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Under the microscope

A guide to the current and proposed foreign investment regimes in the UK, Germany, EU, US and China

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Introduction

In recent years there has been a marked change in attitude towards foreign investment screening. A range of jurisdictions globally have taken steps to strengthen their ability to review and actively intervene in transactions. Most recently, the EU published proposed legislation for an EU-wide regime – a significant move away from its historically more relaxed approach to foreign investment.

In this comparative guide, we examine 15 key parameters of the current and proposed foreign investment regimes in the UK, Germany, EU, US and China. While there are differences in scope and application across these regimes, it is clear that there are a number of striking commonalities that indicate an increasingly protectionist and restrictive environment for foreign investment, including:

- capturing a very broad range of transactions – it is not just traditional M&A which is caught but a range of minority and other investments
- no (or minimal) financial thresholds apply – foreign investment screening covers deals of all sizes
- not just an issue for the defence sector – a wide range of sectors are targeted
- governments are provided with substantial powers to block or amend transactions
- not just talk – governments are actively using their powers and are intervening in transactions of all sizes

This suggests that, looking ahead, foreign investment screening is not only set to remain a common feature of deal-making, but is likely to expand significantly to cover an ever-increasing range of transactions of all sizes and across a range of sectors.

This guide provides companies and investors with an insight into: (i) which types of transaction could be subject to foreign investment screening; (ii) the impact that such processes can have and how long such reviews might take; (iii) what powers governments have to intervene; (iv) the sanctions which can be imposed for non-compliance; and (v) what rights of appeal, if any, exist.

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Overview

Global ramp up of foreign investment screening - key changes

Sweeping new regime for intervention proposed in the UK

In July 2018, the UK Government published proposals for sweeping changes to the way in which it scrutinises foreign investment. This proposed new regime would enable the UK Government to intervene in a much wider range of transactions, irrespective of the size of the deal or companies involved, where it has concerns that the transaction might give rise to national security concerns.

The scale of the changes is reflected in the number of deals impacted:

- in the last two years the UK has only formally reviewed two transactions on defence / national security grounds;
- the UK Government's proposals show that it is estimating that around 200 transactions per year would be reviewed under this proposed new regime; and
- the new UK regime would be more than three times the size of the UK's merger control regime (typically the UK investigates approximately 60 transactions per year).

Germany unleashes its foreign investment regime

Similarly, Germany strengthened its foreign investment regime in 2017 and in August 2018 the German Government intervened for the first time to block a foreign investment in a German mechanical engineering company. There have also been reports that the German Government is considering further lowering its threshold for intervention.

EU reaches agreement on a proposed new EU-wide regime

At an EU-level, there has historically been a more relaxed attitude to foreign investment with no EU-wide foreign investment regime. However, reflecting the changing approach of key Member States such as Germany and the UK, this has now radically changed.

In November 2018, the EU announced that it had reached political agreement on an EU-wide regime to screen foreign investment into the EU, and the proposed legislation was published in December 2018.

Decisions on foreign investment will remain with individual EU countries. However, the new regime will enable the European Commission to assess foreign investment which has an EU-wide impact. While the Commission's opinions will not be binding on individual EU countries they will likely carry significant weight. Significantly, the EU regime will also introduce minimum standards for foreign investment regimes introduced at the national level by individual EU Member States and will also put in place a mechanism for greater cooperation between EU Member States and the Commission.

US continues to lead the way with significant expansion of CFIUS regime

This focus on foreign investment review is not limited to the EU. Importantly, the US – where foreign investment screening through the CFIUS process has long been a feature of US-related M&A deals – significantly expanded its powers with reforms which were signed into law in August 2018.

Under the reforms, CFIUS will have the power to review a broader range of transactions, including a foreign person's purchase, lease or concession with respect to US real estate located at, or functioning as part of, an air or maritime port, or in close proximity to a US military installation or other government facility. At present, CFIUS can only review acquisitions of US businesses, and not properties without associated businesses.

The reforms also give CFIUS authority over the transfer of certain assets pursuant to bankruptcy proceedings or other defaults.

Perhaps most significantly, the reforms have the effect of making it mandatory for certain transactions to be notified to CFIUS, which represents a significant departure from what has always been a voluntary regime.

Analysis of foreign investment screening - common features across jurisdictions

Our analysis shows that, perhaps unsurprisingly, there are key elements of these new or enhanced regimes which are common across the UK, US, EU, Germany and China.

(a) Not just traditional M&A – regimes seek to capture a broad range of transactions

All of the regimes we have assessed have been created or broadened to capture a wide range of transactions. The clear intent of policy-makers is not just to capture traditional M&A acquisitions or joint ventures but also to cover acquisitions of (small) minority interests which, in some cases, may not even be caught by merger control, and in some cases acquisitions of land / other assets or acquisitions of a looser form of influence.

In the UK the current regime applies to acquisitions of material influence (which can apply to acquisitions of shareholdings of below 25%). In China the foreign investment regime can apply to acquisitions of any levels of shareholding, while, a centrepiece of the US expansion of the CFIUS regime is that CFIUS will be able to review any investment which is not passive in nature in a business that relates to critical infrastructure or critical technology, or which relates to sensitive personal data of US citizens. The definition of passive has been narrowly framed. Recent reports also indicate that the German government is looking to expand the regime to acquisitions of shareholdings below 25%.

(b) No (or minimal) thresholds apply – foreign investment screening covers deals of all sizes

No thresholds apply to the proposed new UK regime nor its German, US and Chinese counterparts. This means that deals of any size involving parties of any size can potentially be caught.

(c) Not just an issue for the defence sector – all sectors are targeted

All regimes which we have assessed capture a broad range of sectors. Under the new UK proposals, as with Germany and the US, foreign investment screening can potentially apply to any sector. However, the UK, German and US Governments have all indicated that they are likely to be more concerned by transactions involving certain sectors with key infrastructure (such as communications, energy, transport, defence and nuclear) and technologies high on the agenda.

(d) Regimes provide Governments with substantial powers to block or amend transactions

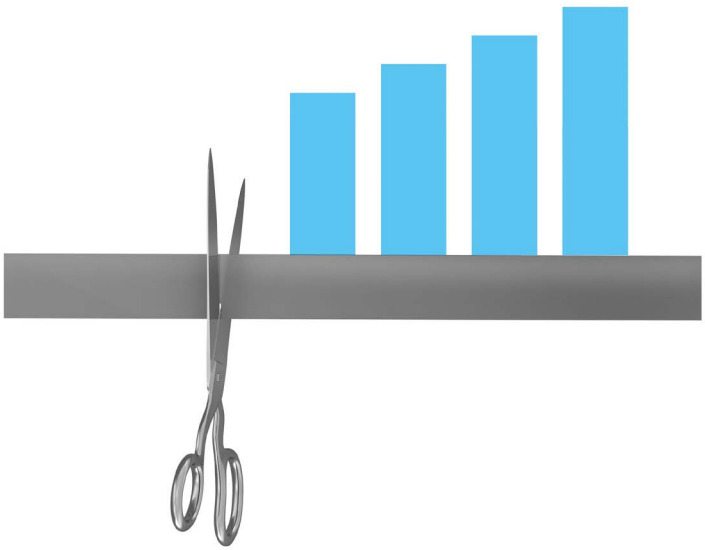
Except for the EU proposals, the regimes assessed allow Governments to prohibit a proposed transaction, unwind a completed transaction and to require remedies to resolve concerns which they may have.

