries that include similar employment provisions in their merger regulation regimes include Botswana, Zambia, Kenya and Tanzania, as well as the Common Market for Eastern and Southern Africa (COMESA) Competition Commission.

Given the importance of employment concerns in mergers relating to Africa, parties should identify any Africa nexus early on, including any locally registered subsidiaries or other assets or production facilities 'on the ground', to leave sufficient time to provide the necessary assurances to the relevant authorities where appropriate.

¹⁸ In the US, employment considerations are not included in the merger control process (other than when evaluating the size of projected synergies), and job offers made to obtain US national security review clearance have failed. Legislation proposing that the US government subject foreign investment to net benefit screening, in addition to national security screening, has been introduced on multiple occasions in the US Congress but has not been enacted.

¹⁹ For example, in South Africa the official rate of unemployment is 27.7 per cent, while the expanded unemployment rate, which includes those who wanted to work but did not look for work, is 36.8 per cent. www.statssa.gov.za/?p=10658. A similar picture emerges in many other sub-Saharan African countries. <http://databank.worldbank.org/data/reports.aspx?source=jobs>.

²⁰ See section 2 of the Namibian Competition Act, 2003.

²¹ See section 47(2)(e) of the Namibian Competition Act, 2003.

²² See section 16 of the South African Competition Act, 1998.

How to mitigate deal risk in Continental Europe

The consideration of employment issues as part of the merger process is not limited to Africa. For example, in France and the Netherlands, in transactions involving companies with 50 or more full-time employees, buyers are required to consult with their works council before any decision to proceed with the transaction can be made. However, in contrast to the position in the African countries listed above, the works council's decision does not necessarily prevent a transaction going ahead. In Europe, the merging parties can proceed notwithstanding a negative opinion of the transaction from the works council.

That said, mandatory information and consultation processes with works councils in Europe can still cause uncertainty and delay because share purchase agreements cannot be signed until the works council process has been completed, something that can take several months. In certain situations, employees may have a pre-emption right to make an offer to acquire the target company. To achieve an acceptable level of deal certainty during this phase, buyers may want to negotiate a put option, including exclusivity and standstill arrangements, to cover the consultation period.

Post-offer undertakings in the UK

In the UK, recent changes have been introduced by the UK Takeover Panel that enhance the disclosure obligations of the parties in public M&A and provide a regulatory framework for any statements made by a party about their intentions or commitments to the workforce after the offer period. These changes are intended to address the lack of enforceability of commitments and assurances given by bidders in public takeovers in the UK. In particular, these changes were prompted by the political outcry over Kraft's perceived broken promise to keep Cadbury's Somerdale factory in south-west England open. Its closure resulted in 500 job losses.

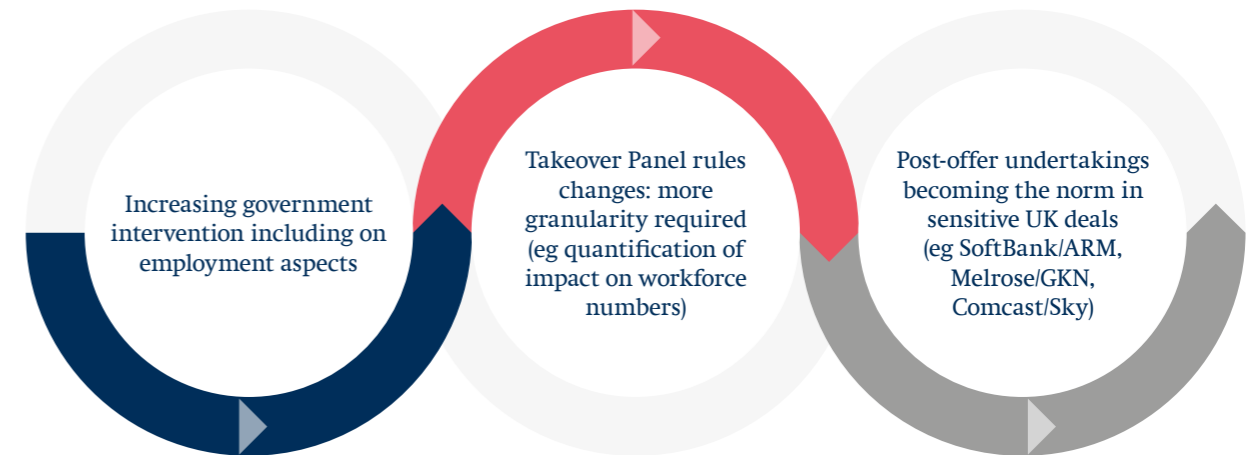
A bidder is now required to provide a more detailed statement of intentions and strategic plans with regard to the business, employees and pension schemes of the target and to provide that statement earlier on in the takeover process than was previously the case. Our recent experience is that the Takeover Panel expects this statement to have a high level of granularity – for example, if a cut in headcount is planned the statement should set out the numbers or percentage reduction envisaged.

Any statement of intention made by the bidder in relation to the target workforce constitutes a 'post-offer intention statement'. This must be an accurate assessment of the buyer's intention at the time it is made, must be made on reasonable grounds and is binding for 12 months following the end of the offer period. If the bidder decides to take a different course of action to that in the statement, it will need to consult with the Takeover Panel.

As well as making a post-offer intention statement, a bidder may decide to make a post-offer undertaking (POU) in relation to employee matters. POUs are legally binding for the period stated and buyers should treat them as absolute commitments. The Takeover Panel will insist on mandatory reporting and monitoring of compliance of any POUs by an independent supervisor. Given the strength of the commitment, POUs can be a very effective means of offering legally binding assurances relating to, for example, the target's employees and management and maintaining the target's headquarters and/or key sites of operation.

We are seeing a clear trend towards the inclusion of employment-related POUs on high-profile UK transactions – and those POUs are becoming increasingly precise in nature. Communicating a willingness to offer a POU at an early stage can improve overall chances of a successful outcome and will allow a buyer to gain maximum traction with relevant stakeholders.

Negotiating employment-related concerns



With such heightened focus on employment issues arising from transactions, businesses looking to engage in M&A activity should consider such issues up front, in particular when analysing deal synergies and valuation. For example, it is not uncommon for competition authorities in African jurisdictions to place a moratorium on any merger-related job losses for a period of up to five years following the implementation of a deal. Such a conditional approval of a merger can have a significant impact on planned cost synergies and buyers ought to factor this into their calculations.

Positively, from our experience in large cross-border M&A transactions, governments and competition authorities are increasingly receptive to creative solutions to potential employment issues and there are often a number of options available to merging parties to alleviate concerns, for example establishing local procurement funds, giving undertakings to maintain certain minimum headcount levels, or offering local investment commitments.

'Bidders offering POUs over post-offer intention statements may improve their chances of a successful outcome as firm undertakings – particularly in a post-Brexit world where many stakeholders in the UK have employment-related concerns – are increasingly desired.'

