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ARTICLE

Foreign investment control regimes reach far and hit hard

PART OF OUR REPORT

Global trends in merger control enforcement

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Foreign investment (FDI) screening regimes continued to present challenges for dealmakers. We saw tough intervention in key jurisdictions. New and expanding rules added to regulatory burden. Overall, most deals are cleared without remedies. But the road ahead is hard to predict, with protectionist headwinds expected to add to an already complex environment.

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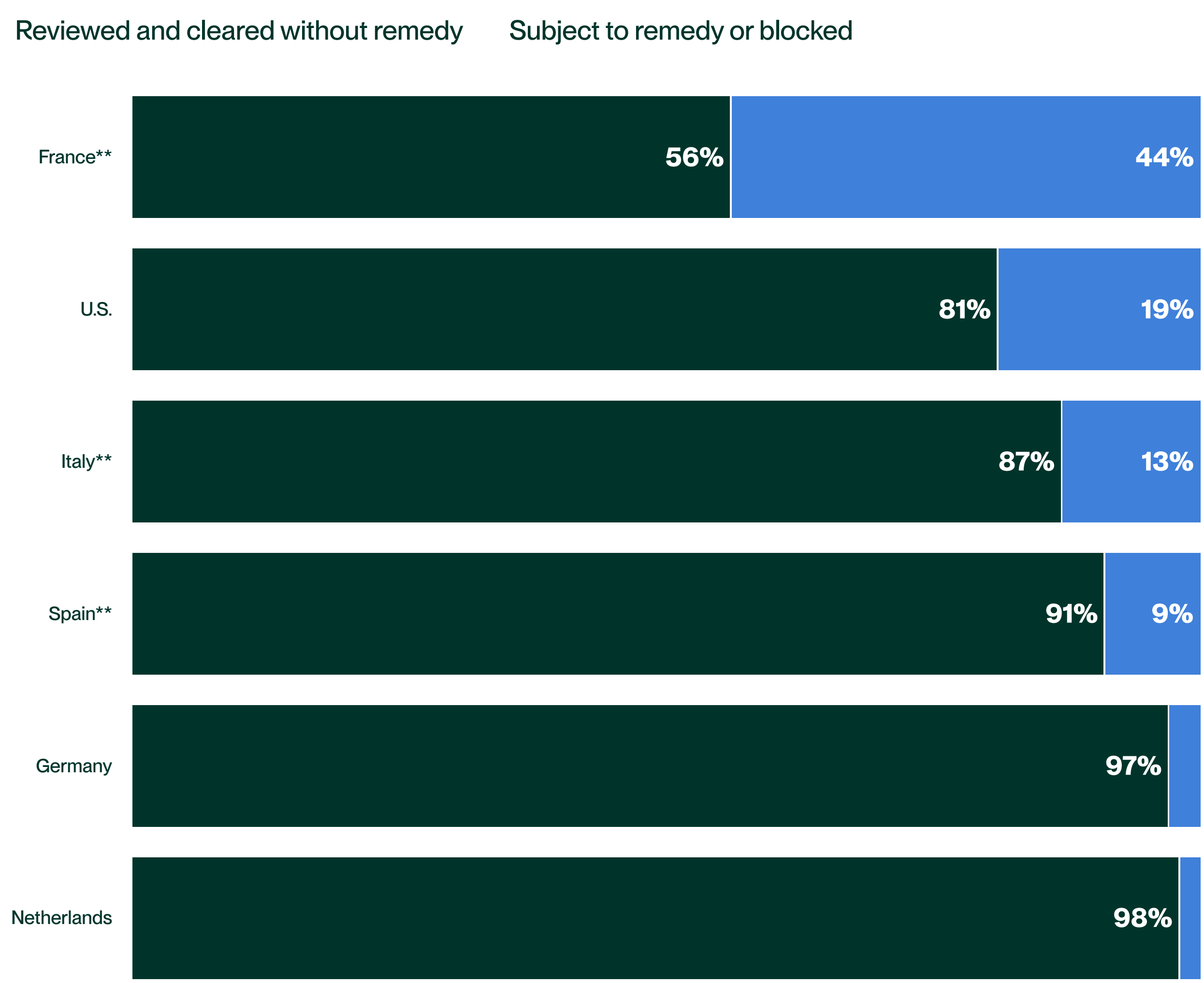
Outcome of FDI screening review*