(e) Potentially lengthy timelines

Each regime provides for a potentially lengthy foreign investment screening process. The proposed UK regime, for example, would have a 15 week review period which could be extended by the UK Government stopping the clock, while the German regime provides for a process which in total could last for six months.

(f) Not just talk - Governments are actively using their powers

What is clear is that not only are regimes being strengthened but that Governments are actively enforcing those regimes. Within a matter of weeks of the UK's current regime being amended in June 2018 (to bring more transactions into scope), the UK Government intervened in a UK aerospace transaction (see our briefing here). As described above, the German Government has blocked a transaction for the first time, while in the US the number of CFIUS filings have continued to increase with nearly 250 transactions being reviewed in 2017.



How do the proposed new UK and EU regimes compare?

Both the UK Government's and the EU's proposals do materially depart from the approach of the US, Germany and China in a number of respects.

(a) UK – Stretching the regime to cover broader national security issues

The UK Government's proposals are deliberately broad focussing on whether an individual or entity has significant influence i.e. where the rights or influence that a person has in an entity or asset is sufficient to trigger foreign investment screening.

This test is deliberately set at a low level and would potentially capture a broader range of situations than is envisaged under the US, German or Chinese regimes.

Key examples of this are set out below.

- Significant influence is currently envisaged to capture persons with veto rights over what have traditionally been regarded – from a merger control perspective – as rights which are minority shareholder protections such as decisions to make additional borrowing from lenders.
- Transactions which are not purely acquisitions can also amount to significant influence. The UK Government's guidance, for example, foresees a possibility that significant influence could be obtained via a loan agreement (albeit rarely).

Looser forms of influence are also covered.

- Where an individual or entity has influence over the "direction of the entity", for example, if a minority shareholder's recommendations are always or almost always followed by other key shareholders then this is envisaged to be sufficient to trigger the proposed regime.
- Similarly, significant influence could also potentially arise where an entity incorporated in another jurisdiction is subject to a change of domestic legislation which enables that jurisdiction's Government to, for example, appoint a board director.
- Perhaps most extreme is that the UK Government's proposals are intended to capture situations where a hostile state obtains significant influence over an individual by way of coercion.

This broad loose approach to the coverage of the regime reflects the fact that the UK Government's policy focus for the proposed new regime is national security, which can arise in a broad range situations, not simply where an investment is made, directly or indirectly in an entity.

(b) UK – Beyond foreign investment

– proposed regime not limited to foreign investment

The proposed UK regime is the only regime of the four we have compared which is not limited to "foreign" investors, focusing instead on the "motive" of an investor.

The US, German and Chinese regimes are all designed to screen "foreign" investment defined by reference to residency, nationality, and place of incorporation. By way of example, the sector-specific review under the German regime applies to all acquisitions by non-German resident investors. Under the Chinese regimes, a person will be regarded as a "foreign" investor if its nationality/place of incorporation is outside mainland China (or where the investment capital comes from outside mainland China). Such an approach lends itself to certainty, as it should be clear to an investor whether it has the requisite nationality, residency or place of incorporation in order to fall outside of the scope of the regime in question.

However, this is not the case in the UK. The new proposed regime focusses on "hostile parties". This is defined as "hostile states", which are states that are hostile to the UK's national security, and parties acting on their behalf, defined as "hostile actors". The UK Government directly states that a UK-based or British acquirer could pose concerns around national security and so could be a hostile actor either because they are controlled by a hostile state or if they themselves have a hostile motive towards the UK's national security. The proposed UK regime is therefore the broadest of the four regimes under consideration in this respect.

(c) UK – Repeated intervention

Finally, the UK's proposals would provide the UK Government with an opportunity to intervene in relation to dealings between the same parties on multiple occasions. For example, in relation to the same entity, if an investor:

- initially acquires a 5% stake which gives rise to significant influence;
- subsequently acquires an additional stake to take it to 26%;
- then acquires further shares to take it to a shareholding of 51%;
- finally takes its shareholding to above 76%,

then the UK Government could, under its current proposals, review the transactions on four separate occasions.

(d) EU – Soft power but no less significant?

The EU regime is different to its peers. The European Commission will have only an ability to offer an opinion to Member States. Power will reside with individual national Governments. However these reforms remain significant: they will encourange more countries to have foreign investment screening, greater standardisation across EU countries and the European Commision is likely to be a powerful voice as it coordinates reviews across the EU.

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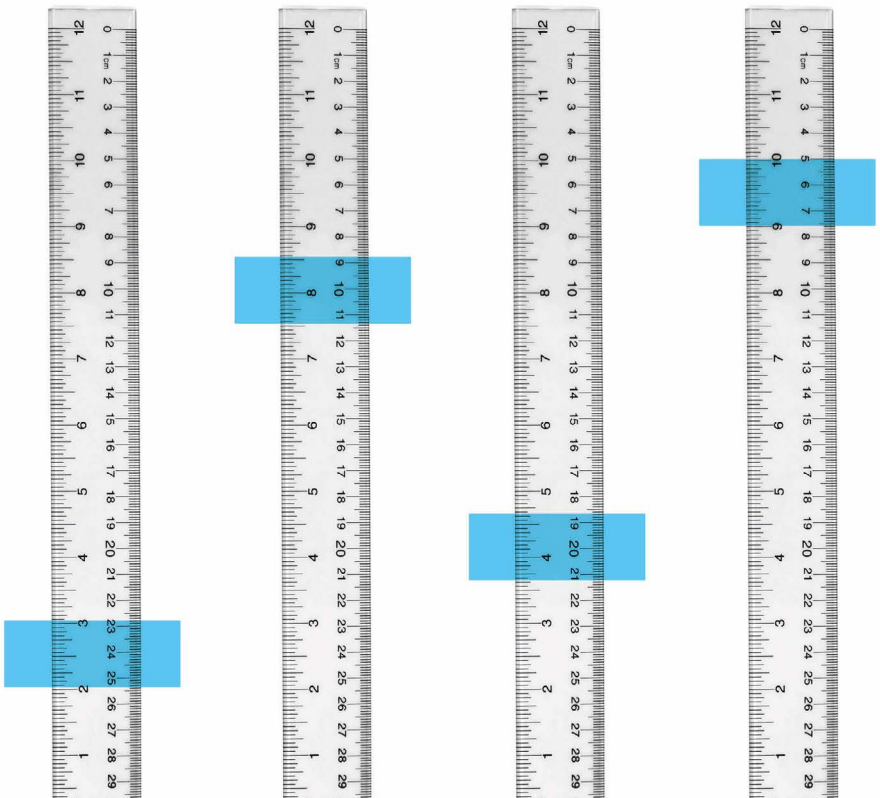
Separate vetting process or part of merger control?