Piers Prichard Jones

CASE STUDY

AB InBev/SABMiller: job guarantees help win South Africa clearance

The deal AB InBev (the world’s largest beer company) announced in late 2015 that it would acquire its main global competitor, SABMiller (the second largest beer producer on a global scale). Despite the global position of the parties, AB InBev did not have local manufacturing operations and constituted a miniscule share of the South African market. Notwithstanding this, a range of concerns were raised by the Competition Commission and various interested parties. The large merger was approved by the Competition Tribunal subject to conditions on 30 June 2016. The Tribunal attributed the relative ease of the South African clearance process, in part, to the pragmatic approach adopted by AB InBev in voluntarily agreeing a ‘wide range of significant measures’.

The issue During the course of the Commission’s investigation, the merging parties concluded an agreement with three government departments, containing undertakings in respect of various public interest issues, including employment. These undertakings were incorporated (with some modification) in the draft conditions recommended by the Commission to the Tribunal. Under the conditions, the merging parties agreed not to retrench employees in South Africa as a result of the merger, in perpetuity.

The outcome Although the merging parties had been willing to agree to the moratorium in perpetuity, the Tribunal considered it improbable that merger-related retrenchments could practically occur indefinitely. Instead, the Tribunal reasoned that ‘merger-specificity is a function of time’. The Tribunal also raised issues with the proposed presumption that any retrenchment, at any time after the merger, was

merger specific unless the merged firm could prove otherwise. Furthermore, the Tribunal considered that an overbroad condition would burden the competition authorities with the arbitration of retrenchment disputes indefinitely. The Tribunal’s solution (in the interests of rationality and practicality) was to retain the presumption of merger-specificity (and onus on the merged entity to show otherwise) for a period of five years, and thereafter to apply a reverse onus on the employee to show merger-specificity. The Tribunal was notably reluctant to impose a time limit on the moratorium, given that this was a ‘concession’ already agreed to by the merging parties.

Points to note AB InBev successfully negotiated positive and (relatively) speedy outcomes before the competition authorities by being able to identify and proactively address the potential public interest issues arising from the transaction. The Tribunal was practically minded and sought to strike a balance in preserving the broad commitments made, but ensured that the condition could be enforced and monitored. Interestingly, the Tribunal was aware that the moratorium on merger-specific retrenchments was likely an easy concession, since there were no operational overlaps between the parties in South Africa. However, the merged firm’s employment commitments signalled its understanding of the government and competition authorities’ stance on the importance of preserving employment in South Africa.

This case study was kindly contributed by Shakti Wood and Simon Trisk, **Bowmans**.

CASE STUDY

EDEKA/Kaiser’s Tengelmann: jobs beat competition concerns

The deal The acquisition by EDEKA of Kaiser’s Tengelmann (both leading grocery store chains) was notified to the German merger control authority in October 2014 and blocked by the authority in March 2015. In March 2016 and following an application by the parties, the German Minister for Economic Affairs approved the transaction, overriding the merger control authority’s decision.

The issue EDEKA and Kaiser’s Tengelmann were among the largest grocery store chains in Germany. Given the substantial overlaps in the parties’ activities in a number of cities, the transaction was blocked on grounds of competition. The minister’s decision to approve the transaction was mainly on grounds of job security. EDEKA was the only bidder who offered to buy all the Kaiser’s Tengelmann stores; competing bidders were only interested in specific stores and the remaining stores would likely have been closed. The minister argued that prohibiting the sale would lead to the dismissal of a large number of Kaiser’s Tengelmann’s circa 16,000 employees.

The outcome The minister’s approval was appealed by a number of competing grocery chains, but the appeals were withdrawn following negotiations with EDEKA, rendering the minister’s decision final.

Points to note Under German law, the approval by the Minister for Economic Affairs of transactions that have been blocked by the competition authority is a rare exception. Overall, there have been fewer than a dozen approvals since the inception of the system in 1973. Approval can only be granted if the restraint of competition that the transaction generates is (i) outweighed by advantages to the economy as a whole; or (ii) if the transaction is justified by an overriding public interest. The minister considered job security for an elevated number of employees to be of public interest.

Interestingly, in a preliminary ruling, the competent court had, inter alia, considered that the minister’s deliberations regarding job security were potentially faulty and likely insufficient to justify approval, and it is unclear whether this decision would have withstood a formal court judgment.

‘The competition authorities are likely to require a definitive statement in relation to employment impacts – even in the case of large, global transactions. Whereas the parties could previously indicate that no local integration planning had yet been carried out in the context of a large, multijurisdictional transaction, they are increasingly requested to provide a firm statement on the question of merger-related job losses, before the transaction is cleared.’

Shakti Wood, Bowmans

- 1
- 2
- 3
- 4
- 5
- 6
- 7

Public interest and foreign investment controls in the G20*

Country	PI issues in merger control?	General FI regime?	Mandatory/voluntary	Suspensory?	Formal review period	Additional sector-specific FI restrictions?
Argentina	No	No	N/A	N/A	N/A	Yes eg media; rural land; border areas; air transport; satellites
Australia	No	Yes	Mandatory	Yes	30 calendar days, extendable by 90 (plus 10 calendar days to notify parties)	Yes eg banking; civil aviation; airports; shipping; media; telecoms; defence; agricultural land
Brazil	No	No	N/A	N/A	N/A	Yes eg nuclear energy; post; aviation; financial institutions; rural properties; media; insurance; aerospace
Canada	No	Yes	Mandatory	Yes	45 calendar days (extendable by 30 or longer as agreed) Up to 200 calendar days for national security reviews	Yes eg telecoms; broadcasting; financial services; transport; uranium mining; fishing; oil sands
China	Yes	Yes	Mandatory	Yes	Administrative approvals: 90 days unless the applicable sector approval regime has different requirements National security review: 30 business days (Phase 1) plus 60 business days (Phase 2) for national security reviews, unless extended	Yes eg automobile; banking; securities firms; life insurance; futures companies; medical institutions; education
EU	No	No	N/A	N/A	N/A	No
France	Yes (by ministerial intervention)	Yes	Mandatory	Yes	Two months (unless extended)	Yes eg air transport; electricity/gas transmission; radio/television
Germany	No	Yes	Voluntary (mandatory for critical infrastructure)	No	Two months (Phase 1) plus four months (Phase 2)	Yes Mandatory and suspensory regime (with different timelines) for eg certain defence-related sectors and satellite systems
India	No	Yes	Mandatory	Yes	10–12 weeks	Yes eg gambling; real estate; tobacco; atomic energy; railway operations

*As at September 2018.

◆ Although note that merger control review will be suspended until after foreign investment clearance is given, where relevant.

■ In July 2018, a revised version of the Competition Bill, 2018 was tabled before the South African parliament that proposes various amendments to the Competition Act, including a new section aimed at foreign investment.

▲ For establishing/extending the term of a liaison office and for the initial acquisition of a real property by a foreign capital company.

