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Winds of Change in Foreign Direct Investment Control in Europe and the Middle East

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In 1990, when the Cold War came to an end, the German rock band The Scorpions sang "The world is closing in, did you ever think, that we could be so close, like brothers?" echoing the spirit of globalisation in their rock ballad "Wind of Change". Europe has since then been a place proud of its openness to foreign investment. Although such openness is still reconfirmed by government officials and repeated as a mantra in preambles to relevant legislation, there has been a tendency of late to tighten control on foreign direct investment (**FDI**) - so are new winds of change in the air?

This article looks at pan-European (EU) as well as national legislation impacting on FDI in certain European states as well as in the United Arab Emirates (UAE).

1 FDI Regulation of the European Union

1.1 The first FDI Regulation on European level

The European Union has recently adopted a new regulation establishing a framework for the screening of FDI into the European Union (**FDI Regulation**). It is the first ever EU level tool to screen FDI on the grounds of national security and public order.

The FDI Regulation has been initiated by ministers from Germany, France and Italy who had called for more effective instruments on a European level to review politically motivated takeovers of highly technical firms by investors from a non-European country. On 13 September 2017, the European Commission made a proposal establishing a framework for screening FDI into the European Union with the aim to open up other economies and ensure that everyone plays by the same rules (i.e. reciprocity) as well as to protect critical European assets against transactions that would be detrimental to legitimate interests of the European Union or its Member States. The EU Regulation comes into force on 10 April 2019 and will apply from 11 October 2020.

A key development is that FDI Regulation now sets up a cooperation mechanism between **MS** and the European Commission (**EC**), which determines certain screening factors and specifies which information should be made available as part of the cooperation.

1.2 Cooperation mechanism

Whilst MS may still decide whether and to what extent they may wish to establish a system to screen FDI on the grounds of national security or public order, the FDI Regulation requires such screening mechanisms to be transparent and non-discriminative and establishes a cooperation mechanism in case of FDI in each MS. Such cooperation mechanism is different depending on whether FDI is undergoing screening in a MS or not.

Both types of cooperation mechanisms are summarised in the table below:

<table>
<tr><th></th><th colspan="2">Screening of FDI in MS</th><th colspan="2">No Screening of FDI in MS</th></tr>
<tr><td>Screening notification</td><td colspan="2">MS notifies other MS and EC on FDI in its territory that is undergoing screening</td><td colspan="2">n/a</td></tr>
<tr><td>Request for Comments or Opinion</td><td colspan="4">MS, which duly considers that FDI in its territory is likely to affect its national security or public order, may request the EC to issue an opinion or other MS to provide comments.

Note that such request is no prerequisite for the steps set out below and other MS and EC are free to issue Comments or Opinion without such request.</td></tr>
<tr><td rowspan="2">Intention of comments or opinion / Request for information</td><td>Other MS notifies screening MS of its intention to provide comments</td><td>EC notifies screening MS of its intention to provide opinion</td><td>Request for information by other MS</td><td>Request for information by EC</td></tr>
<tr><td colspan="2">- may include request for additional information

- to be provided within 15 calendar days following screening notification</td><td colspan="2">- addressed to MS in which FDI takes place</td></tr>
<tr><td rowspan="3">Comments or Opinion</td><td>Comments by other MS

(if such other MS considers that FDI is likely to affect its national security or public order or such other MS has relevant information)</td><td>Opinion by EC

(if EC considers that FDI is likely to affect national security or public order in more than one MS or has relevant information)</td><td>Comments by other MS

(if such other MS considers that FDI is likely to affect its national security or public order or such other MS has relevant information)</td><td>Opinion by EC

(if EC considers that FDI is likely to affect national security or public order in more than one MS or has relevant information)</td></tr>
<tr><td colspan="2">- to be provided within 35 calendar days upon screening notification and, in case of additional information requested, no later than 20 calendar days after receipt of additional information

- additional 5 calendar days for opinion by EC, if such opinion comments on other MS’ comments</td><td colspan="2">- to be provided within 35 calendar days following receipt of information requested

- additional 15 calendar days for opinion by EC, if such opinion comments on other MS’ comments

- no later than 15 months after FDI has been completed</td></tr>
<tr><td colspan="4">EC to notify all MS of MS’ comments or EC’s opinion</td></tr>
<tr><td>Due Consideration</td><td colspan="4">MS, where FDI is planned or takes place, shall give due consideration to comments from other MS or to opinion from EC.</td></tr>
</table>

The additional cooperation mechanism on an European level will have an effect on the timing of any national screening proceedings and thereby also for the timing of transactions subject to such screening.