Country	Separate vetting process or part of merger control?
UK (Current regime)	The UK public interest regime (which provides powers for the UK Government to intervene in transactions including on the basis of national security concerns) is provided for under the same legislation as the UK merger control regime. The UK public interest regime enables the UK Government to intervene in certain transactions on the basis of specified public interest considerations, currently national security, financial stability, or media plurality. If the UK Government believes that a transaction has, for example, national security implications it can direct the UK competition authority, the Competition and Markets Authority (the "**CMA**") to investigate and to report on these concerns.
UK (Proposed regime)	Separate.
Germany	Separate.
EU (Proposed regime)	Separate.
USA	Separate.
China	Both. There are two relevant regimes in China: – a foreign investment review regime ("**FIR**") which is separate to merger control – under the Chinese merger control regime, national security review ("**NSR**") is one of the express grounds for blocking a merger



Relevant authority and decision-maker

Country	Relevant authority and decision-maker
UK (Current regime)	Secretary of State for relevant Government Department: – Business, Energy & Industrial Strategy ("**BEIS**") for national security and financial stability – Culture, Media & Sport ("**DCMS**") for media plurality The CMA's role is to report its findings to the relevant Secretary of State and it is the Secretary of State who has the decision-making power. BEIS will consult other government departments, including, for example, the Ministry of Defence in relation to defence mergers.
UK (Proposed regime)	A UK Government Cabinet-level minister would be the key decision-maker. The Government proposes "the Senior Minister" to be the decision-maker which would be defined as covering Secretaries of State, the Chancellor and the Prime Minister.
Germany	German Federal Ministry of Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie) ("**BMWi**").
EU (Proposed regime)	Member States retain decision-making power over foreign investments. However, the EU-wide proposals would allow the European Commission (the "**Commission**") to issue an opinion on a foreign investment where it considers that a foreign investment: – which is being screened by a Member State is likely to affect security or public order in more than one Member State (or if the Commission has relevant information in relation to that foreign direct investment) – which is not undergoing screening in a Member State is likely to affect security or public order in more than one Member State – is likely to affect projects or programmes of Union interest on grounds of security or public order A Member State can also provide comments on a foreign investment being undertaken in another Member State if it considers that the foreign investment is likely to affect its own security or public order (or if the Member State has information relevant for such screening). The Member State undertaking screening must give due consideration to the comments of other Member States and to the opinion of the Commission.
USA	Committee on Foreign Investment in the United States ("**CFIUS**"), an inter-agency US government committee chaired by Treasury, Defense, Energy, Commerce, Homeland Security and Justice Departments among other key players.
China	The Ministry of Commerce ("**MOFCOM**") is in charge of both the FIR and NSR. In the case of an NSR, an inter-ministerial joint committee is led by MOFCOM on the review process.

Mandatory or voluntary filing?

Country	Mandatory or voluntary filing?
UK (Current regime)	Voluntary. The Secretary of State can intervene in a transaction (which meets the jurisdictional thresholds) for a period of up to four months after closing or four months after the material facts of the transaction are made public. As such, if a transaction raises competition concerns and/or is likely to prompt public interest concerns and the thresholds for review (described below) are met then it is advisable to file.
UK (Proposed regime)	Voluntary. In the event that the parties to a deal choose not to notify, the UK Government proposes that it can intervene either at an early stage (e.g. Heads of Terms) or for a period of up to six months following a trigger event.
Germany	Mandatory for the following sectors: manufacturers or developers of war weapons, ammunition, and military equipment ("**sector-specific review**"). Voluntary for all other sectors (although BMWi reserves the right to intervene in an acquisition if it concerns public order or security of the Federal Republic of Germany) ("**cross-sectoral review**").
EU (Proposed regime)	It is mandatory for a Member State to notify the Commission and the other Member States of any foreign investment in their territory that is undergoing screening. Each Member State's own rules will apply to determine whether a foreign investor must make a filing in that Member State.
USA	**Voluntary except for Pilot Program Investments (see below).** CFIUS can commence investigations of its own initiative at any time (i.e., before or after a transaction closes), and CFIUS monitors public statements and filings relating to investment activity. Note that recent reforms made to CFIUS under the Foreign Investment Risk Review Modernisation Act ("**FIRRMA**") signed into law on 13 August 2018 which significantly expand the authority of CFIUS to review and restrict foreign investments on national security grounds also require CFIUS to establish a mandatory declaration process (i.e. a mandatory filing process), subject to prescribed exceptions and waivers, for certain "covered acquisitions" of a "substantial interest" in a US business involved in critical infrastructure or critical technology, or that maintains or collects sensitive personal data in which a foreign government has, directly or indirectly, a substantial interest. The meaning of "substantial interest", along with exceptions and waivers are not set out in FIRRMA but rather are to be developed by way of secondary regulation (although the definition of a substantial interest will explicitly exclude less than a 10% voting interest). **Mandatory filings for Pilot Program Covered Investments** In October 2018, CFIUS promulgated interim regulations, to become effective 11 November 2018, which establish a pilot program with mandatory filings for a broad range of transactions involving even very small percentage investments in US firms that either: (1) are utilizing a range of technologies deemed critical (including defense, dual use, nuclear, and a range of other "emerging and foundational" technologies to be designated) in one of 27 industrial sectors specified by CFIUS; or (2) have designed such technologies specifically for use in one of these sectors. The industrial sectors include major parts of the economy, including, among others, aerospace, aluminum production, ball bearings, computers, defense, nanotechnology, nuclear, petroleum, semiconductors, wireless communications, and other specified sectors. Parties to mandatory filings have the right to file a short form "declaration" in lieu of a full notification. Upon receipt of a declaration, CFIUS shall "promptly" inspect it and decide whether to accept it or determine it is incomplete and so notify the parties. Once it accepts the declaration, CFIUS then must decide, within 30 days of receipt, whether to: (1) request that the parties file a full notification; (2) initiate a unilateral review of the transaction; or (3) complete the action and clear the transaction.
China	**FIR -** Mandatory. Furthermore, where the target business falls within the "negative list", parties are not allowed to complete the transaction pending MOFCOM's decision. **NSR -** Mandatory if the transaction falls within the range of application of the NSR (see below). MOFCOM will notify the parties to the transaction during the FIR process if an NSR is requested.

Need for prior approval before closing?

Country	Need for prior approval before closing?
UK (Current regime)	No – as above, this is a voluntary regime.
UK (Proposed regime)	No – as above, this is a voluntary regime.
Germany	There are three types of transactions: (a) regular transactions, (b) transactions meeting defined cross-sectoral triggers and undefined "similar cases" and (c) sector-specific transactions. Notification is voluntary for case (a) but can be subject to scrutiny for any transactions involving the acquisition of 25% or more of the voting rights in a German business. Notification is mandatory in cases (b) and (c) for any acquisition of 10% or more of the voting rights in a German business. Prior approval is not mandatory, but is highly recommended as the transaction faces legal uncertainty until it has been cleared or the review period has elapsed.
EU (Proposed regime)	This is dependent on the national rules of the Member State undertaking the foreign investment screening.
USA	The regime is voluntary except for Pilot Program Covered Investments, and so transactions can complete without prior approval.
China	**FIR** Depending on the target business: – acquisitions of businesses involved in a sector on the "negative list" under the Catalogue for the Guidance of Foreign Investment are subject to an approval process at MOFCOM. Industry-specific approvals may also be required – acquisitions of businesses that are not on the "negative list" are only subject to post-transaction filing requirements. No prior substantive review and approval is required **NSR** Prior approval is recommended, otherwise the transaction may face uncertainty as MOFCOM could initiate an NSR at its own discretion or upon receipt of third party complaints.

Is it targeted only at "foreign" investments and if yes, what is "foreign"?