Country	PI issues in merger control?	General FI regime?	Mandatory/voluntary	Suspensory?	Formal review period	Additional sector-specific FI restrictions?
Indonesia	No	Yes	Mandatory	Yes	Five working days to obtain a business licence and five working days to obtain an operational licence (once all information satisfactorily submitted)	Yes eg banking, finance and insurance; energy and mineral resources; broadcasting
Italy	No	Yes	Mandatory	Suspension of certain voting and governance rights	15 working days (extendable by 10)	General FI regime only applies to certain sectors, eg national security and defence; energy; transport; telecoms
Japan	No	Yes	Mandatory	Yes	30 days (extendable to five months for national security concerns)	Yes eg broadcasting; radio; aviation; mining; telecoms; freight forwarding; shipping
Mexico	No	Yes	Mandatory	Yes	45 business days	–
Russia	No [◆]	Yes	Mandatory	Yes	Three and a half to six and a half months	Yes eg insurance; banking; aviation; media
Saudi Arabia	Yes	Yes	Mandatory	Yes	30 days	Negative list of sectors included in general FI regime
South Africa	Yes	No [■]	N/A	N/A	N/A	Yes eg broadcasting; telecoms; banking; insurance; defence; mining
South Korea	No	Yes	Mandatory	Yes	One to two business days for routine cases, or longer where special approval is needed due to national security concerns	Yes eg rice and barley farming; nuclear power materials; electric power; newspaper publishing; broadcasting; telecoms; education; financial services; defence
Turkey	No	Yes	Mandatory	Yes [▲]	15 business days for changes to liaison offices One to five months for acquisitions of real property	Yes eg mining; broadcasting; petroleum; aviation; electricity; railways; education, cabotage; banking; telecoms
UK	Yes (by ministerial intervention)	No	N/A	N/A	N/A	No
US	No	Yes	Voluntary (currently, but future mandatory regime for certain investments in progress)	No	45 calendar days (Phase 1) 45 calendar days (Phase 2) (standard with 15-calendar-day extension possible) 15 calendar days (presidential review)	Yes eg aviation; banking; communications and broadcast; energy; insurance; domestic shipping

4. Critical infrastructure and natural resources

Protecting access to critical resources is one of the cornerstones of civilization. Critical resources are a source of tension between nations, as demonstrated by the issues surrounding the supply of gas to Europe. From fresh water to fertile land, protecting particular resources has always been deemed vital to support progress and prosperity. Similarly, critical infrastructure sectors such as energy, financial services, water supply, transportation and telecommunications are considered essential to ensuring security and public order.

For these reasons, in many countries ownership of such resources and infrastructure was – and in some cases still is – entrusted to the state. Even in a privatised world, they have often been labelled ‘sensitive’ and made subject to ownership restrictions and foreign investment screening, and it is no surprise that they are once again in the spotlight given the recent resurgence of protectionism. These limitations are achieved via sector-specific regulations general foreign investment review regimes and even merger control laws.

Restrictions on critical infrastructure investment

Restrictions on the ownership of infrastructure deemed ‘critical’ have existed in many jurisdictions for some time. In the EU, for example, there have been rules in place since 2009 to ensure that the acquisition of gas and electricity networks by foreign nationals does not put the security of energy supply to a member state or the Union itself at risk.²³ In China, the construction and operation of nuclear power stations, electricity grids and gas networks must be in the form of a joint venture controlled by a Chinese party, and investment in air traffic control and postal companies is prohibited.

Many other countries also have sector-specific restrictions over foreign investment, such as in nuclear energy supply (including the US,²⁴ Brazil, India and South Korea), or air transport (eg Argentina, France and Japan).

Recently, concerns around foreign ownership of infrastructure have also spurred new controls and a tougher stance by agencies. Critical infrastructure is one of the key areas of focus of the European Commission’s recent proposals for harmonisation of foreign investment screenings.²⁵ The UK’s ongoing reform is focused on critical infrastructure and was prompted by the negotiation of the Hinkley Point C nuclear power project with EDF (owned by the French state) and Chinese co-investors (see case study). In Australia, following the controversy around the acquisition of Port Darwin by a Chinese company in 2015, the acquisition of electricity networks and certain generation assets has become more heavily scrutinised. In 2016, the Australian government blocked Hong Kong’s Cheung Kong Infrastructure and China’s State Grid from acquiring a 50.4 per cent stake in Ausgrid, a state-owned electricity distributor. A new Critical Infrastructure Centre (CIC) has recently been set up to identify Australia’s most critical infrastructure, conduct national security risk assessments, develop risk mitigation strategies and support government bodies such as the Foreign Investment Review Board (FIRB) in its decision-making. The CIC’s initial focus is on national security risks to five key sectors: electricity, gas, water, ports and telecommunications. In early 2018, the Australian government announced that all future applications for the sale of electricity transmission and distribution assets, and some generation assets, would be subject to ownership restrictions or conditions for foreign buyers. New laws have also been introduced requiring entities that are either direct interest holders or responsible for critical infrastructure assets to provide the Australian government with ownership, control

²³ Third Energy Package, Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas.

²⁴ In addition, the US more broadly considers the national security implications of foreign ownership of critical infrastructure, including energy infrastructure, transportation, financial systems and water.

²⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union (Article 4).

and operational information. In August 2018, it was reported that the Australian government had banned Huawei and ZTE from supplying equipment for planned 5G mobile networks over concerns that foreign interference could compromise the 'integrity and availability' of the 5G network.²⁶

Deals involving natural resources

Historically, resource-rich countries have also imposed controls over acquisitions involving natural resources, namely in the mining sector. In recent years, countries including China,²⁷ India and Brazil have relaxed their limitations on foreign investment in the mining sector in a bid to encourage development. However, a number of other countries still scrutinise closely or restrict foreign investment in natural resources, for example Australia (in relation to the acquisition of interests in land), Canada (uranium-producing mines), Myanmar, the Philippines and Thailand. Concerns were also raised about the acquisition of a platinum and palladium mining company by a South African buyer with substantial Chinese backers, but the deal was ultimately approved in April 2017.

Finally, with respect to the agriculture and food industries, the ownership of farmland by foreign nationals is restricted or subject to approval in many countries (including Australia, Brazil, Canada, China, India and Mexico).²⁸ In Australia, the acquisition of agricultural land is now the subject of tighter controls, with the treasurer requiring proof that the sale has been marketed widely to Australian bidders before approving a foreign investment. For example, the treasurer initially opposed the sale of S Kidman & Co²⁹ to a foreign purchaser and then ultimately approved its sale following a revised bid process that saw a majority Australian-owned consortium emerge

as the successful bidder. The US also seems poised to take a more restrictive stance. While China has generally relaxed its approach to inbound foreign investment in this area, transactions can still attract commitments around terms and conditions of supply. In the Agrium/PotashCorp deal, the Chinese regulator imposed a requirement on the parties to continue to export potash fertilisers to China on a reliable and competitive basis.

Mitigating deal concerns

The extent to which concerns relating to critical infrastructure or natural resources can be remedied depends on the country in question and whether it has hard legal restrictions or an approvals process in place. In the former, bilateral investment treaties may be a long-term option but are not in the hands of investors (see Chapter 7).

When it comes to government approvals, there are steps companies can take that increase their chances of a positive outcome and a quicker and smoother review process. Strategies that have been deployed in the past that are particularly relevant to these sectors include: assurances of continuity of supply; consultation prior to taking certain business decisions; ensuring that only national citizens occupy certain posts or handle certain information; allowing step-in rights for the government as a backstop in case continuity of supply is under threat; listing conditions for the selection of senior management; putting in place restrictions on the ability of the foreign shareholder to influence certain business decisions; setting up a Corporate Security Committee for monitoring and reporting purposes; and/or putting in place special rules when handling government contracts.