Based on last published report by government/regulator



* Excludes Australia, where reviews cannot be categorized in this way.
** In each of these jurisdictions a large proportion of notifications are deemed out of scope (France: 53%, Italy: 55%, Spain (including voluntary consultations and requests for authorization: 45%).
*** Excludes the outcome of reviews of investments under "net benefit to Canada" provisions, which are usually subject to undertakings (full data is not available).

The global FDI landscape continues to paint a mixed picture. Latest available data shows a dip in the number of FDI decisions in key jurisdictions, including the U.S. and Italy. Elsewhere, review levels rose as expanded—and brand new—regimes subjected more deals to FDI review.

Intervention was similarly varied. FDI concerns resulted in prohibition or remedies in a high proportion of cases in, for example, France (44%) and the U.S. (19%). By contrast, in nearly two thirds of the jurisdictions we analyzed, over 97% of deals notified were cleared without remedies.

FDI reviews continued to impact deal timetables. Most assessments are completed within three months. But even in straightforward deals, FDI clearances often take longer than merger control approvals (see Merger control reviews speed up (at least for straightforward cases)). Assessment of deals raising substantive issues is likely to take significantly longer.

CFIUS steps up enforcement and U.S. outbound investment rule kicks in

In 2023 (the most recent period for which data is available), the Committee on Foreign Investment in the United States (CFIUS) imposed more mitigation measures—in around one in five notifications. Some were far-reaching, including divestment of the entire U.S. business.

The proportion of deals blocked remained broadly in line with previous years, at around 4%. In 2024, all eyes were on the review of Nippon Steel's acquisition of U.S. Steel. President Biden's decision to block the deal in early January 2025 has sparked claims by the parties that the CFIUS process was politicized. The outcome of their appeal will be much anticipated.

CFIUS increased its focus on non-notified transactions and on policing compliance with procedural requirements or mitigation measures. In 2023 it assessed or imposed four civil penalties for violations, double the number issued in its 50-year history.

Parties subject to mitigation measures should not underestimate the burden of compliance and the seriousness of any breach. In 2024, CFIUS fined a telecommunications company USD60m for failing to disclose data breaches in violation of conditions attached to an earlier acquisition.

A U.S. outbound investment rule took effect on January 2, 2025. It prevents or requires notification of certain U.S. outbound investment in Mainland China, Hong Kong and Macau and bites on specific transactions relating to semiconductors and microelectronics, quantum information technologies and AI.

President Trump's plans for U.S. foreign investment are starting to take shape. In February he announced an "America First Investment Policy," which focuses on promoting foreign investment from allies and partners while seeking to address threats posed by certain foreign adversaries. This does not change any laws, but will likely have significant implications for investors, businesses and markets.

EU foreign investment screening nears a full house

In the EU, 24 member states now have national FDI screening mechanisms, although the regime in Bulgaria is not yet operational. The remaining three (Croatia, Cyprus and Greece) have rules at various stages of the pipeline. The pace of change has been dramatic: in 2017, only 11 member states had FDI rules in place.

Some member states are looking to expand their rules. The Dutch government is consulting on bringing additional investments in scope, including in AI, advanced materials and biotechnology.

Reforms to the EU FDI Regulation, including setting minimum standards to be applied by member states and enhancing cooperation and information sharing, were delayed by the EU elections. Work on the proposals has now resumed. We should see further developments in the coming months.

The European Commission is progressing its work to determine whether outbound investment controls are needed. In early 2025, it called on member states to review past, ongoing and new outbound investments in semiconductors, AI and quantum technologies. The exercise will run into 2026.

U.K. intervention soars but investment in key sectors is approved

Intervention under the U.K. National Security and Investment Act (NSIA) fell in FY23/24. Only five deals resulted in conditions (down from 15) and there were no prohibitions.

