Funds Insider

MARCH 2021

Great Brexpectations >
Opportunities and obstacles for the private investment funds sector in the UK

New UK National Security and Investment Bill >
Is dealmaking in the UK about to get tougher?

'Trap Doors' and 'Uptiering' in the High Yield Market >
An introduction to two US liability management techniques

European Round Up >
Industry focused updates from Germany, Italy, France and Belgium

read more

Contents

Great Brexpectations >
Opportunities and obstacles for the private investment funds sector in the UK

New UK National Security and Investment Bill >
Is dealmaking in the UK about to get tougher?

'Trap Doors' and 'Uptiering' in the High Yield Market >
An introduction to two US liability management techniques

European Round Up >
Industry focused updates from Germany, Italy, France and Belgium

Germany – Digitalisation and big tech:
Competition law

Germany – Healthcare:
Update on regulatory restrictions for financial investors in German healthcare centres

Italy – Defence, infrastructure, networks and other critical industries:
'Golden Power' transaction veto

France – Biotechnology and other industries:
Foreign investment controls

Belgium – Real estate:
Property law reform

Foreword

We are delighted to introduce the first edition of **Funds Insider**, our new quarterly publication which will aim to shed light on hot topics in a range of practice areas which are likely to be of interest to our private capital clients.

This edition will cover:

- Opportunities and obstacles for the private investment funds sector in the UK as a result of Brexit;
- The new National Security and Investment Bill and its implications for dealmaking;
- An introduction to two US liability management techniques in the high yield market; and
- European industry insights from Germany, Italy, France and Belgium.

Over the course of the last 12 months our offices around the world have been exceptionally busy advising private capital clients across a number of areas. M&A activity, particularly in EMEA, has held up strongly, direct lending transactions have rebounded strongly in 2021 as a result of ample liquidity on the market and, in the ever-evolving regulatory landscape, we have been privileged to support clients in establishing new compliance structures and processes in existing as well as new (for them) jurisdictions.

We hope that you enjoy reading this first edition of our Funds Insider and please do get in touch if you have any feedback or if there are any topics that you would like us to cover in future editions.

Funds Insider
FundsInsiderEMEA@ashurst.com

Great Brexpectations:

Opportunities and obstacles for the private investment funds sector in the UK

> *"With legislative reforms on the horizon, the UK private funds industry is in promising form to weather the Brexit storm and remain competitive across Europe and beyond."*
>
> CATHERINE GOKAH AND PETER MALLON, 2021

There have been plenty of reasons for UK fund managers and their service providers to be despondent over the last few years. The saga of Brexit negotiations has, for one, dampened more conversations than the English weather. Let's not mention the (hopefully) once-in-a-century pandemic. 2021 is, however, a new year and presents its own set of opportunities and obstacles; a last-minute trade deal and the promise of a Memorandum of Understanding governing financial services in the UK both brighten up an otherwise gloomy start to the year.

While the future for financial services remains uncertain – and at the time of writing a large part of the UK is in lockdown – there is light at the end of the tunnel, with the rapid distribution of Covid-19 vaccines and the election of a new leader of the free world.

Closer to home, we consider the UK funds industry to be on the brink of a renaissance. The UK has rightly earned a reputation as an attractive location for asset management and the UK's expertise in asset management is a valuable global export. The UK's asset management industry is the largest in Europe and the second largest globally, with around £9.9 trillion assets under management.[1] The industry contributes a healthy 1 per cent of the UK's GDP. Our view is that we are poised to capitalise on our newfound status as a "third country" outside the EU and HM Government has signalled its intention to support the industry (more on this below).

Before we get into what the future has in store, we first need to consider what has changed as a result of Brexit and why the UK is still an attractive jurisdiction to establish, and manage, an investment fund.

1. The Investment Association Annual Survey, September 2020, p. 12.

All change please

It is difficult to ignore the profound effect leaving the EU will have on the UK asset management industry. In a nutshell, from 11pm on 31 December 2020, the UK became a "third country" for the purposes of AIFMD[2], meaning that managers of alternative investment funds located in the UK lost their "passporting rights" to manage and market their UK and EU domiciled funds in Member States of the EU.

Following this date, UK managers seeking to market alternative investment funds in the EU now have to rely on national private placement regimes in each Member State or, where the facts and circumstances permit, rely on reverse solicitation by potential investors. This approach is not a perfect solution for UK fund managers. However, depending on the jurisdiction of a fund manager's target investors, the UK works well as a jurisdiction in which to manage, administer or establish funds.

