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TECHNOLOGY MAY-RATHON

**Recent Developments in European FDI Laws and Their Impact on
Technology Companies**

17 May 2021

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Presenters



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Agenda

- Global FDI screening trends
- European Union
- France
- Germany
- United Kingdom
- Impact on technology companies

Global FDI screening trends

- Increased scrutiny under existing FDI regimes
- New FDI screening regimes, in particular in Europe and Asia
- New regimes tend to be interpreted extremely broadly
- Forthcoming subsidy control mechanisms at the cross roads of FDI and competition law
- Different approaches to protection of national security (critical infrastructure vs. sector neutral review)
- Key and critical technologies are at the heart of FDI regimes

European Union – EU FDI Screening Regulation

- Notification mechanism
- Cooperation mechanism
- Need to take account of interests of other Member States



Companies are required to take a pan-European view



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France – FDI control in a nutshell

- Sensitive activities relating to national security and national defense (including crypto and data storage, data security and processing); (ii) Critical infrastructure, goods, or services (including space, electronic communications, public health, agriculture and food industry, publishing and (digital) media); (iii) R&D related to such critical and dual use technologies; (iv) new technologies (bio-tech, AI).
- Non-French investors or French entity controlled by non-French investor
- Acquisitions of control, a business line or over 25%* of voting rights in a French entity active in the above mentioned sectors (**lowered to 10% until 31 December 2021**).
- Substantive test: Harm to “national interests” or violation of business ethics rules
- High degree of discretion: sectors construed broadly, no definition of “national interests”, any kind of relationship or links with foreign governments or foreign public entities can potentially be ground for refusal

France – FDI Procedure in a nutshell

- Requirement to apply authorisation
- 30 business days (45 business days in case of further investigation)
- Possibility to ask for guidance on applicability of FDI screening at any time.
- Possible remedies:
 - Ensuring continuity and security of the activity of the French target on the French territory;
 - Protecting the knowledge and know-how of the French target company;
 - Adapting the governance of the French target company;
 - Structuring post-transaction communication and reporting between the investor and the controlling administrative authority; and
 - Transfer of part of the capital or business lines of the French target to a legal entity different from the investor and agreed by the Ministry.

Germany

The background is a dark, almost black, space filled with a dense field of vertical lines of varying heights. Each line is topped with a small, glowing dot in a variety of colors including blue, purple, pink, and white. The lines themselves are thin and appear to be composed of small segments or dots. In the lower portion of the image, these vertical lines are connected by a series of horizontal, wavy lines that create a sense of depth and movement, resembling a digital landscape or a data visualization. The overall effect is one of a complex, interconnected network or data stream.

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Germany – Current developments

- 2020
 - Introduction of mandatory filings subject to consummation prohibition
 - Criminal sanctions for gun jumping
- 2021
 - New restrictions as of May 1 - Sixteen new sectors
 - Significant prohibition decision
- Outlook

Germany – New restrictions

- Sixteen new critical sectors subject to mandatory filing
 - Focus on critical technologies including quantum technologies, artificial intelligence, robotics, aviation/space, nuclear technologies, autonomous cars
- Mandatory filing requirement for 16 new sectors including for Covid-19 sectors for non-EEA investors acquiring at least 20% of the voting rights in German target entity (directly/indirectly)
- 10% threshold continues to apply for traditional critical infrastructures
- New thresholds for subsequent acquisition of voting rights
- Atypical acquisition of control

Germany – Overview of screening mechanisms (1/3)

- Cross-sector and sector specific review
 - Cross sector: Voluntary and mandatory filing
 - Voluntary: Acquisition of 25% of the voting rights in non-critical target by non-EEA-investor
 - Mandatory:
 - 10% threshold for „traditional critical infrastructures“
 - 20% threshold for new sectors including critical technologies
 - Sector specific (mostly defence related): Mandatory filing

Germany – Overview of screening mechanisms (2/3)

