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NAVIGATING FOREIGN DIRECT INVESTMENT REGULATION: ENERGY

Control of foreign investment in energy

Foreign Direct Investment (**FDI**) regulation is an area of increasing activity and enforcement worldwide. Against a backdrop of heightened geopolitical tensions and the residual pressure to keep strategic industries 'onshore', an increasing number of FDI regimes globally now apply not only to outright acquisitions but also to minority investments, even where the interests acquired do not confer control over the target business or its assets.

FDI controls may typically require parties to notify a monitoring authority of their intended transactions. Where a notification obligation applies, it will frequently be unlawful for parties to complete the transaction without first obtaining consent from the monitoring authority. In some cases, however, countries do not maintain FDI screening regimes in this traditional sense, but instead regulate FDI via "negative list" arrangements that limit or prohibit foreign ownership, or impose other regulatory requirements on foreign ownership.

FDI regimes are typically applied as an additional layer of regulation on top of other rules such as merger control and industry regulations. Moreover, especially in significant cross-border investments, it is quite possible for multiple FDI regimes to apply to a single transaction. With this in mind, conducting a multi-jurisdictional FDI analysis is now an essential part of any M&A or investment due diligence exercise.

Common features of FDI regimes

FDI regimes typically apply to specified classes of investments – increasingly these are not limited to controlling interests but can capture minority investments (eg as low as around 10%) even where they do not confer control over the target business or its assets.

Often there are no turnover or other thresholds for the FDI rules to be engaged.

Mandatory notification obligations may apply and clearance may be required before transactions can complete.

Some regimes prohibit or restrict all foreign investment in specified industries.

Decision-making can be far more politically-driven and secretive than in other regulatory processes such as merger control. Outcomes can therefore be harder to predict and more difficult to explain.