Fund structures are often multi-jurisdictional, involving the delegation of portfolio management services by the fund to a management entity located in a different jurisdiction. Following 11pm on 31 December 2020, UK firms providing portfolio management activities delegated from an EU based manager will need to consider any jurisdiction specific requirements that will need to be complied with by the EU based manager in respect of the delegation and vice versa, with respect to the UK manager. These jurisdiction specific requirements are, unfortunately, not always crystal clear. ESMA has communicated its intention to clarify the existing legal rules on delegation while at the same time promising to safeguard delegation arrangements as an important feature of the funds industry.[3] In other words, watch this space.

2. The Alternative Investment Fund Managers Directive (2011/61/EU)
3. Future challenges for fund managers – Keynote address by Verena Ross at the AIMA Forum on 19 November 2020
ESMA letter on AIFMD review

Fish and Financial Services

The 1,246-page Brexit deal mentions the word "fish" 368 times, compared with 90 references to financial services. Yet fishing accounts for a mere 0.1 per cent of the UK's GDP versus 7 per cent that financial services contributes.

But if we scrape beneath the surface of a "hard Brexit" for financial services perhaps there is more to this than we may give David Frost and his team of negotiators credit for. Fishing rights is a straightforward concept to grapple with, financial services is not. You could argue that by focusing on fish, the government allowed its much more important financial services sector to slip out of the EU net without any real semblance of a deal. While this creates its own set of challenges for the industry, it also provides for its own set of freedoms, which we believe the government is now keen to action.

HM Treasury Call for Input

The first step in that direction has been the publication of the HM Treasury Call for Input in connection with its review of the UK funds regime. It is the most wide-ranging consultation in this area that we have ever seen. It covers the entire spectrum of funds (whether open- or closed-ended) from private funds and listed funds (including REITs) to retail funds. HM Treasury is clearly keen to better understand any "pain points" which might hinder the UK being used as a jurisdiction in which to manage, administer or establish funds.

The Call for Input contains a long section on taxation. In the context of unlisted private funds, English and Scottish limited partnership, like Luxembourg SCSps or Cayman limited partnerships, are (generally) all tax transparent for the purposes of the taxation of profits. However, the differentiators driving decisions as to which jurisdiction and vehicle to choose are more nuanced. HM Treasury is well aware that the VAT treatment of cross-border advice where the fund is based in the UK can steer managers away from establishing funds in the UK. Some welcome (and long overdue) changes are clearly signposted.

Similarly, HM Treasury is alive to the fact that a modern fund tax regime also needs a modernised asset-holding company regime. However, before rewriting the rule book, HM Treasury is trying to understand where the issues are; thus the wide-ranging consultation. HM Treasury is clearly trying to drive useful changes to the UK funds taxation regime and so there is some scope for optimism here. In addition, the industry recently suggested workable solutions to HMRC around other issues (such as Companies House and HMRC tax filing obligations) which have been taken on board.

In terms of fund structures, the government is considering the introduction of the Long-Term Asset Fund structure (**LTAF**). The LTAF will be designed to accommodate redemption requests at fund level without the downsides of open-ended authorised funds, which have operational requirements that dilute returns and may be inappropriate for holding illiquid assets. The LTAF will be a closed-ended, unlisted, tax transparent fund structure but with tradeable units. Redemptions will be set intervals depending on the investment strategy adopted, of anything between daily to annual, or even up to every two years. In addition, appropriate notice periods can be set to provide the manager with enough time to ensure cash is available to meet the redemption, and if applicable, sell some of the assets. The Chancellor wants to see the first LTAF established in 2021 and the FCA plans to consult early in 2021 on setting up a framework for the LTAF.

4. Review of the UK Funds Regime – Call for input

The Future is bright

While it is easy to be despondent about the impact of Brexit on the UK fund management industry, what is clear is that Brexit has spurred the government into action, having now opened its mind to suggestions from the industry on how to improve the attractiveness of the UK as a funds jurisdiction. We are optimistic that the government will address the tax and structuring issues that have arguably held the UK back in recent years, and when it does, the UK funds industry will be all the better for it.

Leaving the changes aside, we are still of the view that depending on the marketing strategy of a fund manager, the UK remains an attractive jurisdiction in which to establish and manage a fund. For UK managers focused on UK specific investments a UK domiciled fund is attractive - the fund infrastructure is well oiled and it is familiar to investors around the world. Our view is that this familiarity and international recognition will smooth over some of the potholes left behind by Brexit.

Finally, looking at the bigger picture. The UK has been a significant contributor to the fund management industry. The challenge will be maintaining this post-Brexit. With the prospect of legislative reform ahead to make the UK more competitive in Europe and beyond it is an exciting time to be a part of the future of the UK asset management industry.