1.3 Screening factors

The FDI Regulation also determines certain screening factors that may be taken into consideration including the potential effects of the investment on, inter alia, critical infrastructure, critical technologies and dual use items, supply of critical inputs, access to and control of sensitive information, freedom and pluralism of media and extent of control or funding by non-EU government as well as previous activity of the foreign investor affecting national security or public order of a MS.

Critical infrastructure is widely interpreted and includes energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities as well as land and real estate crucial for the use of such infrastructure. Critical technology and dual-use items include artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies. Critical inputs include energy or raw materials as well as food security. Sensitive information includes personal data.

During the legislation process, relevant definitions have been extended considerably. The current definitions are in contrast to the traditionally narrow interpretation of term “public order and security” by the European Court of Justice. While the preamble emphasis the European Union’s open investment environment, we expect some MS will apply the FDI Regulation more widely in line with the above.

1.4 Information requirements

The FDI Regulation also specifies which kind of information MS shall provide to EC and other MS as part of the cooperation mechanism. Such information shall include

- the ownership structure of the foreign investor and the target including information on ultimate investor and participation in the capital;
- the approximate value of the FDI;
- the products, services and business operations of the foreign investor and target;
- the MS in which the foreign investor and the target conduct relevant business operations;
- the funding of the investment and its source; and
- the date when FDI is planned to be completed or has been completed.

The FDI Regulation directly obliges the foreign investor to provide such information upon request of the relevant MS.

1.5 Continuing relevance of national laws

Whilst not being required to adopt or maintain a screening mechanism, MS will retain the power to review and potentially block FDI on national security and public order grounds. Despite the framework on European level, national laws will still remain relevant for FDI as set out below.

2 Germany

2.1 Status of foreign direct investment control law in Germany

According to the "*2018 A.T. Kearney Foreign Direct Investment Confidence Index*" (the "FDI Index"), an annual survey which tracks a country's attractiveness for FDI, Germany is 3rd globally and tops the list of European countries. Despite tightening regulations, Germany remains appealing to foreign investors due to its increasing GDP growth rate and diverse economy.

FDI in Germany is, in particular, governed by the Foreign Trade Regulation (*Außenwirtschaftsverordnung* - AWV) issued by the German Ministry for Economic Affairs and Energy in accordance with the authorisations under the German Foreign Trade Act (*Außenwirtschaftsgesetz* - AWG). The AWV provides for a general foreign investment control regime and a sector specific foreign investment control regime.

The sector specific control regime applies if a foreign investor acquires, directly or indirectly, at least 10 % of the voting rights in a target operating in the sector of war weapons, IT security or producing certain goods subject to export control. Such transaction may be blocked if it constitutes a danger for important national security interests of the Federal Republic of Germany. Relevant transactions need to be notified to the Ministry and cannot be closed prior to any approval.

The general investment control regime, in principle, applies if an investor does not come from a state within the European Union (EU) or the European Free Trade Association (EFTA) and acquires, directly or indirectly, 25 % of voting rights. Such transaction may be blocked if it constitutes a threat to public order or national security of the Federal Republic of Germany. Although, in general, there is no obligation to notify relevant transactions to the Ministry and relevant transactions can be closed without the Ministry's approval, the Ministry has a right to review and prohibit the transaction within three months after becoming aware thereof and within five years after signing of the transaction. In practice, parties usually file for a certificate of non-objection from the Ministry in order to gain transaction certainty and only close their transaction after having received such clearance.

As an exception from this general principle, but still within the general investment control regime, a stronger scrutiny applies if the investment relates to:

(i) an operation in a so-called critical infrastructure in the sectors energy, water, IT, finance and insurance, health, transportation and traffic, nutrition or media;

(ii) the development of software specific for such critical infrastructures;

(iii) the implementation of measures to supervise and monitor telecommunication;

(iv) the provision of certain cloud computing services; and

(v) the holder of permission to produce components or provide services relating to telematics infrastructure (German statutory health funds regime being a network within different medical facilities holding patient records).

((i) to (v) being a "**Critical Business**").

In such transactions, the threshold for review is only 10 % of voting rights, the transaction needs to be notified to the Ministry and it is more likely that the transaction will constitute a threat to public order and national security.

	Military-related Business	**Critical Business**	**Other Business**
Personal scope	All foreign investors	Non-EU/EFTA investors	Non-EU/EFTA investors
Threshold	10% of voting rights	10% of voting rights	25% of voting rights
Suspension of closing by law	Yes	No	No

Notification obligation	Yes	Yes	No
Potential timeline (approx.)	4-8 months	2-8 months	2-8 months

Therefore, a prudent and timely analysis of the foreign investment control situation should form an integral part of any plans to acquire a German business. Additionally, non EU/EFTA-investors face an additional procedural layer which they should discuss with a potential seller in good time in order to be able to keep their offers competitive. Recent developments will likely mean that sellers will increasingly ask for appropriate protection from the risks which are related to the potential failure of the foreign investment control procedure, mostly in form of long stop dates and indemnification claims and penalty payments/break fees.