- Scope of review: Likely impairment of
 - Germany's national security or public interest
 - Another EU Member State, or
 - A project or program of European Union interest
- Factor for determination of likely impairment include
 - Target: Extent of critical activities
 - Acquirer: Foreign government ownership and respective funding

Germany – Overview of screening mechanisms (3/3)

- Timing:
 - Phase 1: Up to two months
 - Phase 2: Up to another four months, subject to stop the clock / further extensions
- Decision
 - Clearance
 - Conditional Clearance
 - Prohibition

Germany – Recent Prohibition Decision

- Prohibition of the acquisition of a German telecommunication technology provider by a Chinese investor
- Key take aways:
 - Prohibition despite relatively small revenues
 - R&D activities and strong technology focus key for scrutiny
 - 40% of target revenues resulted from public funding
 - Activities in the armament sector expected to support China defence activities
 - Products subject to export control
 - Commitments offered by the parties not accepted
 - Duration of the proceedings approx. 1.5 years

Germany – Outlook

- Number of FDI filings to significantly increase

2016	2017	2018	2019	2020
42	66	78	106	160

- Additional transactional risks to be addressed
 - Diligence needs to comprise all EU member states and not just Germany due to coordination mechanism under the EU Screening Regulation
 - Mandatory filings impact transaction timeline
 - Criminal fines for gun-jumping
- Amendments to the thresholds of the classical critical infrastructures currently in the legislative process

The UK National Security and Investment Act (the “NSI Act”)