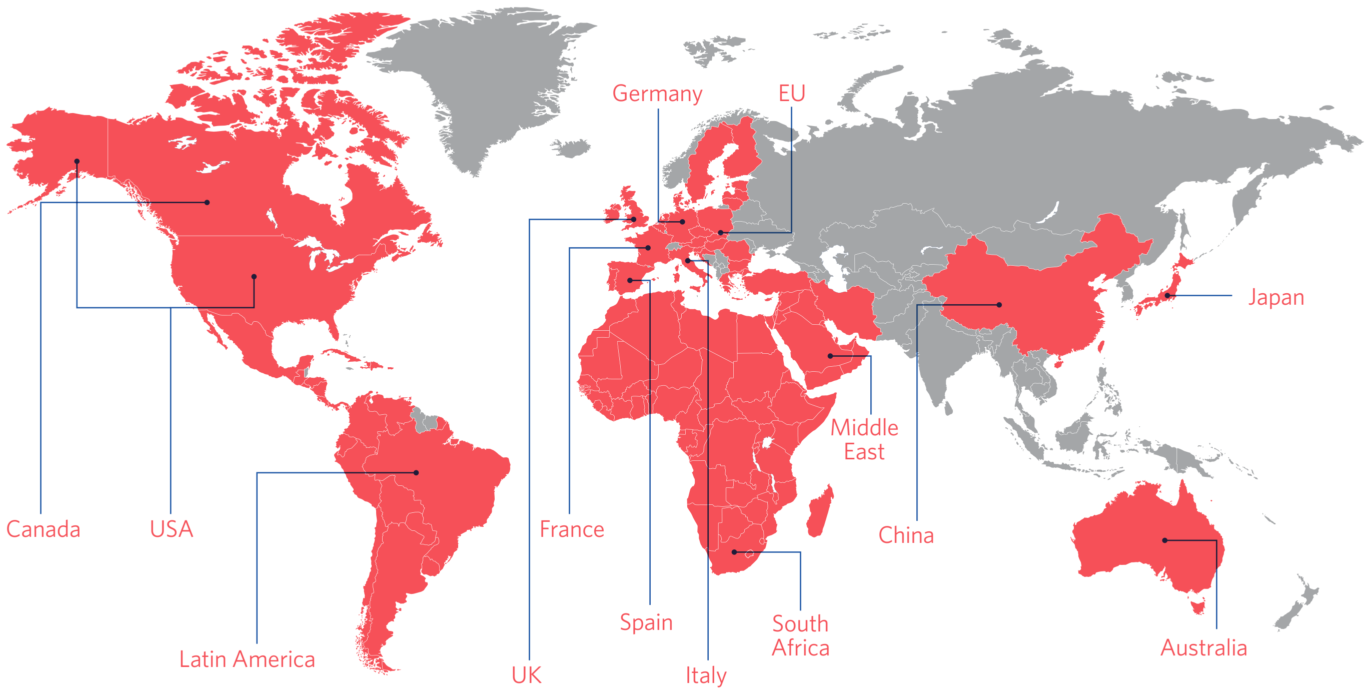
FDI and Energy

FDI controls are often perceived as being concerned with the protection of national security interests. Traditionally this has focussed on areas such as defence (eg military and dual use goods or services), but there has been a gradual expansion to areas of critical infrastructure. Energy has been and remains a core component of modern industrialised economies and is therefore considered to be critical infrastructure. Compromising a country's energy supplies or infrastructure is potentially very harmful. As such many FDI regimes include energy as an area in which foreign investment is controlled.

Energy is defined quite broadly under many regimes capturing, inter alia: electricity generation assets, electricity generation, transmission and distribution infrastructure, upstream and downstream oil and gas infrastructure, and the extraction and processing of oil and gas. The nuclear industry is also captured although it can fall under different sector definitions (eg nuclear or military/dual-use).

As the green energy transition continues, new forms of energy technology (battery energy storage solutions) are or will be caught by these regimes as well as the traditional energy infrastructure. As new technologies and possibilities emerge (eg hydrogen energy infrastructure), it is likely that these too will fall within the scope of FDI regimes.

Energy and FDI regimes around the world



EUROPE

UK

Under the National Security and Investment Act (**NSIA**) a mandatory and suspensory notification obligation applies to certain transactions involving a target entity that carries out activities in the UK of a specified description in one or more of the 17 specified sectors (certain transactions that do not trigger mandatory notifications can still be reviewed at the authority's discretion). Activities relating to energy are currently captured by the Energy sector, as well as the Military and Dual-Use and Civil Nuclear sectors.

These sectors capture a broad range of activities including those in: upstream oil and gas (operating or developing facilities); downstream gas (transmission, distribution, interconnection, processing and LNG import/export); downstream oil (importation, storage, production, distribution or delivery of oil and/or oil products); electricity (generation, transmission, distribution, interconnection and aggregation); dual-use products, services and technologies (research, development or production); and the nuclear industry.

EU

The Regulation for the screening of FDI into the EU on security and public order grounds became fully operational on 11 October 2020 (**EU FDI Regulation**). The EU FDI Regulation does not establish FDI screening at EU level but creates a framework for pan-EU cooperation on FDI screening:

Each Member State must notify the Commission and other Member States of any FDI in their territory undergoing screening.

The Commission may request information on FDI likely to affect security or public order of another Member State or a project or programme of EU interest.

Common criteria and standards are set for national FDI mechanisms if maintained or adopted, but there is no obligation to adopt new FDI screening mechanisms.

The EU FDI Regulation also identifies sectors which it considers Member States should assess for FDI screening as part of their own regimes. These sectors include critical infrastructure (including energy infrastructure), critical technologies including (inter alia) energy storage and the supply of critical inputs including energy.

France

France has an active FDI regime that imposes mandatory filing requirements. The regime is suspensory ie clearance must be obtained pre-closing.

Pre-completion approval is required from the Ministry of Economy (Ministère de l'Economie, des Finances et de l'Industrie) for foreign investments occurring in sensitive or strategic sectors if they result in the (i) acquisition of control of any French law entity or of branches/establishments (succursale) registered in France of a foreign company; (ii) acquisition of all or part of any business division (branche d'activité) operated by a French law entity; or (iii) for non-EU/EEA investors only, the acquisition, directly or indirectly, solely or in concert, of more than 25% of voting rights of a French law entity, or for listed French companies, 10% or more.

The sensitive/strategic sectors include:

a. activities prejudicial to national defence, public authority or to public order and public security;

b. infrastructure, goods or essential services that ensure the supply of certain services (eg energy, water, transportation, space operations, etc.) including the integrity, security and continuity of the extraction, processing and recycling of critical raw materials; and

c. R&D activities prejudicial to the activities in (a) or (b).

The energy sector is therefore specifically in scope of the regime. In addition, since one of the major electricity generators in France is state owned, the acquisition of suppliers of products such as dual-use products required in the nuclear sector can fall within the scope of the regime.