²⁶ www.minister.communications.gov.au/minister/mitch-fifield/news/government-provides-5g-security-guidance-australian-carriers.

²⁷ Restrictions in certain segments are still in place, namely for the exploration and exploitation of oil and natural gas (including coal-bed gas and excluding oil shale, oil sand and shale gas), graphite, tungsten, molybdenum, tin, stibium, fluorite and radioactive minerals.

²⁸ In the US, legislation has been introduced multiple times to include formally the Secretary of Agriculture on the multi-agency committee that reviews foreign investment on national security grounds in order to focus the review on food security issues. That proposal was not included in the reform legislation that ultimately was enacted in 2018. Nevertheless, large agricultural transactions regularly are submitted for review to CFIUS including ChemChina's acquisition of Syngenta, which received clearance. The US agriculture department and other related agencies, though, typically participate on an ad hoc basis in such reviews.

²⁹ S Kidman & Co is the largest private landholder in Australia and represents approximately 2.5 per cent of Australia's agricultural land.



Many countries have had rules restricting foreign ownership of infrastructure or natural resources in place for a number of years. With governments around the world poised to take an even more restrictive approach in this area, crafting a bespoke mitigation strategy to address these concerns is more important than ever to improve the chances of a successful outcome.

Michele Davis

CASE STUDY

ADM/GrainCorp: no to foreign ownership of agri-infrastructure

The deal The takeover of GrainCorp Limited (GrainCorp), Australia’s leading agribusiness in grain handling and processing, by Archer Daniels Midland Company (ADM), a US agricultural commodities trader, was valued at approximately \$2.3bn and was announced on 5 January 2013.

The issue The FIRB and the treasurer at the time, Joe Hockey, raised concerns that the acquisition would limit the access of growers to GrainCorp’s grain storage, logistics and distribution network, which included over 280 up-country storage sites and seven of the 10 grain port terminals. The treasurer also alluded to the fact that the deal would have a negative impact on competition as the sector had only recently been deregulated and GrainCorp was the incumbent. Politicians expressed concern that the deal could affect the country’s supply chain and capacity to grow export markets. This was a separate process to the formal competition review of the transaction that was undertaken by the Australian Competition and Consumer Commission, which cleared the acquisition.

The outcome ADM committed (i) to invest an extra A\$200m in infrastructure improvements focused on rail projects; (ii) to put in place price caps on handling charges; and (iii) to ensure ‘open access’ for port services. The transaction was prohibited by the treasurer on 29 November 2013 due to the threat to Australia’s national interests. The decision was criticised by some for being politically motivated.

Points to note The fact that the deal would have put control over Australia’s incumbent grain processor in foreign hands seems to have been the key factor for the decision to prohibit the transaction, and commentators have suggested that the final decision may have been influenced by election year politics. GrainCorp was effectively seen as the main gateway for grain producers to sell their product domestically and – critically in this case – abroad. ADM’s wide-reaching commitments were insufficient to persuade the treasurer. The main objection to the commitments seems to have been their complexity and the potential interference with free competition in this sector.

This case study was kindly contributed by Kirsten Webb, Rory Moriarty and Matthew Battersby, Clayton Utz.

‘Identifying and understanding early in the process the potential sensitivities of particular governments and regulators, their recent decision-making and approval history, and developing a strategy to manage the interaction between foreign investment review and merger control processes have become very important parts of the regulatory clearance strategy for transactions involving critical infrastructure.’

Kirsten Webb, Clayton Utz

CASE STUDY

Nuclear new build: UK’s ‘golden share’ relieves national security worries

The deal Hinkley Point C is a project to build the first nuclear power station in the UK for more than 20 years. Two state-owned companies will build and operate the power station: Électricité de France (EDF) (85 per cent owned by the French state), which will have a majority stake, and China General Nuclear Power (a Chinese state-owned enterprise) (CGN). The estimated construction costs for EDF and CGN have been put at over £20bn. As consideration for this investment, the British government entered into an agreement with EDF and CGN under which British electricity consumers are expected to have to pay £30bn over a 35-year period.

The issue In addition to delays, mounting costs to the UK taxpayer and state aid, concerns were also raised over the investment by French and Chinese state-controlled companies in a highly sensitive infrastructure project that will be critical to the UK’s future energy supply and that involves a high degree of operational and national security risk. Access to sensitive information about the UK’s energy supply was another concern voiced at the time the project was being discussed.

The outcome The UK government required EDF to agree to a ‘golden share’, which allows the government to have a veto right over the sale of EDF’s controlling stake in Hinkley Point during the construction phase (existing rules and the proposed new foreign investment framework would allow the UK government to intervene once the power station is operational). The agreement signed between EDF, CGN and the UK government also foresees step-in rights for the government in certain prescribed situations. Following a comprehensive review of the project, it was approved in September 2016.

Points to note Due to the financial and national security risks involved in the project, the Hinkley Point negotiations prompted the UK government to announce that it would also take a ‘golden share’ in all future nuclear projects to ensure that significant stakes cannot be sold to foreign investors without the government’s knowledge and consent. More importantly, the deal re-ignited the debate in the UK about foreign ownership of critical national infrastructure more generally. Until a new foreign investment regime for critical national infrastructure is in place, the UK government seems poised to bilaterally negotiate ‘golden shares’ and other conditions on a project-by-project basis.

‘Quite often, governments identify very specific concerns, which can be remedied by bilateral agreements with the government. Identifying and understanding the potential risks of a transaction is key to obtaining clearance and this can often be done during the early stages of a transaction.’

Heiner Braun

1
2
3
4
5
6
7

5. Structuring deals to negotiate uncertainty

Resolving possible public interest or foreign investment concerns need not only be a question of submitting remedies once a screening process has identified specific issues. Our experience shows that by considering deal structuring options early on in the M&A timeline, parties have been able to enhance their prospects of successfully negotiating the uncertainty of what may be a highly political process.

Pre-emptive disposals

Divesting problematic parts of the business can be the most straightforward way of resolving challenges. The advantage of divestments is that they can resolve entirely perceived issues without any need for ongoing monitoring or involvement by the authorities, although there is an obvious direct impact on deal value. If divestments appear necessary, and the relevant parts of the business are not critical to the deal, it can be more efficient for buyers to consider a pre-emptive disposal. Arranging the relevant disposal before, or as part of, any regulatory notification or filing may help to mitigate potential public interest or foreign investment concerns without waiting until the end of a protracted review process. This improves deal certainty and may enable a better price to be obtained for the divested business.

However, where the sensitive part of the business is core to the deal, divestments are not likely to be acceptable to the buyer. We have found that in these circumstances creative structuring options can help to limit opposition to a transaction from the outset.

Dual headquarters and dual listings

The location of a merged company's headquarters can be an area of focus for governments and regulators in significant cross-border M&A transactions (as was seen in the attempted merger between London Stock Exchange Group and Deutsche Börse). In terms of optics, governments will be interested in preserving a company's identity and heritage post-closing, and the location of headquarters is often linked to future plans for the workforce and innovation in that jurisdiction. Dual headquarters (especially in the context of a combination branded as a 'merger of equals') can be a helpful conciliatory gesture to governments in the parties' home jurisdictions to assuage concerns about loss of control of a national champion or businesses with sensitive know-how.

