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# FOREIGN INVESTMENT AND NATIONAL SECURITY

The foreign direct investment landscape has been notably active in recent months, influenced by the unpredictable nature of geopolitics. More countries are scrutinising the extent of inward foreign investment and considering the necessity of imposing constraints on national security grounds. Yet, despite many geopolitical developments suggesting a partial reversal of globalisation's significant economic success, foreign investment remains essential for economies around the world. ■



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Veronica Roberts heads Herbert Smith Freehills LLP's UK competition, regulation and trade practice. She also leads the firm's global foreign direct investment group and is co-head of the global TMT sector team. As leader of the firm's FDI group, she is an expert with over 25 years' experience in coordinating multijurisdictional merger control and FDI reviews and filings for cross-border transactions.



### GERMANY

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Christoph Barth co-heads Linklaters' global foreign investment control focus group. He has deep expertise in complex multijurisdictional cases, particularly before European foreign investment control regulators including Germany's Federal Ministry for Economic Affairs and Energy, and has contributed to major policy projects including the latest reforms of German rules. He offers invaluable firsthand insights into rapid developments and serves on the board of Forum Foreign Investment Control.



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Michael Caldecott is a partner in the competition/antitrust and foreign investment group in Toronto. He specialises in strategic cross-border and domestic M&A transactions and high-stakes Competition Bureau and Investment Canada Act investigations, in particular with respect to the national security, socioeconomic and cultural heritage regimes under Canada's foreign investment legislation. He is a former chair of the Canadian Bar Association's Foreign Investment Review Committee and is well-versed in the multijurisdictional merger review landscape.



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Wesley Lainé is a member of the white-collar defence and investigations and national security practices at Skadden's Paris office. He is qualified to practice in the US and EU, and advises corporations on a wide range of US and EU regulatory matters. He has extensive experience securing foreign investment clearance before the French Ministry for the Economy, having served as counsel in corporate transactions involving numerous clients and various industries.



### UNITED STATES

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Gregory Gonzalez joined Wilkinson Barker Knauer as a partner after 13 years with the US Department of Justice, where he was instrumental to an effort to shield critical and emerging technologies from national security threats. As geopolitical security dynamics increasingly impact international commerce, he draws on his experience to help clients anticipate and proactively address risks to their business objectives.

## FW: HOW WOULD YOU DESCRIBE POLITICAL AND ECONOMIC DEVELOPMENTS AROUND NATIONAL SECURITY ISSUES? HOW ARE THESE SHIFTS IMPACTING FOREIGN INVESTMENT FLOWS?

### UNITED KINGDOM

**Roberts:** Many countries are now paying closer attention to the scope of inward foreign investment and seeking to impose constraints through a foreign direct investment (FDI) regime. The concept of 'national security' continues to be stretched: having started with a focus on defence, dual-use and critical infrastructure, it now covers emerging types of technology and product development. The UK is no exception and we have seen an increasing focus, inspired by geopolitical and economic developments, on maintaining critical industry and technologies in the UK wherever possible and endeavouring to reduce any supply chain risks. The UK's National Security and Investment (NSI) regime, overseen by the Investment Security Unit (ISU), was introduced in early 2022 and has quickly become one of the most active FDI regimes in the world. The UK remains a leading investment destination but the NSI regime will undoubtedly have deterred some investment into more sensitive mandatory filing sectors.

### CANADA

**Caldecott:** Foreign investment enforcement in Canada has always

been subject to the contours of geopolitics. Enforcement using Canada's national security regime has proliferated in the last 10 years as tensions with China and countries China is perceived to influence have grown, especially in sensitive sectors like critical minerals, dual-use technologies, supply chains and infrastructure. If the current unpredictability in the political and especially economic relationship between Canada and the US continues into the medium term, it is possible that we will see Canada's national security regime being used as a tool to shield the Canadian economy from unwelcome US investment in sensitive industries, as evidenced in the Canadian government's March 2025 changes to its National Security Guidelines in response to the US government's tariffs. Despite these moving goalposts, it is important to remember that only a small fraction of foreign investment transactions are called in for national security review. Last year, for example, nearly 80 percent of investments from China were not subject to extended national security review, showing that in many circumstances, Canada remains open to foreign investment.

### UNITED STATES

**Gonzalez:** In the US, there is increasing convergence of economic and national security policy that is reshaping traditional paradigms. While some changes may be influenced by the current political context, this shift will

likely endure given the intensifying competition between the US and China. In the US, the president is afforded significant discretion by the other branches of government to determine whether a national security risk is extant and Congress has provided powerful tools to address any such risks, such as the International Emergency Economic Powers Act (IEEPA). Policy changes can occur quite rapidly, sometimes with the stroke of a pen, adding an element of uncertainty and unpredictability to investment decisions that would otherwise be made based on economic principles.