Since then, however, there has been one prohibition and 11 sets of conditions. It appears that—despite its growth agenda—the new Labour government is continuing to apply just as much scrutiny to deals.

But overseas investment in the U.K.'s strategic sectors remains possible, albeit potentially with remedies. In the past year, the government has conditionally approved telecoms deals, including Vodafone's merger with Three and the acquisition of 24.5% of BT by India's Bharti Televentures. Acquisitions in the energy, defense and post sectors also received a green light, subject to conditions.

2024 saw the conclusion of the first appeal under the NSIA. The court endorsed the government's wide discretion when making decisions relating to national security. It also confirmed that parties cannot be compensated for the cost of complying with remedies, even if this results in financial loss. The ruling has not deterred other appeals—FTDI Holding is challenging the government's decision ordering it to sell its stake in a Scottish semiconductor company (although in deference to the government's discretion in national security reviews, the court has refused an application to suspend the government's divestment order pending the outcome of the appeal).

Currently unclear is the government's position on certain changes to the regime, proposed by the previous leadership, including the introduction of an exemption for intragroup reorganizations. We may learn more during 2025.

Tightening here, loosening there

Outside the U.S. EU and U.K., other FDI regimes are expanding. Tweaks to the Canadian regime last year give the government wider powers, and the minister has announced increased scrutiny of investments in the digital media and critical minerals sectors.

Elsewhere, eager to promote investment, some countries are loosening the reins. In China, new measures lower thresholds and relax requirements for foreign strategic investment in listed companies. They also allow foreign investors to use equity in an overseas company or newly issued shares as payment for such investment. All restrictions on investment in the manufacturing sector have now been removed.

In Australia, the Treasurer's issue of five disposal orders in a quarter and four ongoing Foreign Investment Review Board (FIRB) investigations underscores a heightened focus on national security reviews and call-ins. Changes introduced in a May 2024 policy document will mean greater focus on sensitive proposals and tax arrangements. But, from January 1, 2025, Treasury has indicated a new streamlining process will be implemented. This should hopefully mean faster approvals for known investors with a good compliance record making investments in non-sensitive sectors. We are yet to see this play out in practice.

It's not all about China

While Chinese investors drew the attention of many FDI regulators, non-Chinese investment in particularly sensitive sectors—including from the U.S. and U.K.—has also seen intervention in 2024. This captures intervention against global investment funds.

Italy, for example, accepted commitments in relation to the sale of Telecom Italia's fixed line network to U.S. PE fund KKR. It also conditioned minority stake acquisitions, including BlackRock's purchase of 3% in an Italian defense and aerospace firm.

In Canada, the government required commitments in relation to a U.S. firm's acquisition of a Canadian steel company. Japanese government officials have said they will assess on national security grounds any takeover of retail chain 7-Eleven by Canada's Couche-Tard.

Domestic investment can also face intervention in some jurisdictions, again depending on the deemed importance of the relevant target business for national security. We saw this in Italy and the U.K. last year.

Remember that FDI screening casts a wide net

FDI screening rules are typically broader in scope than merger control regimes. They can catch transactions that are not typically considered to be "mergers," or even deals in a wider sense, including internal reorganizations and fund transactions (e.g., continuation funds).

FDI mechanisms can also impact financing arrangements and security. Last year we saw the Italian government view the grant of a pledge over shares as a trigger for filing (rather than the notification obligation arising only on enforcement of the pledge). U.K. government guidance has been revised to remove a statement that loans, conditional acquisitions, futures and options are unlikely to be called in.

In addition, certain FDI regimes (including the U.K.) automatically treat in-scope deals that completed without the required pre-notification and approval as legally void. As a result, providers of debt finance looking to take security over the shares or assets of a target business are increasingly requiring borrowers to demonstrate compliance with any applicable FDI regimes.

Investors to face increased global FDI scrutiny?

The coming months will see mounting geopolitical and economic tensions create uncertainty, unpredictability and, as a result, increased execution risk.

Some foreign investors will likely face progressively protectionist headwinds in certain jurisdictions. And, while other governments/regulators are keen to decrease barriers to foreign investment, in practice the regulatory burden on dealmakers will grow.

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