A merged company could also seek to list its shares on more than one stock exchange, using either a structure with one holding company or two that are united in a dual-headed structure. These approaches can broaden the investor base in strategically important jurisdictions and demonstrate commitment to the company's business in those countries. They also give comfort that the company has submitted to the oversight of local regulators. Alternatively, a dual-headed structure (or a 'virtual merger') may help to convince politicians that their 'national champions' will survive after a merger. However, a dual-headed structure has sometimes been blamed for corporate governance/structural inefficiencies, a point about which activist investors have been especially vocal recently (for example, see Elliott Advisors' pressure on BHP Billiton and the recent debate over Unilever's dual-headed structure).

'Deal certainty is of particular importance to companies considering cross-border transactions. Careful structuring can greatly increase the chances of success by diffusing political concerns in advance.'

Arend von Riegen

Reverse takeovers

A ‘reverse takeover’, whereby a listed company acquires a larger company, can be used to achieve a combination without changing the holding company of the listed company. It may also be a way to avoid having the transaction supervised by the local public M&A regulator (and thus particular commitments that might have been required from the larger party). This structure was recently used by French industrial group Schneider Electric and UK software developer AVEVA: AVEVA’s UK listing and headquarters were retained but majority control of the group shifted to Schneider (subject to a relationship agreement that protected AVEVA’s independence as a listed company). In other cases, this could provide the basis for a more appealing proposal to governments with concerns about the relocation of national champions or key industrial operations.

However, businesses considering reverse takeovers should be mindful of political sensitivity regarding so-called tax inversions. Clear and consistent messaging and PR strategies will be key (as with any M&A activity) to help ensure the transaction is favourably received.

Staggered shareholdings

Staggering the acquisition of the stake in the target can sometimes mitigate public interest concerns, where the deal is structured to increase or reduce the shareholding of the buyer dependent on its completion of investment undertakings made to governments or local regulators. This approach may appeal to buyers interested in acquiring sensitive assets where a government is unwilling to allow a complete takeover (either in the early stages of new ownership – or at all) and may go a long way to alleviating concerns about whether undertakings made during the offer process will be kept. For example, following the Greek debt crisis, Chinese shipping company COSCO purchased a controlling stake in Piraeus Port from the Greek government in a €280m privatisation deal. As part of the deal, COSCO promised to invest €300m in the port, and for public interest reasons was limited to acquiring a 51 per cent stake until the investment is complete. The acquisition was structured so that a conditional increase to 67 per cent will only be completed in 2021 if the promised investment programme has taken place.

Consortium structures

We often come across transactions that involve purchaser consortia composed of financial sponsors together with sovereign wealth funds controlled or funded by foreign governments. The structuring of these consortia and their internal governance arrangements may greatly influence the view that regulators would take of these consortia, and may also determine whether relevant control or filing thresholds are met. In addition, consortium arrangements can be structured such that they provide for tailored ‘Chinese wall’ arrangements whereby certain minority partners who may be viewed critically have restricted access to sensitive data or technology of the target business. These measures – either upfront or as a negotiated solution with regulators – may help address governmental concerns in the target company’s home jurisdiction or in critical export markets.



Parties facing political interest/foreign investment risks can put themselves in a much stronger position by using structuring and related techniques to optimise their chances of success. A clear and consistent narrative is required from the outset that portrays the deal in the best possible light for political and regulatory audiences. Nonetheless we are also seeing parties focus more and more on downside protections if their deal can’t successfully complete.

Bruce Embley

CASE STUDY

Midea/Kuka: the legal perspective

The deal In January 2017, Midea Group, a Chinese-listed home appliances company, acquired Kuka, a listed German robotics manufacturer, for €4.5bn.

The issue Kuka, Germany's biggest manufacturer of industrial robotics, develops robots used by German carmakers such as BMW and Audi. Midea's bid raised fears that Germany's 'Industry 4.0' strategy would be stalled by interest in domestic assets from China's manufacturing sector. Opposition from certain members of Kuka's management and supervisory board, as well as shareholders and politicians, could have prevented the deal from completing. Kuka also had a US subsidiary engaged in highly sensitive US defence-related activities, which was International Traffic in Arms Regulations (ITAR) registered. Pursuant to an embargo imposed on China by the US, there is a prohibition on Chinese ownership of ITAR-registered companies.

The outcome Midea initially followed a stakebuilding strategy to build up its ownership in Kuka. This highly regulated approach kept the tender offer price down and offered an opportunity to test the target, market and internal reaction to the transaction.

This led to the negotiation of an investment agreement with commitments to keep the company's management and financing independent, maintain Kuka's headquarters and employee base in Germany, and not delist the business. Further, the parties agreed to divest pre-emptively Kuka's ITAR-registered US subsidiary as a condition to settlement of the tender offer. Midea also committed to allowing Kuka to continue to operate independently, and to helping the business expand into Chinese markets. The deal received approval from shareholders and regulators, including clearance from CFIUS, in part due to the pre-emptive divestment of Kuka's US subsidiary.

Points to note By understanding the regulatory landscape and likely roadblocks prior to commencing negotiations, Midea and Kuka were able to take a proactive approach to the merger process and allow the deal to proceed with the minimum of regulatory intervention. As a result of the transaction, Midea obtained access to cutting-edge robotics, Kuka's shareholders obtained a significant premium on their shares, and Kuka itself remained independent and obtained access to Chinese markets.



With the increase in Chinese outbound investment in critical sectors, deals may trigger foreign investment processes in numerous jurisdictions. This needs to be considered as a day one issue to ensure that the commercial rationale for the transaction is clearly understood and the structuring and execution processes are aligned to deliver a successful result.

Richard Perks

6. Reciprocity and trade

In addition to the inward-looking public interest and foreign investment concerns covered in previous sections, some foreign investment regimes are also influenced by outward-looking considerations of fairness and reciprocity. This is hardly a new idea in other fields of policy. It is well established for governments and policymakers to use these principles to encourage other countries to open their markets, as well as to justify domestic policies on inbound trade and investments. These are the foundations upon which free trade agreements and investment treaties are negotiated.

However, record levels of Chinese outbound investment and the rise of nationalist politics have recently renewed the debate around reciprocity in the context of foreign investment regulation. Business communities and politicians have called for tougher screening of foreign capital when home investors face substantial barriers abroad. The concept also seems to have popular support: in a survey of American and Chinese adults, it was found that respondents were consistently more likely to oppose foreign acquisitions when the foreign firm's home country did not provide reciprocal market access.³⁰

How the debate has played out in practice

In the EU, the reciprocity debate was part of the impetus behind current proposals to create EU-wide rules on foreign investment screening. While Chinese state-funded acquisitions of key European assets have surged in recent years, European companies are blocked from receiving similar subsidies from their domestic governments under strict state aid rules.