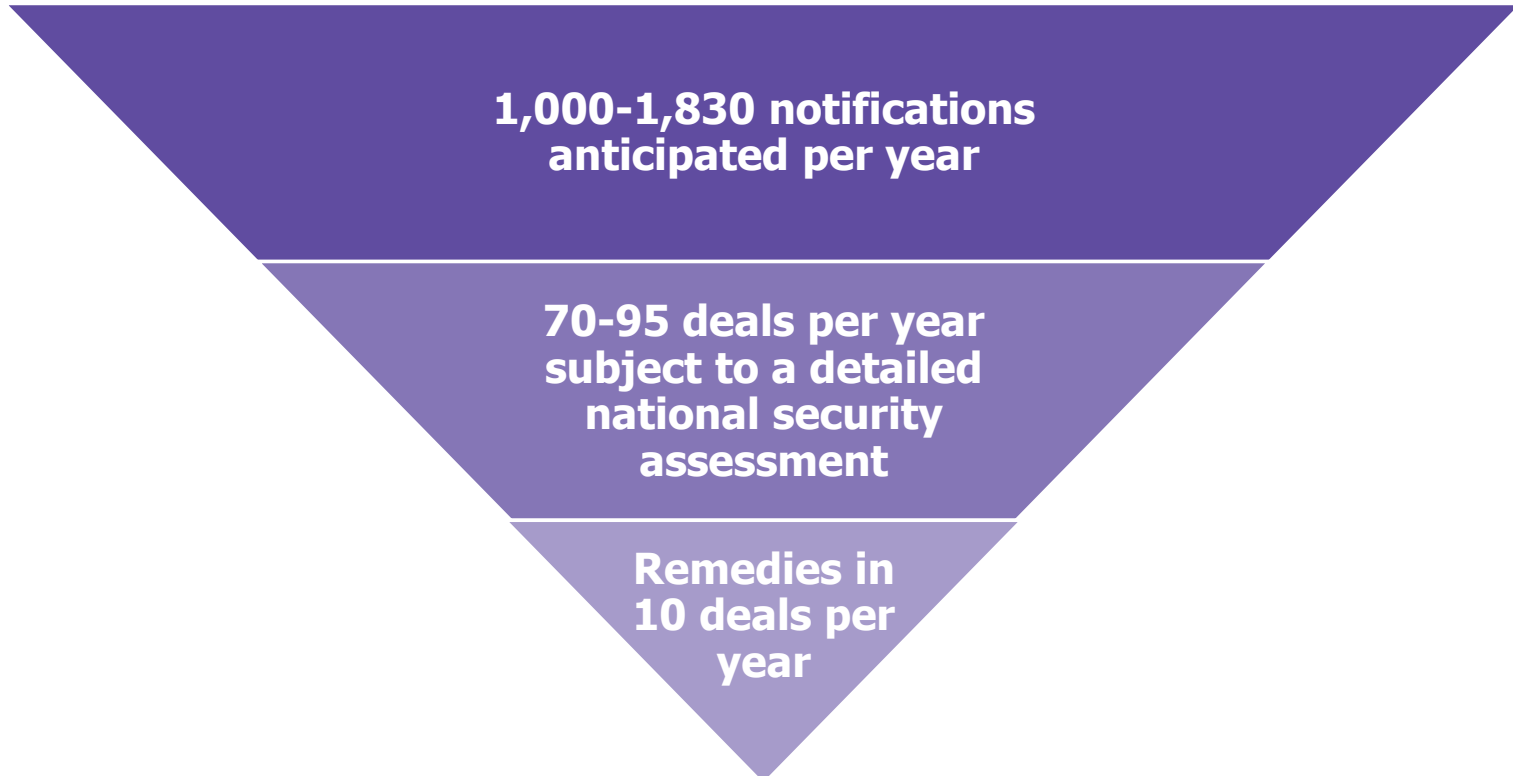


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The NSI Act

- The NSI Act received Royal Assent on 29 April 2021. It is expected to come into legal effect in late 2021 and will introduce a standalone UK national security screening regime, replacing the current regime that links national security screening with UK merger control.
- The NSI Act is a significant departure from the current UK regime and will introduce:
 - i. **mandatory filings** for certain investments in sectors sensitive to UK national security;
 - ii. **a voluntary filing** regime for transactions outside those sectors;
 - iii. **extensive call-in powers** to the Secretary of State to review transactions for a period of up to **five years** for completed transactions, **with retrospective application** for transactions closing on or after 12 November 2020 but before the Bill is enacted;
 - iv. **no minimum filing thresholds**;
 - v. **a statutory review period** – of 30 WDs to decide whether to open an investigation upon accepting a filing as complete. Once open an investigation, a further 30 WDs to conduct a detailed national security assessment. The review is extendable by 45 WDs; a further voluntary extension may be agreed;
 - vi. **the ability of the Secretary of State to impose remedies or block a transaction**; and
 - vii. **civil and criminal penalties for failure to comply** including fines up to 5% of worldwide turnover or GBP 10 million (whichever is the greater) and voiding the transaction.
- Although in principle the NSI Act applies to investors from any country, including the UK, it is expected that the powers under the NSI Act will more likely be exercised in respect of non-UK investors.
- **Parties to transactions with UK national security implications are encouraged to liaise informally with the UK government before the NSI Act enters into force**

Anticipated Impact on UK Deals



Mandatory Filing Regime

- Certain transactions in sectors most sensitive to national security will need to be notified and cleared **prior to closing**.
- **No** minimum filing thresholds.
- If parties complete a transaction prior to receiving mandatory clearance, the transaction will be **void**.
- The Secretary of State will not be limited to five years after completion in which to call-in completed transactions subject to the mandatory filing requirement.
- Mandatory filing under the following changes of control in a qualifying entity or asset:
 - a. acquisition of shares or voting rights from 25% or less to **more than 25%**, from 50% or less to **more than 50%**, or from 75% or less to **more than 75% in a qualifying entity**; or
 - b. acquisition of voting rights that **enable or prevent** the passage of any class of resolution governing the affairs of the qualifying entity.
- A **qualifying entity** is an entity that carries on activities in the UK or supplies goods or services to persons in the UK.
- There are 17 proposed sectors in which transactions will require mandatory notification. The UK government is continuing to develop and refine the scope of these sectors and the final definitions will be set out in regulations.

Tech Sectors Subject to Mandatory Notification



Communications

This will include providers of electronic communications networks and services in the UK.

The definition extends to facilities such as submarine cable systems, cable landing stations, and essential services in the digital infrastructure sector (including Top Level Domain Name Registries, Domain Name System Resolver and Authoritative Hosting services and Internet Exchange Points).