### FRANCE

**Lainé:** France has implemented an economic security strategy since the early 2010s, which aims to protect and promote French interests in economic, industrial and scientific areas. This economic security strategy laid the groundwork for expanding the scope of the French FDI regime to confer broader authority to French authorities to screen transactions on national security grounds. As part of this economic security strategy, France also implemented other policy tools, including adopting the Sapin II anti-corruption law and creating the French Strategic Information and Economic Security Service, which plays a key role in protecting strategic French companies and technologies. The consequences of the events of the global pandemic and the armed conflict in Ukraine marked a shift in paradigm with



respect to economic security policy. Specifically, countries were forced to reassess their strategic autonomy in critical areas such as energy and healthcare, and it highlighted the need to protect critical infrastructure, sensitive data, cutting-edge technology and vital resources. The reinforcement of foreign investment controls as part of this paradigm shift on economic security does not appear to have had a significant impact on the volume of foreign investment flows.

### GERMANY

**Barth:** While many geopolitical developments point toward a partial reversal of the huge economic success that globalisation has brought, foreign investment remains essential for economies around the world, notably in Europe. Regulators are, however, not naïve about such investments and investors need to be realistic about the need to go through screening and how to approach these processes. The share of intervention continues to be at a low level – at around 10 percent across the European Union (EU) for prohibitions and mitigation measures combined, and even lower in certain individual countries.

**FW: COULD YOU HIGHLIGHT ANY RECENT OR FORTHCOMING REGULATORY CHANGES WHICH ARE LIKELY TO AFFECT FOREIGN INVESTMENTS? TO WHAT EXTENT HAVE YOU OBSERVED**

## HEIGHTENED SCRUTINY OF CROSS-BORDER TRANSACTIONS IN GENERAL?

### CANADA

**Caldecott:** The US and Canada trade situation definitely has the potential to heighten scrutiny for certain types of investments that could undermine Canadian economic security or otherwise reduce Canada's economic independence. Outside that policy area and subject to a change in policy following the election of the Carney government in April 2025, we are expecting to see the launch of a mandatory, pre-closing filing regime for non-passive minority or controlling investments in sensitive sectors. Legislation was enacted in 2024 to provide for this regime, but implementation has been delayed by the need to introduce regulations defining its scope. While it will not affect a large portion of transactions that can currently be filed on a post-closing basis, it is designed to bring a class of transactions regarded as higher risk from a national security perspective to the government's attention pre-closing, enabling more effective enforcement action where necessary. This regime will require more advance planning for cross-border mergers that could be implicated, as well as raising some thorny jurisdictional issues as other jurisdictions, such as the US and UK, have discovered when using thresholds based on a target's business activities rather than bright-line financial thresholds.

### UNITED STATES

**Gonzalez:** The advent of the 'Outbound Investment Security Program' in 2025 provides the US government with the authority to prohibit, or require notice of, certain foreign investments emanating from the US that have a nexus to China, including Hong Kong and Macau, and which involve cutting-edge technologies relating to quantum computing, semiconductors and artificial intelligence. The rules apply to a wide range of investment instruments and the investment target does not necessarily need to be incorporated and domiciled in China for the regulations to be applicable. The burden is on the investor to conduct reasonable diligence when contemplating an investment, and any violations would subject the investor to civil and, potentially, criminal penalties. The current administration is considering an expansion of outbound restrictions to reach other technologies, such as biotechnology, advanced manufacturing and aerospace. Congress has also expressed interest in adopting legislation that would codify an outbound programme that is generally consistent with the current IEEPA-based rules.

### FRANCE

**Lainé:** In January 2024, France further expanded the scope of its FDI regime. Covered investments were extended to a foreign investor acquiring control of a French-registered branch of a foreign



company. France also made permanent a covered investment rule that lowers the voting rights triggering threshold to 10 percent for non-EU and non-European Economic Area foreign investors in cases involving French publicly-traded companies. As part of this reform, France expanded the scope of covered activities subject to French FDI control to the extraction, processing and recycling of critical raw materials and to the security of prison establishments. It also amended the list of covered critical technologies for research and development (R&D) activities to include photonics, and replaced renewable energy with low carbon energy to capture a broader universe of energy-related R&D. France has repeatedly expanded the list of covered activities and critical technologies since 2019. It would be reasonable to expect further broadening of their scope in response to national security-related considerations posed by evolving strategic considerations and high-tech issues. This year, it is expected that French FDI authorities will update the French FDI guidelines to clarify certain requirements in the French FDI rules, including on the concept of control and certain exemptions applying to deal structures in private equity transactions.