Following joint calls by Germany, France and Italy for foreign investment based on reciprocity of investment conditions, the issue has featured in discussions around foreign investment regulation within EU institutions and by European business groups.³¹ The notion of reciprocity also played a role in the discussions when Germany tightened its foreign investment regime in July 2017. Even though reciprocity is not specifically part of the legislative text, European Commission officials have frequently alluded to the lack of progress on trade talks with China as a reason for adopting the proposals for EU-wide screening. The European Parliament debated the issue openly and now wants the proposals explicitly to take into account the characteristics of the investor's home country, including whether they have an open market and whether a level playing field exists.

On the other side of the Atlantic, foreign investment rules have been limited to safeguarding national security. Nonetheless, the Trump administration is revamping its foreign trade policy to enforce a level playing field for cross-border trade and investment. The US government has announced various unilateral tactics to respond to what it perceives to be unfair trade practices by others. This has spanned innovative tech industries to more traditional sectors like steel and aluminium.

A case in point: in response to alleged unfair Chinese trade practices, including theft of technology and intellectual property, the White House ordered new investment restrictions to address concerns around Chinese investments in the US and declared that imposing tariffs to combat the effects of global oversupply of steel and aluminium was necessary to protect its national security interests.³²

³⁰ Chilton, A S, Milner, H V, and Tingley, D (2017), 'Reciprocity and Public Opposition to Foreign Direct Investment', *British Journal of Political Science*, pp 1–25.

³¹ *China Manufacturing 2025: Putting Industrial Policy Ahead of Market Forces*, 7 March 2017, European Union Chamber of Commerce in China.

³² Statement from the White House released on 8 March 2018, available at www.whitehouse.gov/briefings-statements/need-know-section-232-investigations-tariffs/.

The current state of reciprocity

Whether or not the measures that have so far been proposed by the US are suitable responses, concerns around lack of reciprocity are not entirely unfounded.

For example, limitations on foreign investment in the US only exist in a small number of sectors, including aviation, banking, communications and broadcast, energy, insurance and domestic shipping. In the EU, member states are restricted in their ability to hamper foreign investment but for a few narrowly defined exceptions under EU law, meaning that formal limits generally relate to certain regulated sectors and specific companies in which the relevant government retains historic ‘golden shares’.

On the other hand, there are still many countries in Asia and the Middle East that have not undergone economic liberalisation. Here, a foreign investor can still find onerous ownership restrictions in a wide range of sectors. Although most of these countries tend to be smaller, developing economies that play a less significant

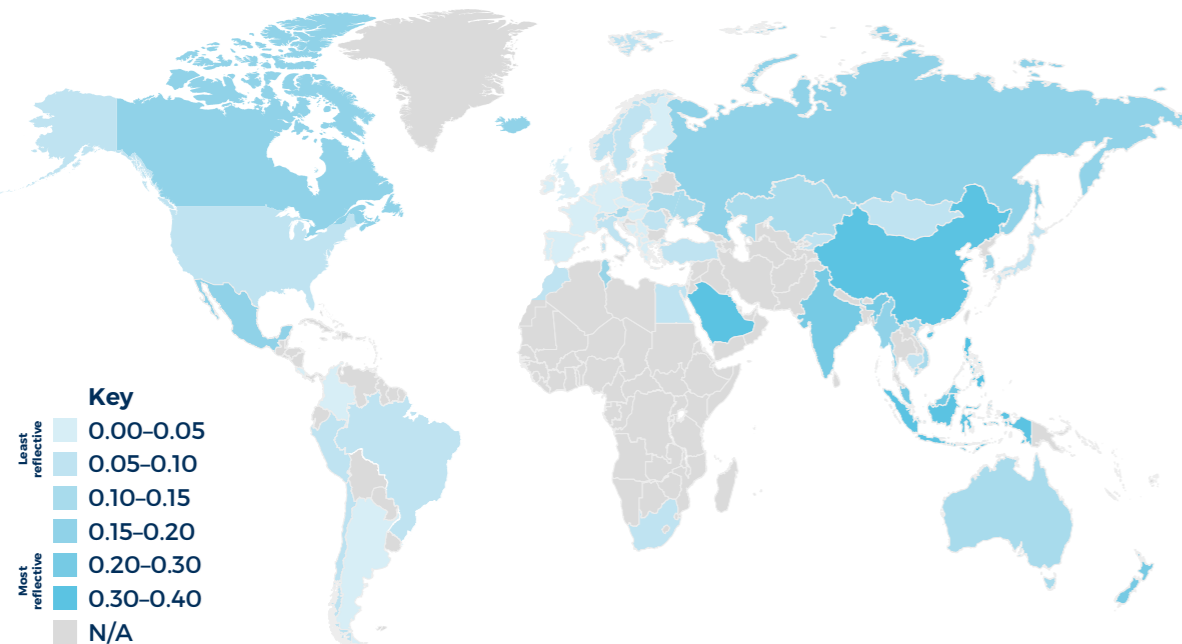
role in cross-border foreign direct investment (FDI) flows, there is one discernible exception: China. As the second largest international investor after the US, it maintains a list of some 48 sectors in which foreign investment is restricted or prohibited. Foreign investment in these sectors can be subject to ownership caps or joint venture requirements, and inbound investors must often comply with onerous rules around technology licensing and data access. It is worth noting, however, that the number of sectors on the so-called ‘negative list’ is shrinking (it was recently reduced from 63 to 48). Various measures have been adopted in the past few years to liberalise China’s foreign investment environment, reducing ownership restrictions and easing administrative burdens for foreign investors. It remains to be seen whether protectionist trends elsewhere (and an emerging trade war) will cast a shadow on China’s commitment to improve its investment environment for foreign investors. We are already seeing spillover effects of the US–China trade spat in the form of delayed foreign deal approvals from Chinese regulators.

Where does this leave us?

Although reciprocal market access is negotiated at the state level and, therefore, inherently not deal-specific, there are various steps a company can take to capitalise on the current state of affairs.

- **Identify opportunities and pitfalls in trade developments**
As trade and investment often go hand in hand, changes to attitudes around trade often have a knock-on effect on foreign investment in particular sectors. Keeping pace with trade negotiations and broader geopolitical trends can help businesses more accurately predict political headwinds in cross-border deal-making. For example, recent US proposals to restrict trade and foreign investment have provisions to exempt ‘friendly’ countries, which is good news for some. As an acquirer, having a precise grasp on current affairs means better risk assessments, while for a potential target, this could represent an additional bargaining chip.
- **Structuring around investment treaties**
Investment treaties have commonly protected foreign investors from expropriation by governments seeking direct control over key or strategic industries and other adverse state measures. We have seen increasing numbers of investors seeking to take advantage of international investment treaties by adapting ownership structures to benefit from their substantive protections, as well as to gain access to international recourse against states in the event that they breach those protections. The prospect of a dispute between a government and an overseas business in an international arbitral proceeding based on a foreign investment treaty may act as a deterrent to public interest intervention in some cases.
- **Engage and influence policymakers**
Whether in the context of a specific transaction or the negotiation of trade deals/investment treaties, engagement can help ensure that your company and sector are taken into account. Understanding how reciprocity and fairness are used to set economic policies will help your argument carry more weight with key decision makers. Where possible, ongoing engagement with governments and the appropriate use of government affairs advisers can nurture a positive relationship, and in those crucial moments help tip the balance in your favour.

