Recent Developments in Foreign Direct Investment Review Regimes

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Foreign Direct Investment - Overview

To protect foreign investment in sectors of national interest (broad regimes)

Minority investments <u>not exempt</u>
10% rule of thumb

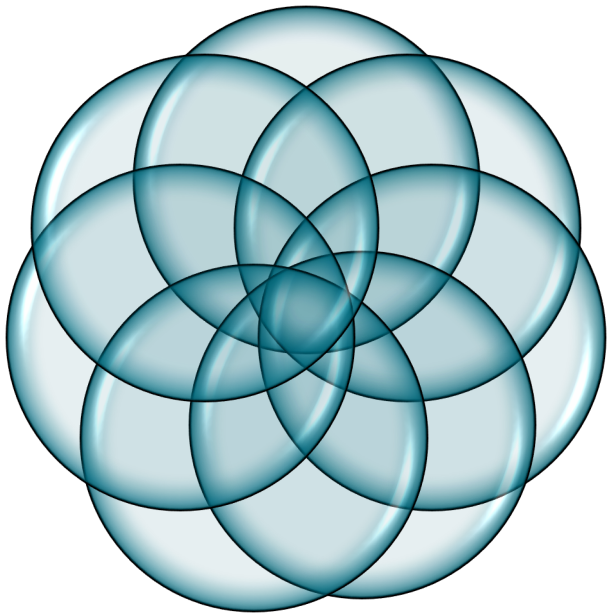
Info sharing between authorities

Risks: Significant fines / impose criminal sanctions

Hostile investors

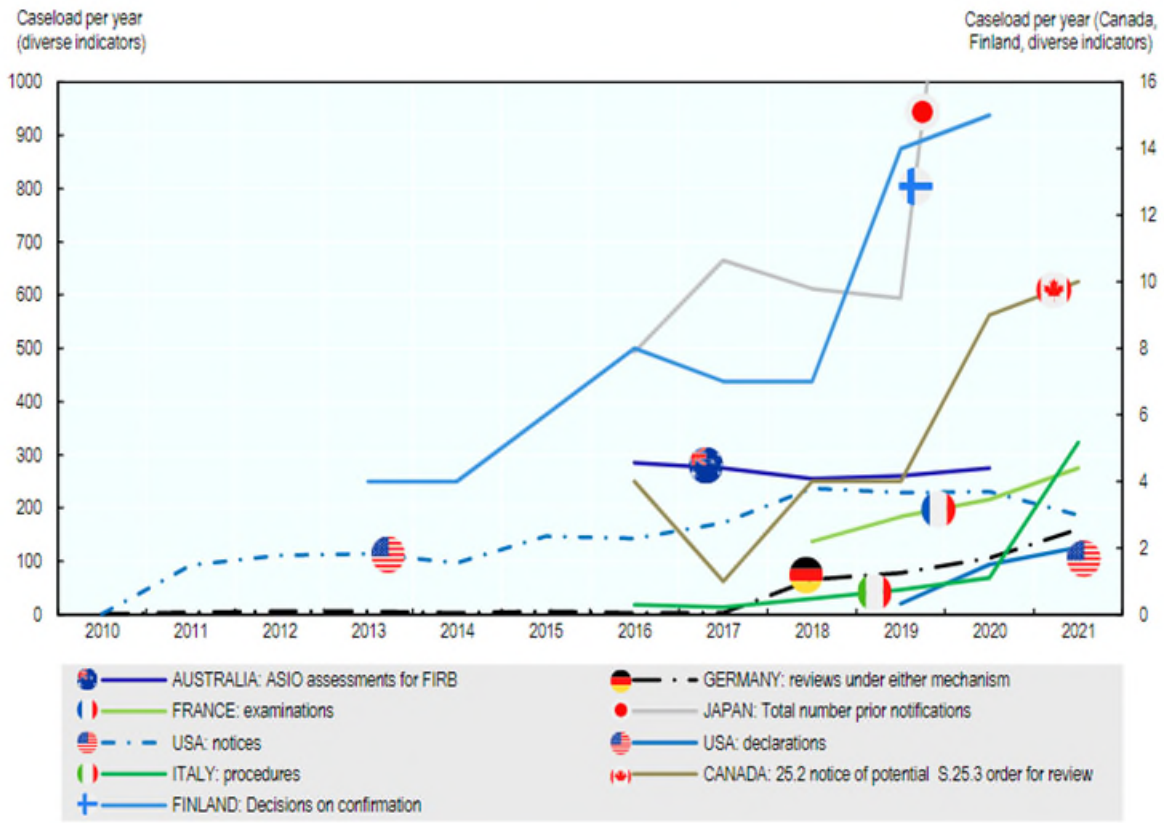
Suspensory, mandatory filings

Review lengths vary



FDI – Global Trends

Figure 4. Caseload under investment screening mechanisms (2009-2021)