Country	Is it targeted only at "foreign" investments and if yes, what is "foreign"?
UK (Current regime)	No, although the Government considers that, in the broadest terms, foreign investment is more likely than domestic investment to raise national security concerns. Foreign investors are less likely to have the UK's interests at heart and may be controlled or influenced by hostile state actors.
UK (Proposed regime)	No. Whilst the Government considers that it is most likely to call in trigger events involving "hostile parties" (defined as "hostile states", which are states that are hostile to the UK's national security, and parties acting on their behalf, defined as "hostile actors"), it acknowledges that it may be that a UK-based or British acquirer could pose concerns around national security. This could be because they are subject to the control of a hostile actor, or if they have a hostile motive towards the UK's national security. The Government also considers that foreign nationality could prove to be a national security risk factor (although less likely to pose a risk than a trigger event involving hostile parties).
Germany	The sector-specific review applies to all acquisitions by non-German resident investors. The cross-sectoral review applies to acquisitions by investors resident outside the customs territory of the EU and EFTA. The BMWi does not regard branches and permanent establishments of foreign acquirers as German residents or EU/EFTA residents.
EU (Proposed regime)	Yes. The proposed regulation is targeted at investments made by "foreign investors", with "foreign investor" being defined as a natural person or an undertaking of a third country, intending to make or having made a foreign direct investment.
USA	Yes. A "foreign person" is defined as: – any foreign national, foreign government, or foreign entity – any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity "Foreign entity" in turn means any corporation, division, or other organisation organised under laws of a foreign state if either its principal business place is outside the United States or its equity securities are primarily traded on one or more foreign exchanges, unless it is ultimately majority owned by US nationals.
China	Both FIR and NSR target foreign investments. A person will be regarded a "foreign" investor if its nationality/ place of incorporation is outside Mainland China. An investment will also be regarded as "foreign" where the capital comes from outside Mainland China (Hong Kong, Macau and Taiwan investors are viewed as foreign under the foreign investment regulations).

Sectoral focuses

Country	Sectoral focuses
UK (Current regime)	The current public interest intervention regime is not explicitly limited to specific sectors, but allows intervention only on the grounds of national security, media plurality/accurate presentation of news, and maintenance of the stability of the financial system. The media/broadcasting, defence/military and financial services sectors are therefore the primary focus of the regime. The Enterprise Act 2002 (the "**2002 Act**") has been amended to introduce different jurisdictional thresholds for certain mergers involving a relevant enterprise (see below). Section 23A of the 2002 Act defines relevant enterprises to include enterprises active in the development or production of items for military or military and civilian use, quantum technology, and computing hardware ("**Relevant Enterprise**"). – the development or production of items for military or military and civilian use ("**dual use**") – this is based on the following lists: the UK Military List (Schedule 2 to the Export Control Order 2008 ("**ECO 2008**"); the UK Dual-Use List (Schedule 3 to the ECO 2008); the UK Radioactive Source List (Schedule to the Export of Radioactive Sources (Control) Order 2006); the EU Dual-Use List (Annex I to the Council Regulation (EC) No.428/2009). Businesses that develop or produce these goods or services, or hold related information that is capable of use in connection with the development or production of these goods are also included – the design and maintenance of aspects of computing hardware – this includes: the ownership, creation or supply of intellectual property relating to the functional capability of (i) computer processing units, (ii) the instruction set architecture for such units, and (iii) computer code that provides low level control for such units – the design and maintenance or provision of support for the secure provisioning or management of (i) roots of trust of computer processing units, and (ii) computer code that provides low level control for such units – the development and production of quantum technology – this includes: (i) quantum computing or simulation; (ii) quantum imaging, sensing, timing or navigation; (iii) quantum communications; and (iv) quantum resistant cryptography
UK (Proposed regime)	The new powers are not limited to specified sectors but will apply on an economy-wide basis. The government considers that entities and assets are more likely to be used to undermine the UK's national security when they fall within the following parts of the economy (the Government calls these "**core areas**"): – certain parts of the national infrastructure sectors. Core sectors include civil nuclear, communications, defence, energy and transport – certain advanced technologies including advanced materials and manufacturing science, artificial intelligence and machine learning, autonomous robotic systems, computing hardware, cryptographic technology, nano technologies, quantum technology, networking and data communication and synthetic biology – certain direct suppliers to the Government and the emergency service sector – dual-use technologies In addition, the Government considers that there are other key parts of the economy where national security risks are more likely to arise compared to the wider economy as a whole. These are: – critical suppliers who directly and indirectly supply the core areas – those parts of the national infrastructure sectors not in the core areas – those advanced technologies not in the core areas

Sectoral focuses (Cont)

Country	Sectoral focuses
Germany	The sector-specific review applies to investments in manufacturers or developers of war weapons, ammunition, military equipment and IT security products. All sectors are subject to cross-sectoral examination, provided public order or security is endangered. Certain sectors under the cross-sectoral review are now clearly in focus: – companies that operate critical infrastructure in sectors such as energy, TMT, finance, insurance, health, and transport – companies which manufacture industry-specific software for such critical infrastructure – companies involved in the field of telecommunications – activities in telematics infrastructure – companies in the media industry that contribute to the formation of public opinion, and that are distinguished by their timeliness and broad impact – providers of cloud-computing
EU (Proposed regime)	In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on, inter alia: – critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate crucial for the use of such infrastructure – critical technologies and dual use items as defined in Article 2.1 of Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum aerospace, defence, energy storage, nuclear technologies, nanotechnologies and biotechnologies – supply of critical inputs, including energy or raw materials, as well as food security – access to sensitive information, including personal data, or the ability to control such information – the freedom and pluralism of the media In terms of the Commission's power to issue an opinion where it considers that a foreign direct investment is likely to affect projects or programmes of Union interest on grounds of security or public order, projects or programmes of Union interest shall include those projects and programmes which involve a substantial amount or a significant share of EU funding, or which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order. The list of projects or programmes of Union interest is included in the annex to the proposed regulation, and the Commission may amend the list of projects and programmes of Union interest in the annex by adopting delegated acts.

Sectoral focuses (Cont)

Country	Sectoral focuses
USA	All sectors – CFIUS can review any "covered transaction" which may impact US national security. National security is not strictly defined, but CFIUS is particularly concerned with transactions involving the following: – **Critical infrastructure** – assessed on a case-by-case basis, generally defined as a "*system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security*" – **Critical technologies** – defined to include export controlled defence articles, services and technical data covered by the United States Munitions List, dual items on the Commerce Control List, certain nuclear-related equipment and facilities, and items covered by the Select Agents and Toxins regulations, and other foundational and emerging technologies to be designated by commerce – **Personal identifiable information** – focused on companies with considerable volumes of sensitive personal information (social security number, financial information, medical information, etc.) that could potentially be exploited by a foreign buyer, including in particular data of US government and military officials FIRRMA will expand the range of "covered" transactions by adding the ability for CFIUS to review a foreign person's purchase, lease or concession with respect to US real estate located at, or that will function as part of, an air or maritime port, or is in close proximity to a US military installation or other government facilities or properties that are national security sensitive, or could reasonably afford a foreign person the ability to engage in intelligence collections or otherwise expose national security activities such as installations, facilities or properties. Today, CFIUS can only review acquisitions of US businesses and not properties without associated businesses.
China	**FIR** Enterprises on the "negative list". **NSR** Enterprises in the following sectors are particularly vulnerable to national security reviews: – military (any businesses involved in the military industry, located near key and sensitive military facilities or in any way involved in activities with national security implications) – key agricultural products – key energy and resources – key infrastructure – key transportation services – key technologies – key equipment manufacturing

Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

Country	Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)
UK (Current regime)	Under the 2002 Act, the Government can intervene when: – a transaction constitutes a "relevant merger situation", i.e.,: it involves two or more enterprises ceasing to be distinct; and the merger meets tests related to specific turnover and/or share of supply – the merger raises at least one of three specific public interest issues – national security, financial stability, or media plurality The ability to exercise "material influence" is the lowest level of control that may give rise to a relevant merger situation. A share of voting rights of over 25% is likely to be seen as conferring the ability to materially influence policy, although shareholdings below this threshold may also attract scrutiny. The 2002 Act establishes particular arrangements for Government to intervene in mergers that do not meet the normal UK turnover and share of supply tests (and which therefore do not amount to a relevant merger situation, whether on the original thresholds or the new thresholds). This is set out in the Special Public Interest Regime as described in section 59 of the 2002 Act. Under the Special Public Interest Regime, the Government is able to intervene on the specified public interest grounds in any transaction which meets all the requirements for a relevant merger situation other than the UK turnover or share of supply test in cases involving the following categories of business: – government contractors who hold or receive confidential defence-related information – certain newspaper and broadcasting businesses

Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets) (Cont)

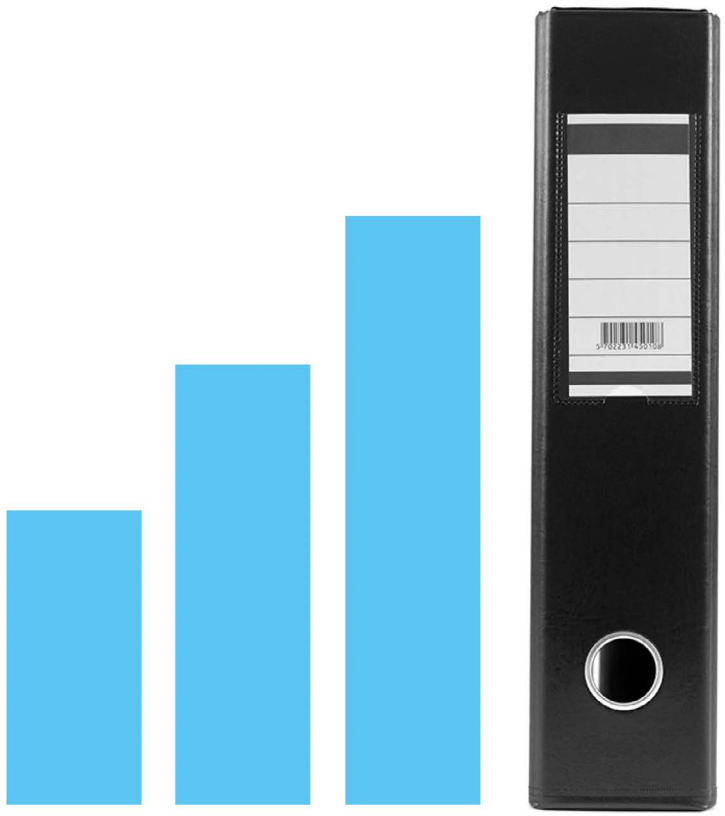
Country	Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)
UK (Proposed regime)	– Acquisitions of more than 25% of votes or shares in an entity – Acquisitions of significant influence or control over an entity – Further acquisitions of significant influence or control over an entity beyond the above thresholds – Acquisitions of more than 50% of an asset – Acquisitions of significant influence or control over an asset The UK Government has indicated that there may be exceptional instances where loans or conditional acquisitions (like futures options) will be covered by the regime. **Significant influence** Where a person has absolute decision rights over decisions related to the running of an entity, for example relating to: – adopting or amending the entity's business plan – changing the nature of the entity's business – making any additional borrowing from lenders – appointment or removal of the CEO or equivalent – establishing or amending any profit-sharing, bonus or other incentive scheme of any nature for directors or employees – the grant of options under a share option or other share based incentive scheme – right to direct the distribution of funds or assets – right to direct investment decisions of a trust or firm – right to amend a trust or partnership deed – right to revoke a trust or terminate the partnership Where a person has absolute veto rights over decisions related to the running of the entity, for example relating to: – adopting or amending the entity's business plan – making any additional borrowing from lenders The right to appoint or remove a single board member of an entity may also be sufficient to constitute significant influence.
Germany	For (a) regular transactions, foreign investment control may be initiated at the discretion of the BMWi where a non EU/EFTA investor acquires a direct or indirect interest of 25% or more of the voting rights in a German business. Investment control may be initiated by the BMWi in (b) cross-sectoral transactions and (c) sector-specific transactions where a non-German investor acquires a direct or indirect interest of 10% or more of the voting rights in a German business.

Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets) (Cont)

Country	Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)
EU (Proposed regime)	The proposed regulation captures investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.
USA	CFIUS has jurisdiction over any "covered transaction" which is defined as *"any transaction…by or with any foreign person, which could result in control of a US business by a foreign person"*. "Control" is not defined by reference to a particular shareholding or board representation. – Control exists where the transaction will enable the non-US person, either directly or indirectly, to *"determine, direct, or decide important matters"* affecting the US business – This includes the power to make decisions regarding: the sale, lease or transfer of the US business' assets; reorganisation, merger or dissolution of the US business; closing, relocating or substantial alteration of US production, operational or research facilities; major expenditures or investments; issuance of debt or equity; appointment/dismissal of officers or senior personnel; and execution or termination of contracts – The control threshold for CFIUS is lower than would apply under the HSR merger control regime and could certainly apply to a holding of <50% of voting securities or voting board representation Whilst today CFIUS can only review foreign acquisitions of "control" over US businesses, a centrepiece of FIRRMA is its addition of the authority to review "[a]ny other investment" that is not "passive" in nature but in a US business that: – owns, operates, manufactures, supplies or services "critical infrastructure" – produces, designs, tests, manufactures, supplies or services "critical technology" – maintains or collects sensitive personal data of US citizens that may be exploited in a manner that threatens national security The scope of the passive exemption is quite narrow. To be "passive" and therefore exempt from review, an investment must not afford the foreign person any of the following: – access to material non-public information in the possession of a US critical infrastructure or critical technology company – membership or observer rights on the board of directors or equivalent governing body of such firms or the right to nominate an individual to such a position – any involvement, other than through voting of shares, in substantive decision-making in the management, governance or operation of such firms Congress has made it clear that traditional private equity investments will be treated as passive, even when the foreign person investing in the fund has membership on a fund advisory board or committee, provided that the fund's general partner, managing member or the equivalent is not a foreign person; the advisory board or committee has no authority to approve, disapprove or control investment decisions of the fund; and the foreign investor has no control over the fund. Novel fund structures affording foreign investors, sovereign wealth investors and other foreign investors greater rights to participate in the investment decisions of a fund and the governance of the fund's portfolio of companies will not be exempt. FIRRMA affords CFIUS new authority over any other transaction or arrangement in which the structure is designed or intended to circumvent the application of Exon-Florio authority. CFIUS will also have authority over the transfer of certain assets pursuant to bankruptcy proceedings or other defaults.