Data Infrastructure

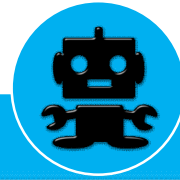
This will include infrastructure which provides the ability to store, process and transfer data for critical sector entities (including entities active in defense, civil nuclear, communications, critical government suppliers, critical emergency services suppliers, energy sector, and transport).



Artificial Intelligence

This will include entities which research, develop or produce goods, software or information that use artificial intelligence for the identification or tracking of objects, people or events, advanced robotics, or cyber security.

Artificial intelligence means technology enabling the programming or training of a device or software to perceive environments through the use of data, to interpret data using automated processing designed to approximate cognitive abilities or to make recommendations, predictions or decisions.



Advanced Robotics

This will include robotics which has capabilities to act autonomously through AI and/or is capable of using sensors to carry out sophisticated surveillance and data collection.

Advanced robotics does not include traditional industrial robotics and robotics which have consumer applications.

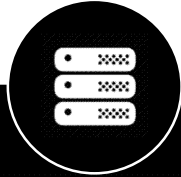
Tech Sectors Subject to Mandatory Notification



Computing hardware

This will include entities which inter alia:

- Own, create or supply IP relating to computer processing units;
- Securely provision or manage roots of trust of computer processing units or certain code therefor
- Fabricate or package computer processing units or integrated circuits with the principle purpose of providing memory.



Cryptographic Authentication

This will include entities that research, develop or produce any product which has authentication as its primary function, employs cryptography in performing that function and is not normally supplied or available to consumers.



Satellite and Space Technologies

This will include the operation, design, production, creation or utilising of facilities inter alia for:

- space debris management
- In orbit servicing, maintenance and manoeuvring;
- Inter-satellite communications links
- ground infrastructure for space activity or sub-orbital activity;
- manufacture and testing of spacecraft, launch vehicles, and satellites



Quantum Technologies

This will include technologies utilising the properties of quantum mechanics – including quantum communications, connectivity, imaging, sensing, timing, navigation, information processing, computing or simulation and quantum resistant cryptography.

Other Sectors Subject to Mandatory Notification

- Civil Nuclear
- Defence
- Energy
- Transport
- Advanced Materials
- Synthetic Biology
- Critical Suppliers to the UK Government
- Critical Suppliers to Emergency Services
- Military or Dual-Use Technologies

Voluntary Notification Regime

- Parties to transactions in sectors outside those giving rise to mandatory notification, may make a **voluntary notification** if they consider that the transaction may raise national security concerns.
- No automatic suspensory obligation for such transactions – unless the Secretary of State orders otherwise.
- Parties may make a voluntary filing if there is an acquisition of:
 - i. shares or voting rights from 25% or less to **more than 25%**, from 50% or less to **more than 50%**, or from 75% or less to **more than 75%**;
 - ii. voting rights that **enable or prevent** the passage of any class of resolution governing the affairs of the qualifying entity;
 - iii. a right or interest in, or in relation to, a **qualifying asset** providing the ability to (a) use the asset, or use it to a greater extent than prior to the acquisition; or (b) direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition; or
 - iv. **material influence** over the target. “Material influence” is a broad concept used in UK merger control and may be found on the basis of various factors including the distribution and holders of the remaining shares, patterns of attendance and voting at recent shareholders’ meetings, the existence of any special voting or veto rights, and any other special provisions, and can even exist with a shareholding under 15%.

Five Year Retrospective “Call In” Power

- The Secretary of State would have the power to **“call in”** investments that do **not give rise to the mandatory filing obligation** where the Secretary of State reasonably suspects that there is or could be a resulting national security risk.
- The Secretary of State will only be able to exercise the call in power if the types of changes of control envisaged for a voluntary filing are satisfied.
- The Secretary of State would have the power to call in for national security assessment **completed transactions** within **six months of becoming aware** of the transaction having taken place, as long as this is done **within a five-year period** from completion.
- For transactions subject to mandatory notification that close without clearance, the call-in power will not be restricted by the five year limitation period.