Germany

Germany has an active FDI regime that imposes mandatory filing requirements. The regime is suspensory ie clearance must be obtained pre-closing from the Federal Ministry for Economic Affairs and Climate Action.

The FDI regime is engaged by acquisitions of either: (i) 25% (direct or indirect control) of voting rights in a German company by a non-EU/EFTA company (in which case the Ministry is entitled to call-in the transaction for review); (ii) 10% if the target company operates in certain sectors (eg critical infrastructure in sectors such as energy), in which case a mandatory filing is triggered; or (iii) 20% in certain other sectors (in which case a mandatory filing is triggered).

Energy is one of the sectors that is within the scope of the regime and therefore there is considerable potential for investments in the energy sector to require filings. In 2024, investments in the energy sector accounted for more than 10% of the total number of FDI filings that were made.

New investment screening legislation is expected to be adopted in Germany. There are indications that this will include stricter rules for sensitive sectors. Draft legislation has not yet been published: given the recent political developments in Germany and the early federal elections in February 2025, new legislation is now expected in the second half of 2025.

Italy

Italy has an active FDI regime that imposes mandatory filing requirements. The regime is suspensory ie clearance must be obtained pre-closing from the Presidency of the Council of Ministers for qualifying investments.

Notifications are required for transactions relating to 'strategic assets' in four sectors. These sectors include energy networks, which includes:

a. the national natural gas transport network and related compression stations and dispatch centres;

b. infrastructure for the supply of electricity and gas from other countries, including onshore and offshore LNG regasification facilities;

c. the national electricity transmission network and related control and dispatch systems;

d. management activities and essential properties connected to the use of the networks and infrastructures referred to at (a), (b) and (c) above; and

e. national spaceports, logistic platforms of national relevance as well as road and motorway networks of national interest.

Energy is also covered in the fourth "sector" under critical infrastructure, energy storage and the security of supply of critical products (including energy).

Spain

Spain has an active FDI regime. There is a suspensory FDI screening mechanism in place that applies in the following scenarios:

a. a foreign investor (broadly speaking non-EU and non-EFTA persons or, where the value of the investment is at least EUR 500 million, non-Spanish EU and EFTA persons) acquires a shareholding interest of 10% or more in any Spanish company and/or Spanish asset; or

b. as a result of any transaction, the foreign investor acquires effective control of such Spanish company and/or asset; and either

- **i.** the investment is made in restricted sectors; or
- **ii.** when the foreign investor:
  - **a.** is directly or indirectly controlled by the government (including state bodies or the armed forces) of a third country; or
  - **b.** has made investments or has taken part in sectors that affect public safety, public policy or public health in another EU Member State; or
  - **c.** there is a risk that the foreign investor conducts illegal activities affecting public safety, public policy or public health.

The restricted sectors include critical infrastructure (including energy) and the land and real estate crucial for that infrastructure, dual-use technologies and the supply of critical inputs (including in particular energy). The energy sector is very broadly defined for the purposes of the regime.

New FDI regimes in Europe

A number of new FDI screening regimes have come into force in Europe in the previous two years. There are now FDI regimes or plans to implement FDI regimes in almost all of the EU Member States. Other countries in which a mandatory FDI regulatory filing could be required in respect of an investment in the energy sector (in that country) include: Belgium, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia and Sweden.

MIDDLE EAST

Middle East

FDI in the Middle East is relatively nascent, and the majority of jurisdictions do not have FDI regimes requiring pre-notification and clearance.

However a number of jurisdictions, such as Kuwait and Oman, have a 'negative list' which prohibits foreign ownership in certain sectors including certain energy related sectors (eg extraction of natural gas and crude oils and manufacturing of gas).

In the UAE, foreign investments in UAE companies are restricted in some strategic industries and prohibited in industries such as security and defence, financial services, insurance, TV and radio broadcasting stations, and satellite communication services. Although restrictions do not apply to investments in the freezones.

In Saudi Arabia, a new investment law applicable to all investors (local and foreign) came into effect in February 2025. The new law does not include a 'negative list' containing all activities in which foreign investment is prohibited, but instead provides that ministerial approval will be needed to undertake 'excluded activities' as will be updated by relevant authorities.