FDI regulatory restrictiveness per country, 2017



Source: OECD FDI Regulatory Restrictiveness Index database (<https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX#>).

‘Shifting trade alliances can present huge opportunities for businesses that are attuned to these developments and are nimble enough to take advantage of them.’

Hazel Yin

1
2
3
4
5
6
7

CASE STUDY

Qualcomm/NXP: antitrust and geopolitics intervene

The deal The proposed \$44bn acquisition of chipmaker NXP Semiconductors (NXP) by Qualcomm was set to be the largest semiconductor deal in history. First announced in October 2016, the deal had received eight of nine regulatory approvals by January 2018, with China left as the final regulatory hurdle.

The issue Between the months of March and July 2018, the Trump administration announced tariffs on \$50bn of Chinese goods – many in the tech sector – and threatened further tariffs of \$200bn more. It also temporarily banned US component makers from selling parts to Chinese handset company ZTE for the latter's sanctions violations. Meanwhile, Qualcomm and NXP were engaging in extensive remedy negotiations with China's Ministry of Commerce (then responsible for reviewing mergers) to resolve the authority's competition concerns.

The outcome When the 25 July long stop date lapsed without a green light from China, Qualcomm abandoned the deal and paid a \$2bn termination fee to NXP. Although the deal was

never set for an easy regulatory process given the identified competition concerns, the decision to abandon the deal was based on the understanding that 'the current geopolitical environment' was unlikely to change in the near future according to the CEO of Qualcomm.

Points to note A spokesman for China's Ministry of Commerce said the absence of approval by the long stop date was an issue of antitrust enforcement and not related to the ongoing trade frictions between the two countries.^{*} Indeed the deal raised complex antitrust issues that resulted in in-depth investigations and the imposition of remedies elsewhere in the world. Besides, by the time Qualcomm abandoned the deal, the statutory review period in China had not lapsed. Nonetheless, given the timing and similar delays experienced by other global deals with a US nexus during this period,^{**} many commentators speculated that the merger review process was being used tactically by the Chinese government in response to the bilateral trade issues.

^{*}See transcript of MOFCOM press conference held on 26 July 2018 (Chinese language only), available at www.mofcom.gov.cn/article/ae/ah/diaacd/201807/20180702770500.shtml.

^{**}According to commentators, UTC's acquisition of Rockwell Collins (<http://ir.utc.com/static-files/8f825861-6e32-43c2-bd96-3bbf718e796a>) and Bain Capital's acquisition of Toshiba's memory chip business (www.ft.com/content/b51606a0-4851-11e8-8ee8-cae73aab7ccb) are just two high-profile transactions that appear to have suffered from the ongoing US-China trade spat. Although other US-related transactions have been cleared within a reasonable timeframe, those transactions tend to occur in non-sensitive or strategic sectors.



Trade reciprocity between the US and China is making big headlines, but efforts to use CFIUS to address perceived imbalances largely have failed for good reason. Voluntary and transaction-specific foreign investment reviews are not a particularly effective tool to implement industry-, or economy-, wide trade strategies. The US is instead turning to tariffs, using national security in some cases to justify them, and China is responding in kind. Until one side relents and actual progress can be made on substantive trade policies, expect the complaints about the lack of reciprocity and unfair trade practices to continue.

Christine Laciak

7. Engaging with all stakeholders

This chapter and case study were kindly contributed by Sir Jonathan Faull and Philippe Blanchard, Brunswick Group.

At a time when politics is becoming a factor in business to an extent not seen for decades, the case for careful, strategic communications in M&A is stronger than ever. This is especially the case in those transactions that involve foreign investment and topics of public interest such as employment, national security, and industries and technologies that governments deem strategic. Effective stakeholder engagement and communication strategies can facilitate smooth regulatory approval and can increase understanding of and support for the transaction among regulators, politicians, investors and the broader public.

Established procedures: public interest tests and foreign investment control

Amid heightened transaction scrutiny, many jurisdictions have established procedures that go beyond traditional competition merger review. As seen in the preceding chapters, increasingly, public interest tests are incorporated in reviews, while many authorities are equipped with powers to control foreign investments in their territories.

Transactions that need to pass these formal controls tend to prompt significant public, media and political scrutiny, and can be put at risk if stakeholders have incomplete or inaccurate information or feel their concerns have not been adequately addressed.

An example of the public scrutiny occasioned by such a transaction arose during AB InBev's acquisition of brewer SABMiller (see case study in Chapter 3). As SABMiller was seen by many as South Africa's national champion, the transaction triggered a public interest provision in competition legislation. The merging parties were required to present significant commitments to the South African government to allay public interest concerns. To this end, a broad engagement programme with government and political stakeholders was undertaken to solicit feedback and generate broad understanding of AB InBev's commitments. In combination with a willingness to engage proactively with media to explain the transaction's rationale and benefits, this led to positive feedback and endorsement being received from local stakeholders on its public interest package.

'We live in an era in which governments and businesses face the challenges of rapid change. Governmental activities have enormous consequences for the business world. Now, more than ever, they need to talk to each other and work together on ways to respond to the public's legitimate concerns.'

Sir Jonathan Faull, Brunswick Group

CASE STUDY

Midea/Kuka: the communications perspective

Outside established procedures: strategic investment control

However, a well-planned communications strategy is necessary even where these established procedures are not triggered, or have not yet commenced: public interest and foreign investment concerns may arise outside legally defined frameworks. In fact, it is not unusual to see a formal process triggered by public commentary on a transaction that can frequently be based on speculation, or misinterpreted or unconfirmed data. A strong communications plan is, therefore, key to engage effectively in these discussions and to allow competition clearance processes to proceed smoothly.

In the case of Midea's investment in Kuka (see case study), effective stakeholder engagement was crucial to the successful completion of the transaction. A number of German politicians were calling for the deal to be examined under Germany's Foreign Trade Law, which can prevent foreign takeovers of companies in critical industries. Opposing stakeholders campaigned in support of alternatives to the proposed transaction. In this context, strategic stakeholder outreach proved key in anticipating and responding to criticism. Direct engagement with relevant stakeholders allowed the company to better understand their positions and concerns, while constructive conversations with political leaders demonstrated the company's willingness to co-operate and work towards an appropriate solution for the concerns raised.

A complementary media engagement strategy allowed the company to underscore the rationale and benefits of the transaction. This fostered a better understanding among commentators based on accurate information, promoted a more thorough evaluation of the strategic rationale and reiterated the benefits of open market principles.

Overall, in cross-border M&A, it is crucial that a strong deal narrative should explain the transaction's rationale, convey its benefits and address the concerns of the different stakeholder groups in line with the legal strategy. It is important to be open and prepared to engage with relevant stakeholders and media in a way that will resonate with the relevant audiences or explain remedies such as divestments. At the same time, unco-ordinated or poorly prepared communications could result in an ill-informed debate around transactions, which in turn can compromise the smooth operation of relevant regulatory clearance procedures.