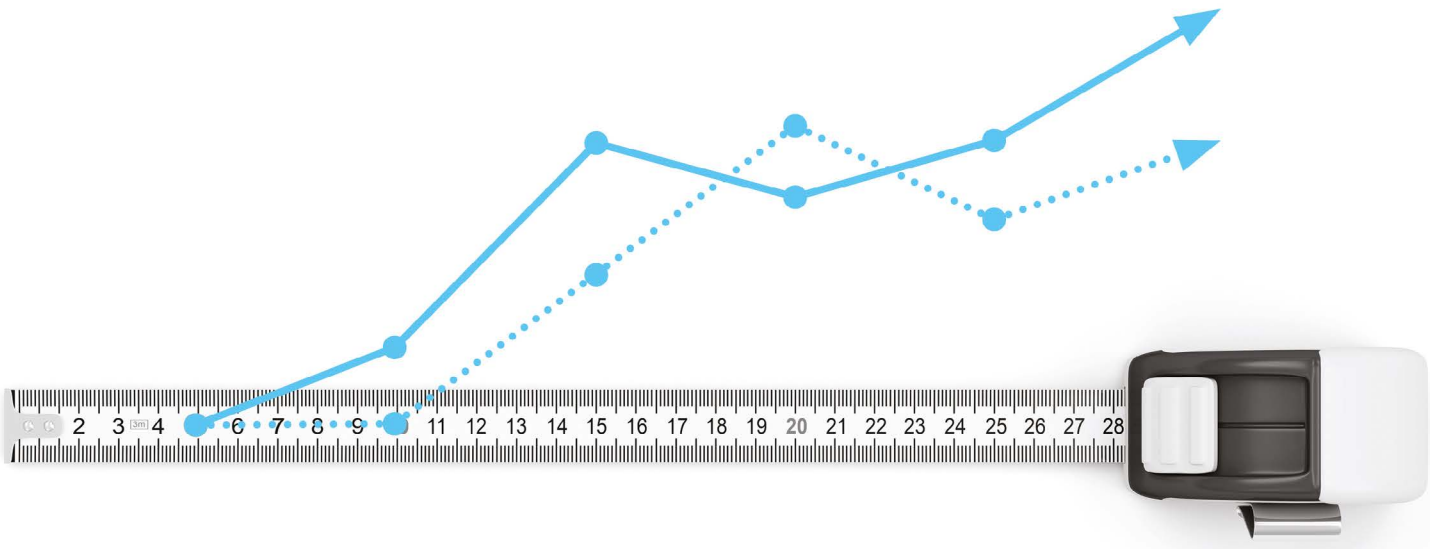
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets) (Cont)

Country	Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)
China	**FIR** Any form of investments, direct or indirect – incorporation, formation of JV, acquisition of shareholdings, minority participation, etc – could be captured, irrespective of the shareholdings acquired. **NSR** The transaction involves domestic military-related enterprises, or the transaction results in the foreign investor(s) accumulatively gaining "control" in domestic enterprises in sensitive sectors (see below). "Control" means: – accumulative foreign shareholdings exceeding 50% – accumulative foreign shareholdings below 50%, but where the voting rights held by the foreign investor confer the ability to have a material impact over the strategic decisions of domestic enterprises – other circumstances that cause control over business strategy, finance, human resources, or technology of the domestic enterprise being transferred to a foreign investor



Thresholds that apply

Country	Thresholds that apply
UK (Current regime)	For mergers in which the enterprise being taken over (or part of it) ***is*** a Relevant Enterprise, the following amended turnover and share of supply tests apply (as opposed to the usual UK merger control jurisdictional thresholds) to any business which generates turnover in the UK: – the turnover test is met if the Relevant Enterprise's annual UK turnover exceeds £1 million – the share of supply test is met if before the merger, the Relevant Enterprise being acquired or merged has a share of supply or purchase of at least one-quarter in a substantial part of the United Kingdom. In other words, the test is met even if share of supply does not increase as a result of the merger, so long as the Relevant Enterprise has 25% The amended thresholds also apply to the jurisdiction of the CMA to review such a merger on competition grounds.
UK (Proposed regime)	No threshold.
Germany	No threshold.
EU (Proposed regime)	No threshold.
USA	No threshold.
China	No threshold.



When can a transaction be called in by a regulator?

Country	When can a transaction be called in by a regulator?
UK (Current regime)	The first formal step for the UK Government's intervention in a merger is the issuing of a PIIN. The Secretary of State issues an intervention notice to the CMA if he or she has "reasonable grounds for suspecting" that it is or may be the case that a relevant merger situation has been created or is in progress, and one of the public interest considerations is relevant.
UK (Proposed regime)	The Government proposes that the call-in test should be made up of two separate conditions – each of which would need to be met in order that the Senior Minister could intervene: – they must have reasonable grounds for suspecting that it is or may be the case that a trigger event has taken place or is in progress or contemplation – they must have a reasonable suspicion that, due to the nature of the activities of the entity involved in the trigger event or the nature of the asset involved in the trigger event (or its location in the case of land), the trigger event may give rise to a risk to national security In exercising the call-in power, the Senior Minister would only act where it is necessary and proportionate to do so.
Germany	The BMWi can intervene in any transaction in relation to which it has concerns.
EU (Proposed regime)	Each Member State's own rules will apply to determine whether or not a transaction can be called in by the relevant regulator.
USA	CFIUS can intervene in any transaction in relation to which it has concerns.
China	Not applicable as the regimes are mandatory.

Relevant test for intervention

Country	Relevant test for intervention
UK (Current regime)	In making its decision in public interest cases the Secretary of State must determine whether a merger operates against the public interest. The UK Government's intervention in a deal and any decisions in relation to undertakings or remedies will, as with all powers, be reasonable and proportionate.
UK (Proposed regime)	The Senior Minister will have regard to the statement of policy intent which sets out the three risk factors that are relevant to that assessment. The three risk factors are: – the target risk – the entity or asset subject to the trigger event could be used to undermine national security – the trigger event risk – the trigger event gives someone the means to use the entity or asset in this manner – the acquirer risk – the person acquiring control over the target has the potential to use this to undermine national security
Germany	The test is as follows: – under the cross-sectoral rules, whether the acquisition may endanger public order or security in Germany (i.e., whether there is an actual and sufficient material threat to fundamental interests of society) – under the sector-specific rules, whether the acquisition may endanger essential security interests of Germany (i.e., interests which are connected with the production of or trade in arms, munitions and war material) The test does not allow transactions to be prohibited on other grounds (e.g., the strengthening of the competitiveness of certain sectors or companies, or the safeguarding of the financial interests of the state).
EU (Proposed regime)	In determining whether a foreign investment is likely to affect security or public order, Member States and the Commission may take into account its potential effects on the sectors outlined above. Member States and the Commission are also able to take into account the context and circumstances of the foreign direct investment, in particular whether: – the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces of a third country, including through ownership or significant funding – the foreign investor has already been involved in activities affecting security or public order of a Member State – whether there is a serious risk that the foreign investor engages in illegal or criminal activities

Relevant test for intervention (Cont)

Country	Relevant test for intervention
USA	The test for CFIUS intervention is whether a covered transaction threatens to impair national security. National security is not defined in the law or regulations, but is assessed on a case-by-case basis, and generally involves an analysis of the threat posed by the foreign buyer and its host country and the degree to which the US company is vulnerable to exploitation: – threat assessment (acquirer) – CFIUS reviews the non-US acquirer's prior record or intent with respect to US national security issues, taking into account whether it is, or is controlled by, a non-US government entity – vulnerability assessment (target) – CFIUS reviews the importance of the target US business to US national security, with a focus on: classified information or materials; critical infrastructure or technologies; sole source US government contracts; and proximity of the US business to sensitive US government facilities – risk assessment (acquirer and target) – CFIUS evaluates potential national security consequences if vulnerabilities are exploited by non-US acquirer
China	**FIR** There is no statutory test/public guidance on the factors applied but the general principle is that the investment must be in compliance with relevant laws and regulations and be good for China's economic development. Foreign investors must not invest in "prohibited" industries and must comply with ownership thresholds and other regulatory restrictions for "restricted" industries. **NSR** NSR will be focused on the impact on: – national defence and security – stability of the operation of the national economy – basic order of the society – research and development abilities in relation to core technologies relating to national security