Five Year Retrospective “Call In” Power

Considerations in deciding whether to exercise the call in power

Target Risk	The nature of the target and whether it is active in an area of the economy where the UK Government considers national security risks are more likely to arise
Trigger Event Risk	The type and level of control being acquired and how this could be used in practice
Acquirer Risk	The extent to which the acquirer raises national security concerns

- Secretary of State will have the power to order **remedies** or order the **unwinding** of a completed transaction.

National Security Assessment Under The Current Regime - AMD/ Xilinx

- The current screening regime is linked to the UK merger control regime.
- Under the current regime, the Secretary of State may intervene only where the transaction meets the relevant merger control thresholds (subject to limited exceptions).
- The UK competition authority (the “**CMA**”) is currently reviewing AMD’s planned acquisition of rival chipmaker Xilinx.
- On 12 May the CMA notified AMD/ Xilinx to the Secretary of State for Digital, Culture, Media and Sport, stating that the transaction may raise national security public interest considerations.
- Under the current regime the Secretary of State is not subject to a statutory timeframe in which to decide whether to decide a transaction does not raise public interest concerns, accept remedies or open an in-depth investigation.

National Security Assessment Under The Current Regime - AMD/ Xilinx

- Potential National Security concerns regarding AMD/Xilinx:
 - Xilinx is a US based (San Jose) manufacturer of programmable logic devices. It produces inter alia field programmable gate array (“**FPGA**”) chips.
 - FPGA chips are used in various sectors relevant to UK national security including: telecommunications, aerospace and the defense industry.
 - The Secretary of State will examine whether AMD/Xilinx would negatively impact access to such inputs for these sensitive sectors in the UK or otherwise negatively impact UK national security.

Taking a cross-jurisdictional FDI approach

The background of the slide is a dark, abstract digital landscape. It features a grid of glowing lines that recede into the distance, creating a sense of depth. The lines are primarily blue and purple, with some red and orange accents. At the end of many of these lines are small, bright dots, resembling stars or data points. The overall effect is that of a futuristic, high-tech environment.

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Issues list for FDI across jurisdictions

- Critical jurisdictions
 - on timing
 - on triggering events
 - type of transaction
- Type of activity
- Type of customers
- „Tech is Everywhere“