'The success of getting a deal through is no longer solely dependent on a strong legal case. In these challenging times of political uncertainty, businesses need to consider the political landscape around the transaction and engage with all relevant stakeholders at the right time and with the right tone. Creating a supportive stakeholder environment for the deal can do much to support the successful completion of a transaction.'

Philippe Blanchard, Brunswick Group

The deal In spring 2016, Midea Group, a Chinese-listed home appliances company, made a public tender offer to acquire Kuka, a listed German robotics manufacturer, for €4.5bn. The deal concluded successfully in January 2017.

The issue Midea's bid for Kuka sparked debate in Germany amid fears from some quarters that key technologies might be acquired by foreign institutions while China protects its own companies against foreign takeovers. The bid triggered initial scepticism by some stakeholders and opposition by certain shareholders and political leaders keen to preserve a 'national champion'. This resulted in calls to examine the deal under Germany's Foreign Trade Law review process as well as close examination by CFIUS.

The outcome A coherent communications programme was implemented in order to:

- organise and prepare meetings between Midea's management and the relevant political stakeholders to maintain a continuous open dialogue;
- better understand the positions and concerns of the relevant stakeholders, including politicians, shareholders, the media, industry leaders and advisers;
- consistently reiterate key messages about the deal's rationale and the benefits of the transaction with relevant stakeholders and correct inaccurate media coverage while communicating accurate facts;

- communicate openly and transparently to all stakeholders, educating the markets on Midea and its long-term objectives; and
- engage with third-party commentators and relevant media representatives, when appropriate, to reiterate key messages (eg via interviews).

Communications facilitated a better understanding of the benefits of the transaction and helped in generating a more thorough evaluation of the deal's strategic rationale. Industry leaders also began expressing favourable views in support of Midea as a partner, and over time, initial opponents of the deal became more supportive, accepting that Kuka's growth ambitions in China were more achievable under Midea's ownership.

Points to note A thorough communications strategy can and should complement the legal strategy from the early stages, especially when political debate is expected to have an impact on the dynamics of the transaction process. Identifying key issues and engaging with relevant stakeholders are important to generate understanding and endorsement. In addition, engagement with third parties, constructive conversations with targeted stakeholders, and maintaining a transparent approach to communications are critical to a successful transaction strategy.

1
2
3
4
5
6
7

Conclusion

Given the increased scrutiny over public interest and foreign investment, and some recent high-profile deals that failed to complete such as Broadcom's proposed takeover of Qualcomm, it may sometimes seem that large-scale cross-border deals are simply too risky in the current political climate. However, in our experience, possible public interest or foreign investment concerns are often not insurmountable. Provided that companies are aware of the issues in advance, a lot can be achieved with good deal planning and structuring.

Some key points to bear in mind are set out below:

1. Conduct a thorough public interest and foreign investment assessment early.

Merging parties should identify possible sensitive sectors early on, and establish whether notifications may be necessary or desirable. Formal notification requirements vary significantly across jurisdictions, and can be vague and cover a wide range of transactions, including acquisitions of minority shareholdings and joint ventures, so it is particularly important to establish whether, and where, a transaction may trigger a requirement to notify. Even if a formal filing is not required, it may still be prudent to engage with government authorities or other stakeholders to pre-empt any concerns. In some jurisdictions, authorities can call in transactions to review even after closing. Early assessment allows the parties sufficient time to plan an appropriate risk management strategy.

2. Engage constructively with other parties to the transaction.

Recommended bids remove the risk of a target using notification rules to obstruct takeover plans. Indeed, a consensual process can be particularly important for the buyer (as compared to 'traditional' merger control) given that more detailed due diligence can be necessary where public interest or foreign investment issues may arise. As mentioned above, the triggers for mandatory filings can often be vague, and a buyer may need extensive access to information about the target to establish whether a transaction falls within the scope of a particular regime. In particularly sensitive sectors, the target is likely already to have established relationships with the governmental authorities, and it will be valuable for the buyer to work with the target to present a united front to assuage any concerns.

Conversely, for a target company, it is important properly to perform diligence on potential bidders and the sources of their funding. Many foreign investment regimes do not ostensibly distinguish between different types of foreign investor (whether private investors, or state or government controlled, and where they are based), but in practice investors from particular jurisdictions or with particular structures may attract more scrutiny.

'Public interest and foreign investment issues are not just a matter of national security concerns, and can affect deals across the full spectrum of business sectors. These are issues that only look likely to become even more prevalent over the next few years, and companies will need to take them into account in deal planning as a matter of course.'

Jérôme Philippe

3. Consider deal structuring and remedies as part of planning.

Careful deal structuring may help to limit concerns and avoid complex or lengthy regulatory processes. Options include dual-listed companies, reverse takeovers or 'virtual mergers' created by contract only. Buyers may also be able to team up with more acceptable bidders in a consortium.

Where issues have been identified early on, it may be possible to carve out particularly sensitive parts of the business in advance. This approach can provide a clear-cut solution, which resolves all of the foreign investment concerns in one go. Although there may be advantages in waiting to offer divestments later in the process, in the hope that they will not, in fact, be needed, such a strategy carries the risk that a suitable buyer would not be found, or that more extensive remedies would end up being required.

Any structuring or remedy strategy relies on being able to predict the concerns that will be raised, which is not always feasible given the broad discretion available to authorities. However, taking a proactive approach can be particularly beneficial in a public interest or foreign investment context to limit political objections and negative media commentary, which can otherwise build up over time after announcement.

4. Plan the deal timetable carefully.

Public interest and foreign investment reviews can take significant time and can be hard to predict. Depending on the jurisdiction, statutory timelines can be extensive, but we have also found that some authorities are frequently stopping the clock or extending their reviews as they do not have sufficient resources to keep up with the volume of notifications received. Enough time, therefore, needs to be built into the SPA to ensure that all processes can be completed satisfactorily.

Timing also needs to be taken into account in engaging with stakeholders. Starting a political engagement strategy too early could obstruct deal momentum, but leaving it to later in the process might offend key stakeholders and allow objections to take root before the parties can present their positive case. The right balance will depend on the deal.

5. Employ a co-ordinated global strategy.

The complexity of a global transaction with public interest or foreign investment issues requires an integrated team of lawyers and governmental affairs and communications advisers across jurisdictions. It is vital to have a consistent deal narrative that can be used with politicians, media and regulators alike. Any remedies plan should also be approached on a global basis, as authorities in different countries may well keep each other apprised of developments, leading to the parties needing to make similar concessions in multiple jurisdictions. In our experience, taking a holistic approach can improve deal certainty and significantly speed up time to closing.



We hear from a lot of clients who have concerns over the potential for roadblocks in relation to their proposed deals. However, in our experience, getting the right advice early on, with a combined legal and communication strategy that addresses the issues head on, can make a significant difference.

Alan Wang



Freshfields Bruckhaus Deringer

275
— YEARS —

[freshfields.com](https://www.freshfields.com)

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the law of England and Wales) (the UK LLP) and the offices and associated entities of the UK LLP practising under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, and Freshfields Bruckhaus Deringer US LLP, together referred to in the material as 'Freshfields'. For regulatory information please refer to www.freshfields.com/support/legalnotice.

The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam. Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington DC.

This material is for general information only and is not intended to provide legal advice.