Timetable for review

Country	Timetable for review
UK (Current regime)	**Phase 1** Following an intervention notice, the CMA is bound to prepare a report for the Secretary of State by a date specified by the Secretary of State. There is no statutory deadline for the Secretary of State to respond to the CMA's Phase 1 report. **Phase 2** In the event that the Secretary of State wishes the merger to be investigated further, it is referred to the CMA which will establish a group of independent panel members to look at the matter. The CMA must submit its Phase 2 report to the Secretary of State within 24 weeks (with a possible extension of a further eight weeks). The Secretary of State has 30 days from receipt of the Phase 2 report to consider their decision.
UK (Proposed regime)	Up to 30 working days, with a possible extension of up to an additional 45 working days. The act of requesting information from parties will "pause the clock" until that information is supplied.
Germany	**Cross-sectoral review** Phase 1 The BMWi has three months to initiate a cross-sectoral review after it has obtained information regarding the closure of the purchase contract. Where the acquirer applies for a certificate of non-objection, the BMWi has two months to initiate a cross-sectoral review. Phase 2 The BMWi has four months from receipt of complete documents to decide whether the acquisition should be prohibited. **Sector-specific review** Phase 1 The BMWi has three months from notification to decide whether to open an examination procedure. Phase 2 The BMWi has three months from receipt of complete documents to decide whether the acquisition should be prohibited.

Timetable for review (Cont)

Country	Timetable for review
EU (Proposed regime)	**Timetable in relation to foreign investments undergoing screening** Member States must notify the Commission and the other Member States of any foreign investment in their territory that is undergoing screening as soon as possible. Other Member States and the Commission must notify the Member State undertaking screening of their intention to provide comments or issue an opinion within 15 calendar days following receipt of the notification from the Member State undertaking screening. Comments or opinions must be addressed to the Member State undertaking the screening within a reasonable period of time, and in any case no later than 35 calendar days following receipt of the notification from the Member State undertaking screening. The Commission may issue an opinion following comments from other Member States where possible within the deadline of 35 calendar days, and in any case no later than five calendar days after this deadline expires. Where further information is requested from the Member State undertaking screening by other Member States or the Commission, comments or opinions must be issued no later than 20 calendar days following receipt of the additional information. In the exceptional case where the Member State undertaking screening considers that its security or public order requires immediate action, it must notify other Member States and the Commission of its intention to issue a screening decision before expiry of the timeframes referred to above, and justify the need for immediate action. In such circumstances, the other Member States and the Commission must endeavour to provide comments or to issue an opinion expeditiously. **Timetable in relation to foreign investments not undergoing screening** Where the Commission or a Member State considers that a foreign direct investment which is not undergoing screening is likely to affect security or public order, it may request information regarding the investment from the Member State where the foreign direct investment is planned or has been completed. This information must be provided by the relevant Member State without undue delay. Comments or opinions must be addressed to the Member State where the foreign direct investment is planned or has been completed within a reasonable period of time, and in any case no later than 35 calendar days following receipt of the requested information. In cases where the opinion of the Commission follows comments from other Member States, the Commission has an additional 15 calendar days for issuing that opinion. Member States may provide comments and the Commission may provide an opinion for up to 15 months after the foreign direct investment has been completed.

Timetable for review (Cont)

Country	Timetable for review
USA	– pre-filing – today CFIUS need not initiate a review unless it deems the notification filed by the parties "accurate and complete"; in practice, CFIUS is currently taking in the range of 30 days to review and provide comments on filings prior to initiation. Under a new law that will take effect in around 6 months, CFIUS will be required to provide comments on draft filings within ten days – 45 calendar day initial review period – if no national security risks are identified, or if such risks are resolved, no further action is taken – 45 calendar day factual investigation period (if national security risks are not resolved in initial review – under the recent amendments, CFIUS will have the authority to extend the period for a subsequent 15 calendar day period in "extraordinary circumstances"; Treasury will write regulations defining "extraordinary circumstances" within the next 18 months – 15 calendar day Presidential review period – if CFIUS cannot reach a decision, or recommends that the transaction be blocked, the transaction is referred to the President In an effort to short-cut the current CFIUS process for some transactions, FIRRMA authorises CFIUS to establish, by regulation, a process whereby parties in any covered transaction will have the option to submit a short-form declaration (generally not to exceed five pages) with basic information about the transaction instead of a full and detailed written notice. CFIUS must then decide, within 30 days of receipt, whether to (1) request that the parties file a full notification; (2) initiate a unilateral review of the transaction; or (3) complete the action and clear the transaction.
China	**FIR** For investments in enterprises not on the "negative list", MOFCOM is required to issue a record-filing receipt within three days from notification. For investments in enterprises on the "negative list": – notifying investor must give notice to MOFCOM before making any other governmental filings – MOFCOM has up to 90 days from notification to review and approve the investment/establishment of foreign enterprise **NSR** An inter-ministerial joint committee shall be organised by MOFCOM within five working days upon the application of NSR. The committee then has 25 working days (extendable to 90 working days) to make a decision.

Ability to prohibit/unwind a transaction?

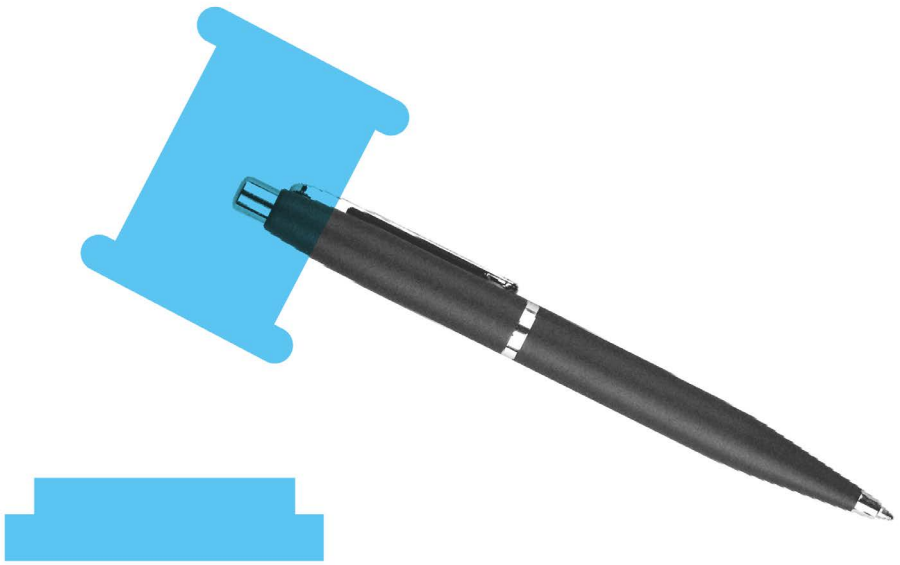
Country	Ability to prohibit/unwind a transaction?
UK (Current regime)	If the Secretary of State considers that no remedies can adequately address the public interest concerns, they can block the deal entirely.
UK (Proposed regime)	The proposed legislation will provide that the Senior Minister can declare that the trigger event cannot proceed in its current form and is blocked. In the case of completed transactions, the Senior Minister will also have the power to require the parties to unwind a transaction by serving an Unwind Order on them.
Germany	The BMWi can prohibit a transaction by: – prohibiting or restricting the exercise of voting rights in the acquired company which belong to a non-EU acquirer or are attributed to it; or – appointing a trustee for the unwinding of a completed acquisition
EU (Proposed regime)	The final screening decision is taken by the Member State undertaking the screening, and its own rules with regards to its ability to prohibit or unwind a transaction will apply. The Commission does not itself have such powers.
USA	CFIUS can prohibit a transaction pre-closing (with Presidential approval), and can unwind a transaction post-closing (with Presidential approval) if US security concerns are not resolved to its satisfaction.
China	The authorities have the power to decline an application, and to unwind a completed transaction (although this is rare in practice).