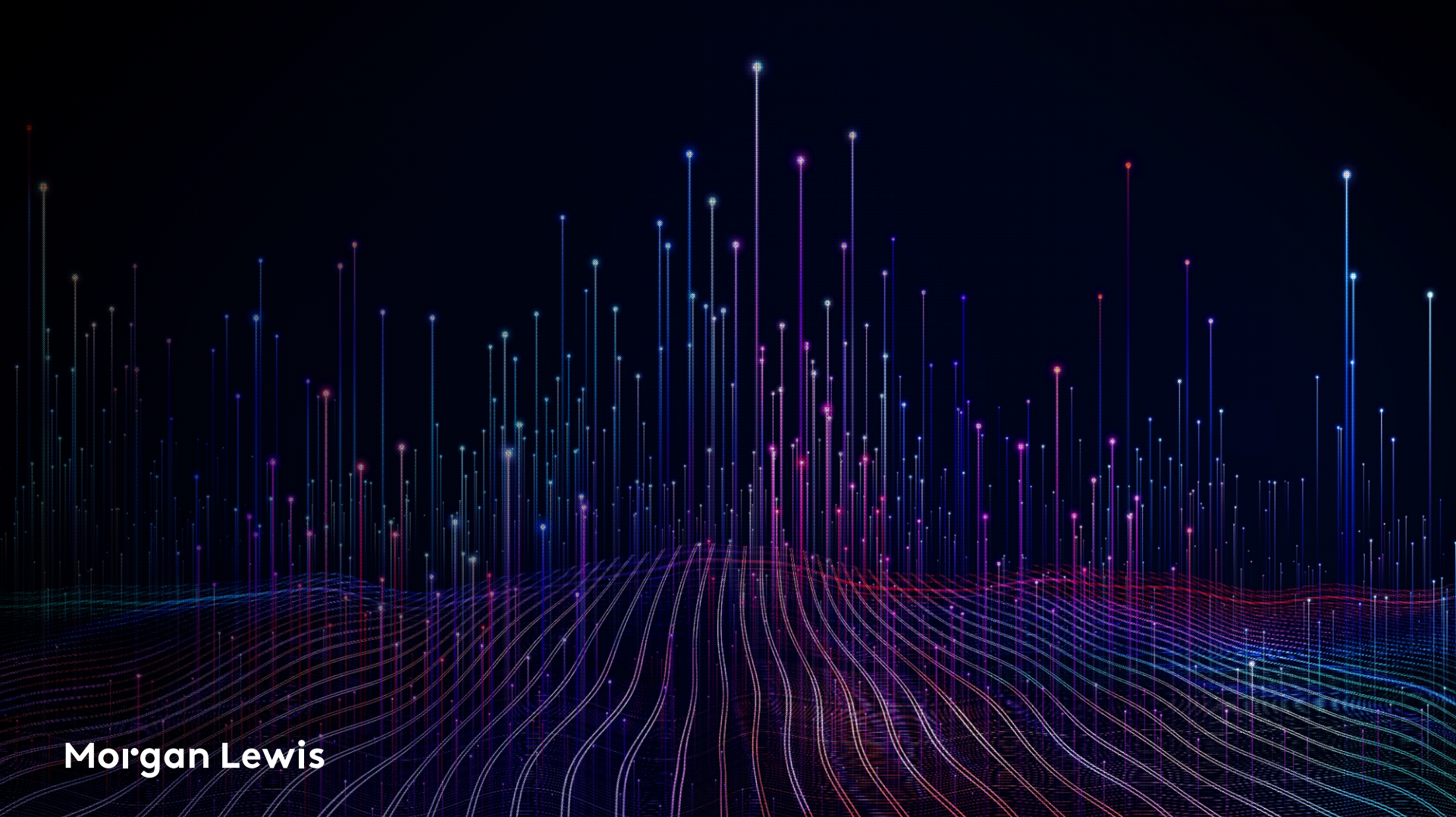
Key take aways

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Key take-aways for investors into Europe

- Size does not matter
- Increased sensitivity of EU Commission and European governments
- FDI increasingly covers traditional investors from Japan, the US, Canada
- FDI control can significantly extend time line
- Condition precedent unavoidable
- Take account of international cooperation in FDI scrutiny which cuts both ways
- Structure transaction in a way to anticipate possible concerns
- Engage early with relevant authorities



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Biography



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Omar Shah represents clients in complex global cartel and anticorruption investigations and civil proceedings for damages for breach of antitrust laws, as well in merger control procedures and on antitrust matters, particularly those involving the intersection of competition law with media/communications regulation. His practice involves representing clients before UK, EU, and other competition authorities, courts, and tribunals and in commercial and regulatory litigation proceedings, including judicial reviews. Chambers UK 2016 describes him as a "charming and effective partner who instantly wins the client's confidence and respect."

Omar is the general editor of the book *Class Actions—A Global Guide* and has co-authored the articles "The New EU Technology Transfer Regime—Out of the Straightjacket and into the Safe Harbour?" and "Disclosure and Negotiation of Licensing Terms Prior to Adoption of Industry Standards: Preventing Another Patent Ambush," both of which appeared in the *European Competition Law Review*. Omar is a regular speaker at conferences including those organised by the Law Society, IBC and ILFR.

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Biography



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Christina Renner concentrates her practice on European Union and German merger control, competition, and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina regularly advises clients concerning mergers reviewed by the European Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities. She has experience handling multi-jurisdictional filings for a variety of clients and regularly advises on complex competition compliance matters.

Christina also represents diverse international clients in antitrust investigations before the European Commission and other national competition authorities, including in litigation before European courts.