2.2 Hot topics: intended changes

Although the regime has been subject to recent changes both in July 2017 and December 2018, the investment control regime is still subject to review. Further changes are to be expected, ‚particularly given the newly adopted European FDI Regulation, which considers a wider scope of transactions as critical (e.g. covering not only critical infrastructures but also critical technologies, security of supply of critical inputs, access to and control of sensitive information and extent of control or funding by non-EU government), it is likely that the competent Ministry will amend the AWV again reflecting the additional limitations set out in the FDI Regulation.

2.3 Relevant cases

The acquisition of German robotic company Kuka by Chinese electrical appliance manufacturer Midea was cleared by the Ministry, and after the sale of the US military business of Kuka, also by the US authority CFIUS.

At the same time, the Chinese Fujian Grand Chip Investment Fund intended to acquire German semi-conductor producer Aixtron. The German Ministry granted a clearance (by issuing a certificate of non-objection) but revoked such certificate about a month later based on new information presumably from US authorities. In December 2016, US authorities prohibited the transaction due to security concerns with respect to the US business of Aixtron and the transaction did not take place.

Although clearly affecting a Critical Business, based on the legal framework applicable at the relevant time, the Ministry was not entitled to intervene in the intended acquisition of a 20% stake of German energy network operator 50 Hertz because it did not go over the 25 % threshold for the investment control proceedings to be triggered. Nevertheless, the German Government indirectly blocked the transaction as the Belgian majority shareholder Elia was induced to exercise its right of first refusal for the relevant shares and later sold the stake to the German state-owned bank KfW.

In August 2018, for the first time, the German Government decided to empower the Ministry to prohibit a transaction – namely, the acquisition of the German mechanical engineering company Leifeld by Chinese metal processing company Yantai Taihai that has activities in the nuclear sector. This came as a surprise as the company Leifeld was almost unknown to the public in Germany. However, in contrast to the Leifeld case, the German Government had at an earlier point in time (late 2017) authorised Yantai Taihai to purchase Duisburg Tubes Production, an insolvent producer of zirconium tubes for the nuclear industry.

2.4 Consequences for FDI

To put this into perspective: according to the statistics provided by the Ministry, between January 2016 and October 2018, the Ministry reviewed 171 investments including 68 investments from China. Only in one case, the German Government intended not to grant an approval that had been applied for, which resulted in the investor withdrawing its application for approval and cancelling the project. In

some cases, the German Government has entered into public law contracts with investors to implement certain obligations that the Ministry considers necessary to make sure that the investment is no threat to public order or security.

While at first glance burdensome and potentially having a discouraging effect, essentially these are procedural items which should remain manageable.

As set out above, most investments receive investment control approval in Germany - quietly and without media coverage. Notwithstanding, unpredictability of the decisions of the Ministry is the greatest concern and results in competitive disadvantages for non-EU/EFTA investors in Germany.

Therefore, a prudent preparation of a transaction and a clear and concise communication plan vis-à-vis the sellers and the Ministry is key and will enable foreign investors to implement the clear majority of their investment plans as intended and within an acceptable time period.

3 United Kingdom

3.1 Status of foreign direct investment control law in United Kingdom

The United Kingdom (UK) ranks 4th globally and 2nd in Europe in the FDI Index.

FDI in the United Kingdom is, and has been, principally governed by the Enterprise Act 2002 (the "**Act**"). On 17 October 2017, the UK Government published a Green Paper '*National Security and Infrastructure Investment Review'* proposing short and long-term proposals to reform how the UK Government can ensure that national security is not undermined by inbound mergers or investments, having first identified that in certain sectors of the UK economy, the jurisdictional thresholds under the current merger regime in the UK are no longer working effectively as a threshold for intervention on national security.

Two public consultations followed, the first focusing on the changes to the Act and the second on longer term options. The Act was reviewed in order to (a) strengthen existing UK measures and (b) expand the UK Government's power to be able to intervene in certain transactions involving the acquisition of businesses supplying products in the military, dual-use, quantum technology and/or computer hardware section for national security and other public interest concerns.

The UK has a voluntary merger notification system for review of transactions on both public interest and antitrust grounds whereby the parties involved make their own assessment as to whether to notify a deal for approval prior to completion.