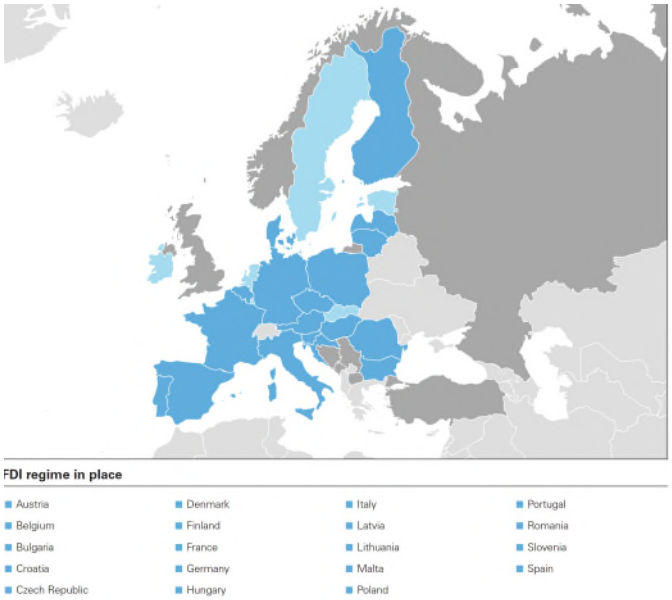


- Now 40+ FDI regimes globally
- FF filed 15 FDI filings in 9 different jurisdictions 2022-23 and was involved in Phase II filings in the UK and Germany
- New regimes = lack of precedent
- Look back periods for regimes not yet in force
- Caution for U.S. (Inmarasat / Viasat) and Russian (“hostile”) investors
- Antitrust / FDI regulator info sharing
- Atypical remedies

EU FDI In Practice

The EU FDI Screening Regulation provoked MS to rethink their approach to FDI

Cooperation mechanism	The EU FDI regime is not a "one-stop-shop". Decision-making stays within the reviewing MS
Outcome of cases	The EC has screened over 740 FDI transactions since the Regulation entered into force. Member States reported reviewing nearly 2000 FDI filings. More than 80% - cleared.
Most active players	Germany, Austria, France, Italy and Spain



Average Review Period for a Simple Case

Germany	*Austria*	*France*	*Spain*
2 months	*3 months*	*30 BDs*	*6 months*

UK FDI In Practice

Main principles

1. Reviewer: ISU within the Cabinet Office (following the reshuffle in March)
2. Timeline: 30 BDs from confirmation of complete submission + further 45 BDs (extendable)
    a) Initial review – 4-6 BDs
    b) Info requests stop the clock
3. Notification – an online template (most common issues?)
4. Transparency? Computer says "No"
5. Triggering events (type of transactions and nexus to the UK)

Relevant sectors and helpful resources

1. Target UK activities must fall within the 17 specified sectors
2. NSIA and Statutory Instrument
3. New and updated Guidance (as of 27 April) on:
    a) 17 sensitive sectors
    b) Completing and registering a notification form

    NB! Certain inconsistencies between the Statutory Instrument and the Guidance remain (e.g., Communications)

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Tips for approaching FDI in a transaction agreement

- Often the transaction has to be conditional on obtaining FDI clearance. CP can be an open-ended one or a specific one listing the respective jurisdictions
- Long-stop date has to accommodate the lengthy review periods in some jurisdictions
- A hybrid efforts provision that covers both merger control and FDI
- Structural carve-outs/hold separate

(c) (i) The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been terminated, (ii) all required Consents and expirations or terminations of waiting periods (as applicable) under each Regulatory Law specifically set forth on Section 6.1(c) of the Company Disclosure Letter shall have been obtained or shall have occurred (as applicable) and (iii) the CFIUS Approval shall have been obtained.

5.1 Closing shall be conditional on the following conditions (each a **"Condition"** and together the **"Conditions"**) being satisfied or waived in writing by the Seller and the Purchaser (it being understood that the Condition in Clause 5.1(c) can be waived by the Purchaser in its sole discretion) on or before 11:59pm on the Long Stop Date:

(a) any applicable waiting periods (and any extensions thereof) under the HSR Act relating to the Transaction shall have expired or been terminated;

(b) any waiting periods (or extensions thereof), filings or approvals under the following laws shall have expired, been terminated, been made or been obtained:

(i) China pursuant to the Anti-monopoly Law of 2007, as amended;

(ii) European Union pursuant to the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings;

(iii) Australia pursuant to the Foreign Acquisitions and Takeovers Act 1975 (FIRB ref. no. FI2021/00608);

(iv) Denmark pursuant to the Act on Screening of Certain Foreign Direct Investments, etc. in Denmark (Act no. 842 of 10 May 2021); and

EU Foreign Subsidies Regime

What?	• Covers direct and indirect financial contributions from a country outside of the EU - i.e. including the U.S. and U.K.
When?	• EU FSR entered into force from 12 Jan 2023, with a three year look back
Triggers	• Turnover threshold of €500m – applies to Target, JV or one of merging parties • Financial contribution threshold of more than €50m in three years prior to signing - for PE, it applies to portfolio companies
How to avoid filings	• Target turnover threshold is high • Carve out for pure financial investors • If the financial contribution could not have been obtained under normal market conditions
Timing	• Pre-notification important given burdensome filing requirements • Phase 1 is 25 WD (+ suspension)
Considerations	• Efforts provisions, reps & warranties, long stop, CP • Carve out for certain investments?

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