Christina has an established EU regulatory practice which spans across a variety of industries, including telecommunications, transportation, energy, life sciences, as well as retail and ecommerce.

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Biography



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Michael Masling advises clients on all aspects of EU and German competition law. Michael obtains merger clearances from national and international competition authorities in complex transactions, defends clients in government and private investigations and cross-border litigation, provides antitrust counseling including on distribution systems and compliance systems. In addition, he counsels on European and German foreign direct investment rules.

Michael's work spans a variety of industries, including automotive, chemicals, financial services, as well as healthcare and life sciences.

Additionally Michael regularly speaks at seminars and publishes articles on developments in European and German competition law. He is an editor of a section on international antitrust developments of Germany's leading antitrust law journal *Wirtschaft und Wettbewerb*.

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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

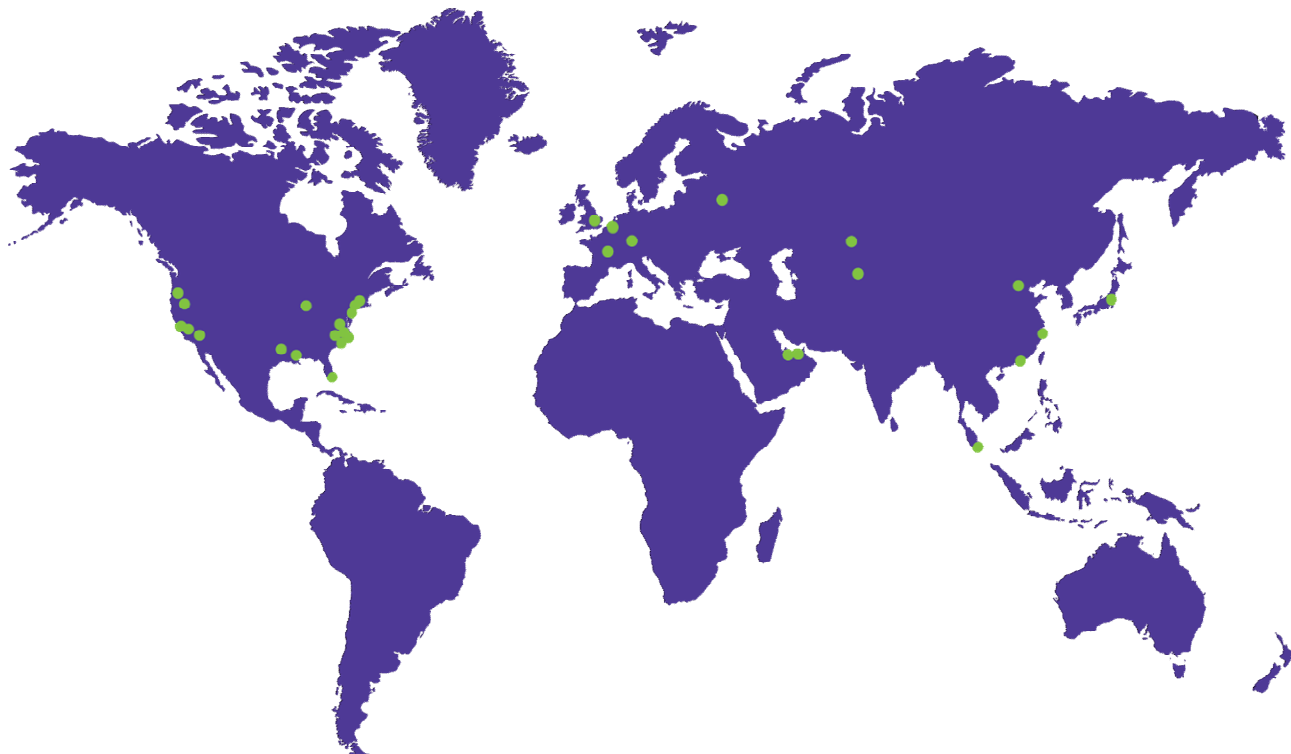


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