The Competition and Markets Authority ("**CMA**") has jurisdiction to review a deal if it has reasonable grounds to suspect that the transaction may give rise to concerns over national security, the stability of the UK financial system or media plurality.

The old rules

Prior to 11 June 2018, the CMA had jurisdiction over mergers where either:

(a) the target business had a UK turnover of £70 million in the last financial year ("**Turnover Test**"); or

(b) both the buyer and the target supply the same category of goods or services in the UK (or a substantial part of it accounting for at least 25% of such supply) ("**Share of Supply Test**").

If a transaction did not satisfy the above thresholds, the UK Government's power to intervene was limited to mergers involving certain public interest and security issues (notably relating to defence) or

certain newspaper and broadcasting companies. Under the old rules, the UK Government only intervened on national security grounds seven times and of these, six of the cases had clear military grounds for intervention.

The new rules

Amendments, which came into force on 11 June 2018, were made to the tests laid out above to ensure that the UK Government has sufficient powers to deal with threats to UK national security. The threshold tests were amended as follows:

(a) The Turnover Test is lowered whereby the 'target' business must have UK turnover of more than £1 million per annum (rather than £70 million); or

(b) The existing Share of Supply Test will still apply even if only the target business has a 25% or more share of supply i.e. there will not be a requirement for both the buyer and the target to supply the same category of goods or services and the test is met even if the share of supply does not increase as a result of the merger (so long as the relevant enterprise has 25%).

Under the new rules, the revised tests will only apply to mergers in three sectors of the UK economy:

(a) The development or production of military items and "dual-use" items (dual-use being for both military and civilian use) included in the existing UK Strategic Export Control List. This area extends to businesses who hold related software technology or information that can be used in connection with the development or production of such items;

(b) The design and maintenance aspects of computing hardware, being businesses that own, supply or create intellectual property in the functional capability of multi-purpose computing hardware (which may have an unintended broad interpretation); and

(c) The development, design, manufacturing or production of goods for use in, or supply of services based on, quantum technology, being quantum computing or simulation, quantum imaging, sensing, timing or navigation, quantum communications, and quantum resistant cryptography.

3.2 Hot topics: intended changes / discussions

The UK Government is still considering the responses to the second consultation. The long-term reforms are expected to be far more significant and wide-reaching across a broader scope of sectors/transaction types and the UK Government intends to introduce further measures, which may or may not involve expanding the range of sectors which will trigger a public interest merger review process and/or a mandatory notification regime. The UK Government's actual intention remains unclear but will be announced in a White Paper later this year.

3.3 Relevant cases

The CMA has currently 24 open ongoing cases, none of which appear to be being investigated in respect of national security on foreign investment.

Previously, Hytera Communications Corporation's acquired Sepura plc in 2017 as the target company's operations were mainly in the production of "walkie talkie" devices supplied to the police and the ambulance services. Whilst there was no clear military link in this case, the CMA still felt it was appropriate to intervene. The acquisition was eventually allowed to proceed with conditions, but it perhaps demonstrates the UK Government's progressively tightening attitude, even before the amendments to the Act were passed into law.

More recently, the CMA served on 18 June 2018 an initial enforcement order under the Act for the purposes of preventing any action in relation to the anticipated acquisition by Gardner Aerospace Holdings Limited of Northern Aerospace Limited (the "**NAL**"). The seller of NAL is owned by private equity fund, Better Capital. The proposed buyer, Gardner Aerospace Holdings Limited, whose parent company is the Chinese mining company Shaanxi Ligeance Mineral Resources Co. Ltd, has effectively been blocked from completing the acquisition. The specifics of the case are not public but it is clear that there is concern by CMA as to the sale of a UK company holding ministry of defence contracts to an overseas buyer, possibly from China.

4 Spain

4.1 Status of foreign direct investment control law in Spain

Spain is one of the most relevant global players in foreign investment, thanks mainly to its liberalised foreign investment regime. In this regard, Spain is ranked 15th globally and 6th in the EU in the FDI Index and has been considered as the 11th economy more open to foreign investments by the Organisation for Economic Co-operation and Development.

General regime for foreign investments.

FDI in Spain is governed by the Royal Decree 664/1999, 23 April, on the legal regime of foreign investments ("**RD 664/1999**"). This RD 664/1999 adapted Spanish domestic law to the rules on the freedom of movement of capital contained in the EU regulations.

The most relevant aspects relating to FDI in Spain are:

- For purely administrative, statistical or economic purposes, foreign investments must be reported *ex post* to the Directorate-General for International Trade and Investments, once the investment has been made; and

- The only exceptions would be: (i) investments from tax havens, which in general would be subject to *ex ante* administrative notification; and (ii) foreign investments in real estate investments for diplomatic missions by non-EU Member States, which would also require *ex ante* notification.