## GERMANY

**Barth:** After a flurry of reforms, foreign investment regimes have 'stabilised' in the last two to three years, with fewer legislative

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UNITED STATES GREGORY R. GONZALEZ  
WILKINSON BARKER KNAUER, LLP

changes and regulators finetuning the application of their rules. At a European level, I expect the overhaul of the Screening Regulation to be a key topic for 2025 as the legislative proposal goes into its final stretches. It strives for more alignment between member states but also expansion into areas that were not controlled to date, such as greenfield joint ventures. A new regulation will need to be transposed into national laws, and experience shows that this may result in some 'over-implementation' – that is, a further sharpening of the rules.

## UNITED KINGDOM

**Roberts:** The NSI regime has not been amended since its introduction. Data published by the ISU suggests that it is clearing a greater percentage of transactions during the initial 30 working day period. Only five final orders were

imposed between April 2023 and March 2024, all of which were conditional clearances, compared to 15 final orders between April 2022 and March 2023, of which five were prohibition decisions or divestment orders. In my experience, the ISU continues to ask questions – liaising closely with other government departments – about transactions where there could be a national security concern, usually where the target is operating in one of the mandatory filing sectors. On occasion, this means that a transaction will only be cleared during a further review period. If this is not possible, the ISU will usually put forward a set of remedies for consideration, to try to reduce or eliminate its concerns.

**FW: WHAT CHALLENGES MIGHT FOREIGN INVESTORS EXPECT TO FACE DURING**

### A FORMAL REVIEW OF A PROPOSED INVESTMENT OR TRANSACTION? WHAT KINDS OF CONSIDERATIONS NEED TO BE MADE WITH REGARD TO INVESTMENT SCREENING, INCLUDING NATIONAL SECURITY CONCERNS?

#### UNITED STATES

**Gonzalez:** Challenges can be myriad and are dependent on a number of factors, including the acquirer, the acquiree, the purpose of the transaction, the nature of the acquiree's business, the access that the acquirer will have to the acquiree, the acquiree's commercial agreements and relationships, among other factors.

#### FRANCE

**Lainé:** Required disclosures in a French FDI filing – on the foreign investor, French target business and

deal structure – have been extended in recent years to reflect, among other aspects, certain provisions of the EU FDI regulation. In addition to the disclosures in a filing, French FDI authorities may request other information in Q&A format during the review process to close any gap in required information they need to complete the review. Gathering information often requires extensive coordination between deal parties and counsel, which can impact the deal timeline. The broad scope of the French FDI regime requires looking beyond national defence and other similar public security concerns to understand the full spectrum of considerations. In comparison to other EU countries, France tends to impose mitigation measures more frequently in authorised transactions – this was the case in 53 percent of transactions authorised in 2022

and 44 percent in 2023. Mitigation measures typically take the form of a so-called undertaking letter pursuant to which the relevant foreign investor agrees to certain commitments with the French state.

#### UNITED KINGDOM

**Roberts:** A filing under the NSI regime will be reviewed for target risk, control risk and acquirer risk. Transactions in the defence sector are the most likely to be reviewed in detail, followed by military and dual-use communications, advanced materials and academic R&D. Heightened scrutiny of transactions involving Chinese acquirers continues, but this is not the ISU's only focus. While we have seen some prohibitions and conditional clearances of Chinese investment, including the University of Liverpool and Pinggao Group Ltd, some Chinese investors have also benefitted from unconditional clearance, such as Shanghai Sierchi Enterprise and Flusso. The ISU continues to monitor transactions and start reviews on its own initiative, so it might be advisable to make a voluntary filing in some cases. It is important to emphasise that the NSI regime applies equally to domestic investors. We have even seen an example with Epiris and Sepura of conditions being imposed in relation to investment in a UK company by a UK investor.

#### GERMANY

**Barth:** Processes are not designed to be fully transparent and there may be an information



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FRANCE WESLEY LAINÉ

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP AND AFFILIATES

asymmetry between transaction parties and the regulator. It will be important to have an as open as possible dialogue with the regulator and an adviser that can facilitate such exchange. With lessons learnt from certain dependencies that result from naïve decisions in the past, regulators may be more critical than they used to be in investments in high-tech industries, critical infrastructures and where a target has unique selling points in its industry.