AFRICA

Africa
(excluding South Africa)

Most African countries do not have specific FDI regimes. Instead, they may regulate and monitor foreign investment through other means, such as through exchange control regulations and treasury approvals. In some cases, FDI regulation is more nebulous – regulation is carried out by way of broad policy considerations conveyed to investors through informal discussions with government or through licensing requirements imposed on an ad hoc basis at the time of the investment.

Many African countries also regulate foreign investment by ensuring that such investment is carried out in a responsible manner and for the benefit of the country (eg linking it to a social responsibility requirement to local communities or local industry).

Competition law regulations may include public interest considerations which may bring transactions involving energy into the scope of review.

South Africa

While there is currently no separate foreign direct investment authority in South Africa, the South African Competition Commission (SACC) reviews mergers that meet prescribed financial thresholds.

Foreign investors will, through this process, often be required by the SACC and/or Department of Trade, Industry and Competition to provide commitments that are responsive to the SACC's public interest mandate, notably in respect of local ownership, employment and procurement.

Aside from the merger notification, there is no general obligation to notify acquisitions in South African companies by foreign investors, or the establishment of new South African companies by foreign investors. However, foreign investment in South African companies active in the aviation, mining, and broadcasting sectors is restricted.

AMERICAS

Canada

Canada has an active FDI regime. All acquisitions of control of Canadian businesses by non-Canadians are subject to review under the Investment Canada Act (**ICA**).

Energy is not a specifically designated sensitive sector under the current regime, so whether a suspensory pre-close filing is required will depend on a number of factors including: the value of the Canadian business, where the investor is from, whether the investor is state-owned, and whether it is a direct or indirect investment. Otherwise the filing can be made post-close.

Amendments to the ICA that have been passed will introduce a mandatory and suspensory notification and review process for foreign investments in certain defined business sectors. As at the date of writing, the sectors to be covered, have not been finalised. It is currently expected that these amendments will not enter into force until at least the second half of 2025.

USA

The USA has an active FDI regime (the Committee on Foreign Investment in the United States, **CFIUS**), which includes a mandatory filing component.

Notification under the CFIUS regime is largely voluntary and mandatory filings are generally only required (i) where the US business produces or develops a product that is subject to US export control regulations or (ii) where a foreign government owns 49% or more of the investor and the investor will acquire 25% of more of a US business involving certain export-controlled technology, sensitive personal data, or critical infrastructure.

This critical infrastructure includes certain energy businesses, so mandatory suspensory CFIUS filings are sometimes required for energy investments.

Even in the absence of mandatory CFIUS filing obligations, there is a very active CFIUS investigation and call-in regime that is not sector specific, and CFIUS has broad discretion to investigate and call-in for review covered transactions where CFIUS believes the transaction may present US national security concerns. The energy sector is one of the areas where CFIUS is particularly active. The US Department of Energy is also one of the nine voting members of the Committee. Therefore, it is important to keep CFIUS in mind for any transactions in the US energy space.

Latin America

Regulation in the region is increasingly intense, including with respect to protection of the environment and communities.

There are few mandatory and suspensory FDI screening regimes that are active in the region.

ASIA-PACIFIC

Australia

Australia has an active FDI regime (**FIRB**). Mandatory filings are required for the acquisition of 10% or more of "national security businesses". These include critical infrastructure businesses that hold assets in the energy sector.

China

China has an FDI screening regime as well as a screening list (Negative List). The Negative List regime applies to acquisitions by foreign investors in Chinese companies (and other forms of foreign investment in China) and does not apply monetary jurisdictional thresholds.

The mandatory notification regime extends to industries relevant to national "economic security". The list of sectors includes energy infrastructure.

Japan

Japan has a reasonably active but limited FDI regime. The regime is generally only mandatory and suspensory in respect of certain listed Japanese companies that are active in defined sectors. These sectors include national security (which includes nuclear energy) and public order (which includes electricity, gas and heating). Acquisitions of 1% or more of the shares or voting rights in these listed companies engage the regime.

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Outlook for the future

In recent years, FDI regulation has featured increasingly on the radar for cross-border M&A, against a backdrop of amplified protectionist rhetoric.

Energy has been and remains a key sector for FDI regulators, given its importance for industry and national security more broadly. As the global green transition steadily gathers pace, the technologies and industries that are subject to notification requirements continues to evolve.

FDI regimes continue to develop globally, and more and more regimes are coming into force and becoming increasingly active. Given the global focus on green transition, going forward we can expect to continue to see a high level of intervention in this area.

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