The Council of Ministers can suspend this liberalised system on an *ad hoc* basis for investments that affect, or might affect, public powers, public order, national security or public health-related activities. In such case the relevant investments would need the clearance by the Council of Ministers.

Specific restrictions for some activities and sectors.

Telecommunications: Law 9/2014 of 9 May on Telecommunications ("**Law 9/2014**") does not contain restrictions to foreign investments in Spanish telecommunications operators. However, the Law 9/2014 provides that telecommunication activities can be rendered by EU companies and by non-EU companies provided that, for non-EU companies, there is an international treaty signed between Spain and the country of the relevant company. However, the Spanish Government can authorise exceptions to this regime.

Television and radio: As a general rule, Law 7/2010 of 31 March, on Audiovisual Communication, does not set out any restrictions for the foreign investments in Spanish companies belonging to the audiovisual communication services sector. However, non-European Economic Area ("**EEA**") investors would only be entitled to invest in Spanish audiovisual communication services company if they fulfil the principle of reciprocity. In addition, the stake held, directly or indirectly, by a non-EEA investor in a Spanish audiovisual communication license holder shall not exceed 25% of its share

capital, and the total stake held by Non-EEA Investors in the relevant Spanish target must not exceed 50% of its share capital.

Energy: Law 3/2013 of 4 June, creating the National Commission on Markets and Competition ("**NCMC**"), establishes that the acquisition of or by companies that carry out regulated activities (such as transmission or distribution of electricity or gas) or owners of energy assets, must be notified to the Ministry of Energy, Tourism and Digital Agenda ("**MINETAD**").

In addition to the above, in the scenario in which the acquisition is made by a regulated energy company or a non-EEA resident company and the relevant transaction implies a real and sufficiently serious threat to the guaranteed supply of electricity or gas within the scope of the companies with regulated activities, conditions related to the exercise of such activities may be imposed by the MINETAD. The NCMC has temporarily taken responsibility for this function of the MINETAD.

Article 34 of Royal Decree Law 6/2000 establishes limits on the holding of stakes in the main operators (production and supply) of the electricity and gas system, regardless of the nationality of the acquirer by application of European unbundling rules.

Financial: According to Law 10/2014 of 26 June, investments (both national and foreign) in certain financial entities, such as credit entities, insurance companies and investment service companies, must follow an authorisation or non-opposition process, respectively, before the European Central Bank (through the Bank of Spain), the General Directorate of Insurance and Pension Funds or the Stock Market National Commission ("**CNMV**").

The thresholds triggering the prior authorisation requirement is 10% or more of the voting rights or a lower percentage if it allows the exercise of a significant influence in the relevant entity.

Prior approval from the CNMV is also required for the acquisition of a direct or indirect interests in Bolsas y Mercados Españoles (the holding of the Spanish stock exchanges).

National defence-related activities: Article 11 of RD 664/1999 states that a foreign investment in activities directly related to national defence is subject to a prior administrative authorisation from the Ministry of Defence.

The Spanish Ministry of Defence establishes that the concept of *"activities directly related to the national defence"* includes all defence material set forth in Annex I of Royal Decree 679/2014, 1 August, approving the regulations on control over the foreign commerce of defence material, other materials and products and technologies of dual-use ("**RD 679/2014**"). Annex I of RD 679/2014 is quite specific and technical and includes materials, software and even technical assistance related to military activities.

Air transportation: Law 48/1960 of 21 July on air navigation, with Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September on common rules for the operation of air services in the European Community, states that at least 50% of the share capital of the companies holders of operating licences for air transportation of passengers, cargo or mail, or both, for remuneration, as well as their effective control, must be held by EU nationals, except otherwise provided in agreements entered into with a third country to which the EU is a party.

4.2 Hot topics: intended changes / discussions

Over the years, foreign investment restrictions and exchange controls in Spain have been mostly eliminated in line with the EU legislation on deregulation in this area.

As of today, the current Spanish Government does not have parliamentary majority to implement major reform programmes, and we understand that its main purpose is to sustain the growth in the Spanish

economy and to manage the situation in Catalonia, trying to avoid any kind of instability that may inhibit FDI in Spain.

5 Italy

5.1 Status of foreign direct investment control law in Italy

After a series of intense reforms implemented since 2011, Italy is now 10th globally and 4th in the EU, in the FDI Index. Even after the national-populist League and the anti-establishment Five Star Movement won the highest share of the vote in the elections, markets did not react strongly, with bond yields continuing to remain low and the equity market rising.