## CANADA

**Caldecott:** In 2023-24, only 26 investments were subject to some form of national security review in Canada, compared with 1195 mandatory notifications – setting aside all the transactions that are not currently notifiable but are subject to national security jurisdiction. The vast majority of investments therefore do not experience national security review in Canada. The same is true for Canada's socioeconomic net benefit regime: only approximately 10 transactions per year meet the very high net benefit review thresholds. If subject to national security review, a key challenge is the information deficit between an investor and the reviewing government. While the Canadian national security regime is gradually moving away from a binary system of unconditional clearance or prohibition, obtaining sufficient information about the national security concern and how to design mitigation to address

that concern in a proportionate but effective way is not always straightforward.

**FW: WHAT ESSENTIAL ADVICE WOULD YOU OFFER TO FOREIGN INVESTORS ON NAVIGATING A TRANSACTION SCREENING PROCESS? WHAT STEPS CAN THEY TAKE TO PREPARE FOR AND ASSIST THE PROCESS?**

## GERMANY

**Barth:** It is important for investors to be proactive. A key 'ingredient' in foreign investment control reviews is to 'drive the process' – to holistically consider upfront what information regulators require and, if needed, to reconcile the national security and their own logic of pursuing an investment. This may, occasionally, also entail designing certain, typically behavioural, concessions

CANADA MICHAEL CALDECOTT  
MCCARTHY TETRAULT

*The principles of national security policy in Canada are pretty well-established and further changes in screening processes are not likely in the next few years.*

that ease and accelerate the process to approval.

## CANADA

**Caldecott:** Even in the unpredictable world of foreign investment enforcement in 2025, there remain some bellwether principles in Canada. First, if a transaction is subject to net benefit review, remedies committing to similar or better socioeconomic investment in the target's Canadian business are usually essential to obtain approval. This can come as a surprise to some investors that naturally want to achieve a defined set of synergies that could impact on things like Canadian headcount, R&D, and investment spending and Canadian office locations. Incorporating this analysis into pre-transaction planning and valuation workstreams is a worthwhile exercise when it is known that a net benefit review will be required.

Second, national security review is inherently opaque in nature, and so establishing clarity on an investor's commercial red lines in terms of potential mitigation, and then appropriately protecting those imperatives in the transaction agreement, is important for transactions where national security scrutiny is expected. This approach will only become more important if transactions and investors that can generate concerns expand in the current geopolitical climate.

### UNITED KINGDOM

**Roberts:** It is crucial that investors attempt to anticipate any potential national security concerns in advance. Sometimes the risk will be obvious, such as investment into defence, but investors should also consider more broadly whether an acquisition might

be politically contested. In such cases, investors should consider any possible remedies upfront and whether these could potentially be incorporated into the transaction documentation in an effort to ease the regulatory review process. The review process can be opaque, with very little contact with the ISU until, and if, they flag concerns and start to consider remedies. FDI agencies can liaise with each other behind the scenes in certain circumstances, so it is critical to take a coordinated approach in all FDI filings globally. The transaction agreement will likely need to include a tailored FDI condition precedent and warranties, and the review timetable will need to be factored into the overall deal timetable.

### FRANCE

**Lainé:** Foreign investors should assess whether the French FDI

regime will apply at the onset of their transaction. Such assessment should be tailored to the specifics of the French target, including evaluating the sensitivity of the relevant lines of business of the French target, its industrial capacities, technologies and customers. The broad scope of the French FDI regime means that companies that may view themselves as peripheral to or simply not involved in French national security are increasingly likely to be caught up in the French FDI rules. French FDI authorities are also open to dialogue before a filing is made and also during the review process. If needed, foreign investors should take advantage of this communication channel to engage with French authorities to discuss the considerations that may apply to their transaction.

### UNITED STATES

**Gonzalez:** Foreign investors must establish credibility with the Committee on Foreign Investment in the United States (CFIUS) or other screening body at an early stage and demonstrate a respect for the process and the authority that the US government has vested in CFIUS to protect US national security. Thoroughness and accuracy in providing information to CFIUS is paramount. A significant portion of the information may be technical in nature, so it is important to involve subject matter experts. Establishing and maintaining the trust of regulators throughout the process greatly



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GERMANY CHRISTOPH BARTH  
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enhances the ability of the foreign investor to successfully navigate a stringent inquiry. Further, it is vital to ensure that there is a thorough CFIUS due diligence process that precedes the transaction. Parties must determine whether CFIUS has jurisdiction over the transaction and whether the transaction falls into the limited categories that require a filing. That diligence also allows the transaction parties to assess whether CFIUS would likely have an interest in reviewing a transaction, such that they can adequately evaluate whether to make a voluntary filing or face a potential post-close, 'non-notified' inquiry. Before a declaration or notice is filed, transaction parties should work with counsel to anticipate the potential risks that CFIUS might focus on, such as the investor's associations and affiliations, and the target's products and service offerings. Where the risk of government concern may be high, for example if advanced technology is of interest to adversaries, parties should seek to reach agreement on the types of mitigation terms and implementation costs that would preserve the investment rationale.

