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Foreign Direct Investment Review Regimes Are Well-Established and Active; Outbound Investment Regimes Are on the Horizon

Chase D. Kaniecki, Samuel H. Chang, B.J. Altvater, and William S. Dawley*

In this article, the authors offer suggestions for boards of directors to take given the active global foreign direct investment landscape and the possibility of countries adopting outbound investment rules.

Boards of directors are now facing a well-established, complex, and active global foreign direct investment (FDI) landscape in which transactions will regularly trigger multijurisdictional FDI filing and approval processes. This is the case not only with respect to well-known FDI review regimes such as the Committee on Foreign Investment in the United States (CFIUS) but also with newly established, modified, and/or expanded non-U.S. FDI review regimes, particularly in Europe. Indeed, as governments around the world have become increasingly empowered and willing to scrutinize, and in some cases prevent, transactions they deem objectionable, FDI approvals have become a significant regulatory issue for many cross-border transactions.

Moreover, while existing FDI review regimes focus on inbound investment (i.e., investment by foreign persons into the relevant jurisdiction), the United States is developing, and the European Union is considering, restrictions and prohibitions on certain outbound investments (i.e., investments by U.S. and EU persons outside of the United States and European Union). If adopted, such restrictions and prohibitions could complicate, disrupt, and in some cases prohibit certain cross-border investments by U.S. or EU investors involving "countries of concern."

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Recent FDI Developments

Most existing FDI review regimes focus on national security– or national interest–related concerns, such as (1) access to defense-related or otherwise sensitive export-controlled technology or other information (e.g., personal data), and (2) potential disruption to essential public services, supply chains, or critical or sensitive infrastructure. However, the jurisdictional thresholds, review timelines, and substantive tests vary by country, sometimes significantly.

Moreover, FDI review analyses are often subjective and driven by factors of interest to each particular country, including factors that may not be known to the transacting parties. To further complicate matters, FDI review authorities have broad discretion to assert jurisdiction over transactions and to determine what does or does not qualify as a relevant concern. All of these factors combine to provide unique challenges to cross-border investors.

Here are major 2023 developments relating to certain key FDI review regimes:

- *United States*. Although there were no changes to the laws or regulations underlying the CFIUS regime in 2023, CFIUS continues to be very active in reviewing transactions notified to it, inquiring about "non-notified" transactions (i.e., transactions within the jurisdiction of CFIUS but that were not notified to CFIUS by the transacting parties), and imposing mitigation where it identifies national security concerns. CFIUS continues to remain interested in transactions that:
  1. Involve Chinese investors, non-Chinese investors with significant ties to China or that otherwise have China-related touchpoints;
  2. Implicate the semiconductor industry;
  3. Involve U.S. businesses that provide products or services, directly or indirectly, to U.S. government customers;
  4. Involve U.S. businesses involved with artificial intelligence or similar emerging or other sensitive technologies; and
  5. Involve U.S. businesses that collect or maintain data from or about U.S. persons.

  In addition, consistent with guidance issued by the U.S. Department of the Treasury in late 2022, CFIUS appears

willing to use its enforcement authorities—which can result in the imposition of significant penalties—to ensure that (1) mandatory CFIUS filings are made, and (2) CFIUS mitigation agreements are fully complied with.

- *European Union*. Following the EU's 2021 adoption of its FDI regulation, which laid out a common framework for FDI reviews by, and created an information-sharing and cooperation mechanism between, EU member states, there have been significant FDI developments throughout the European Union. As of the date of this publication, 23 out of 27 EU member states have FDI review regimes and the other four EU member states are adopting, or are expected to adopt, FDI review regimes in 2024. Among other developments, in 2023:
  - *Belgium*. The Belgian FDI review regime—which includes mandatory and suspensory notification requirements—went into effect on July 1, 2023.
  - *Ireland*. The new Irish FDI legislation was signed into law in 2023 and the Irish FDI review regime is expected to go into effect during the first half of 2024.
  - *Luxembourg*. The Luxembourg FDI review regime—which includes mandatory notification requirements—went into effect on September 1, 2023.
  - *Netherlands*. The Dutch FDI review regime—which includes mandatory and suspensory notification requirements—went into effect on June 1, 2023.
- *United Kingdom*. The UK FDI review regime has been in effect for approximately two years. In November 2023, the UK government opened a consultation regarding its FDI review regime, seeking stakeholder input on the first two years of experience under the regime and possible changes.

Outbound Investment Regime Proposals

In August 2023, the Biden administration issued a long-awaited executive order and accompanying rule-making proposal, setting forth the contours of an outbound investment regime targeting China. Under the proposed U.S. outbound investment regime, U.S. persons would be prohibited from making, or be required to notify the U.S. government regarding, certain investments in entities engaged in certain activities relating to semiconductors and

microelectronics, quantum information technologies, and artificial intelligence involving "countries of concern" (presently limited to China, Hong Kong and Macau).

Although previously referred to informally as "Reverse CFIUS" in industry circles, the proposed regime would not involve a case-by-case review of outbound investments. Instead, the proposed regime would require parties to determine whether a given transaction is prohibited, subject to notification, or permissible without notification. There has been no guidance on when the final regulations for the proposed regime will be issued or when the proposed regime may take effect.

In parallel, in August 2023, the European Commission issued a communication that included discussion of potential outbound investment rules that would have a similar scope as the proposed U.S. outbound investment regime (i.e., the rules would target China and be focused on investments in areas such as quantum computing, advanced semiconductors, and artificial intelligence). More recently, in January 2024, the European Commission issued a white paper regarding potential outbound investment rules, beginning a long consultation and assessment process. The European Commission indicated in its white paper that it expects to adopt a Recommendation to EU Member States to monitor and review certain outbound transactions in sensitive technologies in summer 2024 and publish its assessment and proposal for a policy response in 2025.

The proposed U.S. outbound investment regime and a potential EU outbound investment regime would be aimed at (1) limiting U.S. and EU support of certain industries in China, and (2) preventing the transfer of sensitive technology or intellectual property from U.S. and/or EU companies to China. Although there is still significant uncertainty regarding the proposed/potential outbound investment regimes, there appears to be significant support for such regimes in the United States and Europe. Such regimes, if adopted, could significantly disrupt U.S. and EU investment in certain Chinese industries.

Conclusion

Given the consequences that existing FDI review regimes can have for cross-border transactions, and the potential implications

of outbound investment regimes, boards of directors would be well advised to stay up-to-date on related developments in key jurisdictions, particularly in North America, Europe, and Asia.[1]

In addition, boards of directors should ensure that they are directing their management teams to conduct thorough due diligence and analysis in connection with cross-border transactions, especially transactions involving companies involved in sensitive sectors or activities (i.e., companies in the semiconductor or artificial intelligence industries and companies that collect and maintain sensitive (including personal) information) or with government (particularly defense or security-related) relationships, think about how FDI filing and clearance timelines overlap with other regulatory processes (including, for example, merger control/antitrust filings), and consider risk allocation when identifying closing conditions and agreeing to regulatory efforts provisions.

Notes

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1. As of the date of this publication, most countries in Central and South America and Africa generally have no or very limited FDI review regimes, although those countries may separately limit or prohibit foreign investment or ownership in certain industries or companies. However, Mexico is considering the creation of an FDI review regime.