Focusing on the hi-tech start-ups sector, total investments in equity of Italian start-ups was equal to Euro 598 million in 2018, with a component of international funding that increased significantly compared to the previous year: foreign investments reached Euro 229 million, that is + 82% compared to the Euro 126 million recorded in 2017. The investment inflow comes mainly from the USA (72.73%), across Europe (23.36%), China (3.77%) and Brazil (0.06%).

With regard to applicable laws, the Italian Government introduced a variety of reforms aimed directly at increasing FDI.

The 2015 Stability Law and "*Investment Compact Decree*" provided the following:

- Patent box – partial tax exemption on income derived from patents, know-how and trademarks if R&D activities are performed by an Italian company;
- Enhanced R&D tax credit;
- Full deductibility from local tax of labour costs for employees hired on a permanent basis;
- Extension of the tax incentives provided to technological start-ups and innovative SMEs; and
- Refinancing of prior tax credits/incentives for the purchase of industrial equipment.

In January 2017 the Government launched a three-year industrial plan, "*Industria 4.0*", aimed at boosting private investment in research and development that returned the industrial policy to the top of the government's agenda. According to the Italian Minister of Economic Development, the plan offers support to improve competitiveness, digitize new processes, boost productivity, promote new skills, and ultimately attract more FDI.

FDI in Italy is subject to two main sets of regulations: (1) the reciprocity principle and (2) the so-called "golden powers" that the Italian Government can exercise on Italian companies operating in certain strategic sectors.

Reciprocity principle

A non-EU national (including both natural persons and legal persons) enjoys the same civil rights granted to Italian citizens provided that an Italian citizen would be entitled to the same rights in the country of the non-EU national. The reciprocity principle, however, does not apply to countries that have a bilateral investment treaty with Italy.

Golden powers

According to Law Decree No. 21/2012 (converted into Law No. 56/2012), certain investment opportunities considered to be strategic importance to the national interest, identified by the legislator, must be notified to the Italian Council of Ministers Presidency. Such Council has the ability to oppose and/or apply a veto and/or require conditions to the performance or not permit the investment. These business sectors are: energy, transport, communications sectors and defence.
Such limitations also apply to Italian investors.

On 8 October 2017, the Italian Government issued Law Decree No. 148/2017 (converted into Law No. 172/2017), which, inter alia, extended the scope of the golden powers to "high-tech" companies, such as those dealing with data storage and processing, artificial intelligence, robotics, semiconductors, dual-use technology, and space/nuclear technology.

Furthermore, on 25 March 2019, the Italian Government issued Law Decree No. 22/2019, which extends the perimeter of golden powers by introducing broadband electronic communication services based on 5G technology. The protection mechanism shall operate not only in the event of acquisitions of shareholdings but also in the event of supplies of goods and services related to the design, construction, maintenance and management of the networks of such services where put in place with a non-EU person. Elements indicating the presence of vulnerability factors which could compromise the integrity and security of the networks and data passing through them shall be among the elements subject to evaluation by the Italian government when assessing the transaction proposal.

5.2 Hot topics: intended changes / discussions

The Italian Trade Agency ("ITA"), the Government body whose mission is to foster Italian investment and trade relations with foreign countries, set up a dedicated foreign investment department. The department focuses on giving assistance to companies and entrepreneurs wishing to set up a new business in Italy.

Many different grants and incentives (such as assistance to buy buildings, subsidies for job creation, low-interest loans, tax incentives etc.) are available for new businesses, particularly in rural areas and in the south of Italy, including central government grants, regional development grants and grants from provincial authorities and local communities. The Italian Chambers of Commerce and Embassies have information on the various grants and incentives available and that apply to their specific areas.

The government further supports FDI via tax credits, including 25% for private investments in R&D (50% for projects with universities or research institutions) and 15% for investments in machinery and capital goods. Further public support is granted to new investments in manufacturing and R&D, especially in southern regions of Italy.

5.3 Relevant cases:

Notable FDI in Italy include the following: Tim/Elliott, Samsung Electronics Italia/HP Inc., Tagetik S.p.A./ Wolters Kluwer NV, BravoSolution S.p.A./Jaggaer Inc., and Snaitech/ Playtech.

6 France

6.1 Status of foreign direct investment control law in France

France ranks 7th globally and 3rd in Europe in the FDI Index. Since 2005, France has organised its legal framework for controlling FDI in its Monetary and Financial Code ("*Code Monétaire et Financier*"). The Code has been amended and the rules have been strengthened over the years.

FDI that is subject to a prior authorisation by the Minister of the Economy and Finance is described as an exception to the general principle of freedom of investment and it is motivated by a concern for public security interests.