**FW: LOOKING AHEAD, WHAT ARE YOUR PREDICTIONS FOR CROSS-BORDER INVESTMENTS AND SCREENING PROCESSES? WHAT TRENDS DO YOU EXPECT TO SEE WHEN IT COMES TO BLOCKING OR PERMITTING INBOUND FOREIGN INVESTMENT?**

*The concept of 'national security' continues to be stretched: having started with a focus on defence, dual-use and critical infrastructure, it now covers emerging types of technology and product development.*

UNITED KINGDOM VERONICA ROBERTS  
HERBERT SMITH FREEHILLS LLP

#### CANADA

**Caldecott:** The principles of national security policy in Canada are pretty well-established and further changes in screening processes are not likely in the next few years. Enforcement posture can change from government to government, and as different sectors and products or services assume more importance to Canadian economic and national security. Aside from a keen focus on investments by Chinese investors and those into critical minerals, sensitive technologies and businesses involved in essential supply chains, we are beginning to see greater enforcement of more traditionally 'marginal' cases, such as in businesses with access to the personal information of Canadians or by investors from countries potentially subject to influence from China. This complicates the risk matrix, expanding the

risk of intervention to a second concentric circle of investors and target businesses. Assuming the final limb of 2024's legislative reform is implemented in 2025, the trend in Canada continues to be interventionist on national security matters, albeit focused on the minority of cases that raise genuine questions relating to Canada's national security.

#### UNITED KINGDOM

**Roberts:** The UK government remains committed to ensuring that the UK FDI regime is "effective but light touch, helping businesses and investors to continue with certainty". I expect that the government might amend some of the sensitive sector definitions where its experience shows that the security risk is minimal. That said, as technologies develop rapidly and access to certain resources and inputs becomes more acute,

the government could also seek to extend some of the mandatory filing sectors. This means that we are likely to continue to see a large number of UK filings, in the region of 800 to 900 per year. While investment from certain countries will continue to be scrutinised, I also expect to see more conditional clearance cases even for investors from allied countries. While there are no proposals currently for an outbound UK investment screening regime, this is likely to remain under consideration given the recent introduction of a US outbound regime.

### FRANCE

**Lainé:** It is possible that the scope of covered activities and covered critical technology in the French FDI regime will be expanded to additional business sectors and technologies that raise economic security considerations. Other FDI regimes have lowered the thresholds for covered investments to cover minority interests that confer a significant ability to influence sensitive matters. It remains to be seen whether the French covered investment trigger thresholds, which are customary corporate thresholds, will also be lowered. Disclosure requirements might also be enhanced due to, among other considerations,

increasingly complex deal structures. The French FDI regime has always sought to address the policy question of balancing the goals of promoting open investment and protecting French national security. To achieve this goal, French authorities have historically addressed perceived risks or threats arising from FDI through mitigation, rather than blocking transactions. In this regard, it can be expected that French FDI authorities will continue using mitigation measures as the best way to preserve French national interests.

### UNITED STATES

**Gonzalez:** Despite the increase in authorities and scrutiny over recent years, most inbound investments to the US are ultimately given clearance by regulators. Officially, there have been about 10 presidential prohibitions in the history of CFIUS, although other transactions have been abandoned due to an inability to reach agreement on mitigation conditions. The current administration has indicated that it intends to “restrict PRC-affiliated persons” from investing in certain sensitive and strategic technologies and sectors, while creating a complementary “fast-track” process to facilitate investments from allied and partner countries. Where mitigation is

deemed necessary, agreements would be streamlined and cabined temporally. There could also be an expansion of the ‘excepted country’ roster which currently includes only the ‘five eyes’. ‘Excepted investors’ from countries that establish robust investment screening regimes are exempted from CFIUS jurisdiction in certain circumstances. These actions would serve as a strong incentive for countries to align with US investment security policy regarding China.

### GERMANY

**Barth:** A key question for foreign investment review will be how European regulators treat investment from the US, the single-largest source of foreign investment in Europe. Historically, this was always very welcome, but it can be expected that more consideration will be given by regulators to the interplay of extraterritorially applied US laws, such as the Patriot Act and the Defence Act, and European security interests – an aspect which also had some relevance during the 2017-21 US administration. I do not expect this to result in more prohibitions but likely some more red tape in processes and potentially certain mitigation requirements. ■

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