Any acceptable remedies to address national security risks?

Country	Any acceptable remedies to address national security risks?
UK (Current regime)	Whether proposed voluntarily in undertakings or imposed by order, remedies can take two broad forms – behavioural and structural. The first relates to parties doing, or not doing, certain activities to protect national security. Structural conditions relate to the organisational structure of enterprises of the merger. – An example of behavioural undertakings in relation to national security could include limiting access to certain physical sites, or other tangible or non-tangible assets of the target business to those with appropriate UK security clearances – Structural undertakings, meanwhile, could include (but not be limited to) a requirement that control over a particular division or asset is not part of a wider merger
UK (Proposed regime)	The Senior Minister will have the power to impose two types of remedy – behavioural and structural: – an example of behavioural conditions in relation to national security could include limiting access to certain physical sites, or access to other tangible or non-tangible assets of the acquired entity to those with appropriate UK security clearances – structural conditions could include a requirement that control over a particular division or asset is not part of a wider merger
Germany	As well as being able to clear or prohibit a transaction, the BMWi has the power to issue as a less severe measure orders containing instructions to ensure public order or security or to protect essential security interests of Germany by regulating the structure of the acquisition.
EU (Proposed regime)	The final screening decision is taken by the Member State undertaking the screening, and its own rules with regards to acceptable remedies will apply. The Commission does not itself have such powers.
USA	CFIUS can impose pre-closing "mitigation" remedies (which will often be negotiated with the parties), designed to reduce US national security risks, such as: – establishing guidelines for handling US government contracts and other sensitive information – ensuring only US citizens handle certain products and services, and/or ensuring that such products and services are located only in the US – notifying the US government in advance for approval of non-US nationals' visits to the acquired US business – providing the US government with the right to review (and object to) certain business decisions that raise US national security issues Compliance with mitigation remedies is monitored by the US government post-closing, with penalties for violations. CFIUS can unwind a transaction post-closing (with Presidential approval) if US national security concerns are not resolved to its satisfaction.
China	MOFCOM could require a termination of the transaction, or prohibit any further implementation of the transaction without another round of review on the adjustment of structure as well documents of the transaction made by the investor(s). For transactions which have already completed, MOFCOM may require the transfer of shares/assets or other measures so as to eliminate the national security risks.

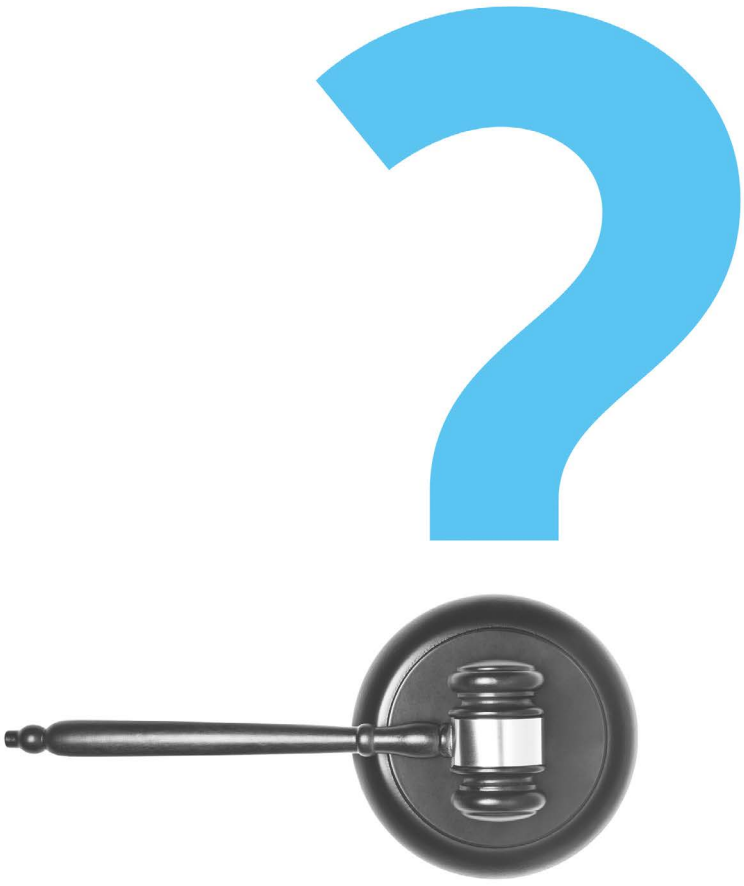
Potential sanctions for gun jumping/failure to file

Country	Potential sanctions for gun jumping/failure to file
UK (Current regime)	As there are no notification obligations, there are no applicable sanctions (other than in relation to providing false or misleading information in the course of the review, or breach of remedial orders).
UK (Proposed regime)	Given that the regime will be voluntary, there will be no sanctions for gun jumping/failure to file. There will, however, be criminal offences and civil sanctions for any breaches of requirements imposed by the Senior Minister.
Germany	Failure to notify does not trigger any administrative or criminal sanctions, however, there are administrative and criminal sanctions in related fields. There is no deadline for notification, however, a transaction that must be notified is provisionally invalid (*schwebend unwirksam*) until it has been cleared or the review period has ended. A transaction that has been prohibited by the BMWi is void.
EU (Proposed regime)	The proposed regulation does not include sanctions for a failure to notify the other Member States and the Commission of foreign direct investments undergoing screening.
USA	No, although there are penalties for violations of mitigation remedies, and making false or misleading statements to CFIUS during the review process. Parties who do not file run the risk of CFIUS unwinding the transaction (with Presidential approval) if it finds that there are US national security concerns.
China	**FIR** – fine: up to RMB 30,000 for non-filing – order to unwind the transaction – order to terminate the operation of the target business **NSR** No specific sanctions stipulated under the relevant regulations.



Right of Appeal

Country	Right of Appeal
UK (Current regime)	The Secretary of State's decisions at each stage of the process may be challenged by a judicial review. Specifically, affected parties can request judicial review of the decision to serve (or not to serve) a PIIN, any decision that follows a Phase 1 report, or any decision that follows a Phase 2 report. In each case, the courts will scrutinise whether the Secretary of State acted in a reasonable and lawful manner.
UK (Proposed regime)	A specific appeals process will be created for the regime. Appeals against decisions under the regime will be heard by the High Court, and will need to be brought within 28 days of the decision or action that is being challenged. The appeals process will not be by means of a judicial review but will be based on and aligned with judicial review principles whereby appeals are made against the lawfulness of a decision (save for appeals against the imposition of financial penalties, which will be on the basis of a full merits appeal).
Germany	Yes – the BMWi's decisions are subject to judicial review by the Berlin administrative court. The time limitation for an administrative claim against the prohibition order is one month.
EU (Proposed regime)	Not relevant as comments received from Member States and opinions issued by the Commission are not legally binding.
USA	Findings and decisions of the President are not subject to judicial review. However, the process that CFIUS/ the President apply in reaching a determination can be subject to a due process (constitutional) challenge.
China	Yes – in principle any negative decision could be challenged by way of administrative review.



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Key Parameters Compared

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