On 1 December 2018, the French Government published a new decree extending the sector list for which there exists an FDI control and a Ministerial approval. As from 1 January 2019, FDI in French companies active in the aerospace sector or carrying out research and development activities in cybersecurity, artificial intelligence, robotics, additive manufacturing and semiconductors is subject to a prior Ministerial approval. The same applies to IT hosts for certain sensitive data, particularly in the field of health. France has anticipated the new European regulation on FDI that it is supporting.

The Ministerial authorisation may be subject to conditions intended to ensure the preservation of national interests while allowing FDI. Conditions relate to a concern to preserve the sustainability of the activities, the research and development capacities and the continuity of an establishment's operations.

In the event of irregular FDI in one of the sectors concerned, the Minister may impose fines of up to twice the amount of the investment breaching the rules. However, the sanction must remain proportional to the seriousness of the facts and the fine may be subject to an appeal.

6.2 Hot topics: intended changes / discussions

The French parliament is currently discussing additional rules to ensure that foreign investors will comply with the French regulations. The text is known as the Action Plan for the Growth and Transformation of Enterprises ("the **PACTE Act**"). The adoption of the PACTE Act requires two votes, one from the National Assembly and the other from the Senate. The latest version of this PACTE Act was adopted by the National Assembly on 15 March 2019. Since 18 March 2019, the project has been debated again by the French Senate. A further review of this PACTE Act by the Senate is scheduled for mid-April 2019.

6.3 Relevant cases

One of the most emblematic cases in recent years in France is undoubtedly the acquisition by the US group *General Electric* of *Alstom*. This case prompted a strengthening of regulations in France during 2014 in parallel with the acquisition of Alstom in the same year. With the adoption of the "*Alstom Decree*", the French Government extended the application of the French FDI control system to the following sectors: (i) water sector, (ii) health sector, (iii) energy sector, (iv) transport and (v) telecommunications.

In a report dated November 2017 French senators stated that: "*Finally, it should be noted that promises of job creation are not always kept. General Electric (GE) had committed to developing employment in France at the time of the acquisition of Alstom but recently announced the loss of 350 jobs at GE Hydro and a restructuring of the GE Power business line that could significantly affect employment in France*".

Other notable FDI in France that emanates from China include the *Donfeng* acquisition of 13% capital shares of *PSA* group in 2014 or the 83% capital control of the fashion group *SMCP* (including the *Maje* and *Sandro* brands); the *Fosun* acquisition of *Club Med* group since 2015 and the *Jun-jiang* acquisition of 15% capital shares of *Accor* hotel group.

7 Belgium

7.1 Status of foreign direct investment control law in Belgium

Belgium does not have a specific legislative framework for controlling foreign direct investments. Far from being problematic, this absence of state control over foreign direct investments promotes Belgium to 21st place worldwide based on the FDI Index. This ranking is explained in the context of strong economic recovery as well as key advantages highlighted by foreign investors (such as the proximity of numerous international institutions, connectivity to the rest of Europe and a productive and educated workforce).

7.2 Hot topics: intended changes / discussions

Belgium is in a pre-election context. The next federal and regional polls are scheduled for May 2019, and as a result there are no ongoing political discussions to adopt a legal framework for the control of FDI in Belgium. On the contrary, FDI is frequently positively quoted by Belgian institutions, such as

the National Bank of Belgium. In September 2016, the National Bank of Belgium stated that "*In Belgium, the Federal Government has introduced various fiscal measures to attract FDI, such as the notional interest deduction, tax rulings, dividend withholding tax exemption, etc.*".

However, in response to the EC's proposal for a regulation on this subject in September 2017, the four Belgian employers' federations (FEB, Voka, Beci and UWE) confirmed in a published common position in April 2018 that they "*welcome in a constructive way the establishment of a European framework for the screening of certain FDI. However, particular attention must be paid to the balance between maintaining openness to international investment and protecting the essential interests of the Union and its Member States*".

Although there exists no general legal framework requiring prior authorisation to invest in Belgium, in certain sectors such as the TMT sector, the market is very closed in Belgium. Only Proximus and the cable operators (Telenet/VOO) have a fixed telecom infrastructure which required billions of Euros in investment. To stimulate competition, regulations allow "*mobile only*" operators to rent access to the two fixed networks in order to operate its own network.

Currently, nearly 95% of the mobile telephone market is dominated by three Mobile Network Operators (Proximus, Orange Belgium and Telenet). These companies have invested in spectrum frequency licences and infrastructure. New frequency bands access will be granted through auctions which is seen as an extremely important matter. Initially approved at the Federal Government level, the text is still under discussion by Regional authorities which are discussing the emission standards.

8 United Arab Emirates (UAE)

In order to put the European restrictions into perspective, the last section is dedicated to FDI in UAE showing that, despite recent tightening of controls, the European Union still has a relatively open investment environment compared to some other jurisdictions that also benefit from FDI.

8.1 Status of foreign direct investment law in UAE

Pursuant to the *UAE Commercial Companies Law No. 2 of 2015* (as amended) foreign investors seeking to establish a company in the UAE are entitled to hold no more than 49% of the share capital of the UAE company, with the exception of free zones which allow foreign investors to own 100% of the company (provided that the business activities of the free zone company may only be conducted within the perimeter of the free zone).

On 23 September 2018, UAE Law No. 19 of 2018, also known as the Foreign Direct Investment Law (the "FDI Law"), was issued to provide some relaxation on this foreign investor ownership restriction. The FDI Law came into force on 1 October 2018. The FDI Law empowers the UAE Cabinet to allow foreign investors to own up to 100% of the share capital in a UAE onshore (i.e. non-free zone company) in certain sectors.

8.2 Negative list under FDI Law

Higher levels of foreign ownership are prohibited in sectors included in the "Negative List" in Article 7 of the FDI Law. Such sectors include:

- audio-visual services, postal and ***telecommunications***;
- banking and financing activities, payments and funds management systems;
- blood banks, poison/venom control centres, and quarantines;
- commercial agency services;
- fishing and related services;

- pilgrimage services;
- insurance services;
- investigation, national security, military sectors, and manufacturing of weaponry, explosives, military equipment and associated devices and uniforms;
- labour and servant services, and recruitment of personnel;
- medical retail (including pharmacies);
- petroleum exploration and production;
- printing and publishing services;
- road and air transport services;
- umrah services; and
- water and electricity services.

The UAE Cabinet is empowered to remove or add any sectors from the negative list.

8.3 Positive list under FDI

Article 6 of the FDI Law calls upon the UAE Cabinet to constitute a FDI committee (the "**FDI Committee**"), which is to recommend a "Positive List" to the UAE Cabinet comprising sectors for which higher levels of FDI will be allowed.

The FDI Committee is to consider the following when recommending the Positive List:

- achieving a positive environmental impact;
- achieving the best profit and added value to the UAE economy;
- foreign investor's level of competency, expertise and international reputation;
- increasing innovation and providing job opportunities and training for UAE Nationals;
- integration with strategic plans of the UAE;
- limiting negative effects on existing UAE companies that conduct a comparable activity;
- optimal use of modern technology; and
- requirement that any such approvals are limited to one or more specific Emirates.

The UAE Cabinet may impose certain requirements before investors are permitted to take advantage of any proposed increase in the levels of foreign ownership (i.e. above the current 49% restriction), including for example:

- Emiratisation requirement (minimum percentage of UAE Nationals required to be employed in the relevant sector/activity);
- form of legal entity that may carry on an activity within the Positive List;
- level of foreign ownership permitted in the relevant sector which could be 100% or any lesser percentage; and
- minimum capital requirement of the foreign investor.

8.4 Licence application process

Article 10 of the FDI Law sets out processes for foreign investors to seek to avail of the higher level of foreign ownership in accordance with the Positive List. Following submission by the foreign investor

to the competent authority of an application, the competent authority is required to process the request within five business days. Where the application is rejected, the foreign investor may submit an objection which is to be handled in accordance with the dispute resolution mechanism in the FDI Law.

Where an application is approved by the competent authority, the approval is to be recorded in the FDI registry in the relevant Emirate and the department of economic development of such Emirate will issue a license.

8.5 Recent FDI law developments in the Emirate of Abu Dhabi

The recently issued Abu Dhabi Law No. 1 of 2019 establishes an Abu Dhabi Investment Office ("**ADIO**") and Abu Dhabi Law No.2 of 2019 regulates partnerships between public and private sectors.

The ADIO is charged with developing and implementing a strategy to increase FDI into Abu Dhabi. In conjunction with Abu Dhabi's *Ghadan 21 Programme*, ADIO is anticipated to help accelerate economic growth in technology, tourism, advanced manufacturing and public-private-partnerships.

9 Conclusion

Investors are well advised to closely monitor the developments and to take into account the specific situation in the country of the investment target.

Given seismic movements in global trade and geopolitics FDI will be a key indicator as to how various countries are responding in these ever-changing times. As a result, governments should closely monitor their relevant regulation of FDI (and that of others) to ensure that it promotes and does not hinder the attractiveness of its economies to the international investment community. That would be a self-defeating act whilst the winds of change continue to blow.