Piers Warburton
Practice Group Head, Investment Funds
T +44 20 7859 1099
piers.warburton@ashurst.com

Catherine Gokah
Counsel
T +44 20 7859 1591
catherine.gokah@ashurst.com

Peter Mallon
Senior Associate
T +44 20 7859 3870
peter.mallon@ashurst.com

Katie Gingell
Junior Associate
T +44 20 7859 1293
katie.gingell@ashurst.com

New UK National Security and Investment Bill

Is dealmaking about to get tougher?

On 11 November 2020, the UK Government announced the new UK National Security and Investment Bill ("Bill"); it is expected to come into force by early-to-mid 2021. The Bill marks the culmination of a period of change from the previous "light touch", and wholly voluntary, regime to what is now a more robust approach to national security concerns in the context of foreign direct investment, creating new powers for the UK Government to scrutinise and impose remedies, or in certain particularly egregious cases, block, M&A transactions. Most notably, the new regime provides for a mandatory notification obligation for certain sectors considered to be the highest national security risk for the UK, with a voluntary regime for others.

Considering the broad jurisdictional applicability to the regime and the lack of any safe harbours, it is expected that a large number of potential transactions will be affected. In fact, in its impact assessment of the proposed measures, the UK Government states that it envisages around 1,000-1,830 notifications being made each year, with 70-95 detailed national security assessments undertaken under both the compulsory and voluntary regimes. In strict contrast, in the 18 years since the previous Enterprise Act regime was introduced, there have only been 12 national security interventions.

In the context of this shift in the UK Government's approach, it is important for investors to understand the implications for executing such transactions in the UK, including from a timing, risk (including potential civil and criminal penalties) and deal-certainty perspective.

Practical steps for investors to consider:

1. **Does the transaction fall within the mandatory regime for notification?**
The new regime creates a mandatory notification regime in 17 specified sensitive "core" sectors, which are considered to be the most relevant for potential national security concerns. For a transaction within the scope of those "core" sectors, the Secretary of State will need to give clearance to the transaction before any sale and purchase can complete.

The range of transactions that will be caught under the mandatory regime is very extensive, as there are no minimum turnover levels, market share or values to determine whether the transaction is notifiable.

A notifiable acquisition takes place, broadly, where an entity:

- gains **"Control"** of a **"Qualifying Entity"** of a specified description; or
- acquires a **right or interest equivalent to 15%** or more of the shares or voting rights in a **"Qualifying Entity"**.

A notifiable acquisition under the mandatory regime that is completed before being approved by the Secretary of State has no legal effect and will be void.

Penalties for breach of the mandatory regime will be imprisonment for individuals (of up to 5 years) and fines (up to 5% of worldwide turnover or £10 million – whichever is greater) for non-compliance with the mandatory notification requirement.

2. **If a target company does not meet the criteria for the mandatory regime, the parties to the transaction should consider whether to make a voluntary notification**

Parties to transactions that do not meet the criteria for mandatory notification may submit a voluntary notification to the Secretary of State if they consider that their acquisition may constitute a "trigger event" that could raise national security concerns.

The Government will also have the power to "call-in" transactions for review post-closing, that are not subject to mandatory notification for a national security assessment. To help inform this assessment, the Secretary of State has published a draft statement on how he expects to use the "call-in" power.

The Government will potentially "call-in" transactions which give rise to "trigger events" i.e. where a person:

- gains **control** or **material influence** over a qualifying entity; or
- gains control of a qualifying assets (including land, tangible moveable property or ideas, information or techniques which have industrial, commercial or other economic value).

The "call-in" power is available up to five years after the "trigger event". Practically, it is possible to obtain greater certainty by making the Government aware of a transaction - this reduces the call-in period to six months from the date of awareness (or six months from the date the law is passed if the Government is made aware before the law is passed).

Investors should consider the voluntary regime where acquisitions do not meet the mandatory criteria. If the acquisition could potentially either give rise to a trigger event or raise potential national security issues, the transaction parties should seek advice as to whether to submit a voluntary notification to the Secretary of State, to ensure deal certainty from the outset.

> *"The Government have presented this legislation as a proportionate tool to mitigate national security risks but not stymie investment into the UK."*
>
> JACOB GOLD, 2021

‘EU framework for screening foreign direct investment’

EU framework regime
Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 established a framework for the screening of foreign direct investments into the Union (the **“EU Screening Regulation”**). The mechanism provides for an obligation to exchange information between Member States and the European Commission as well as the possibility for the Commission and Member States to issue comments and opinions on specific transactions up to 15 months after the foreign investment has been completed.

Nevertheless, the ultimate power to review and potentially block such investments on security and public order grounds will remain with the Member States. In addition, the Member States are not obliged to adopt national screening mechanisms and the decision on whether to set up such a mechanism remains the sole responsibility of the Member States. However, where a Member State has adopted a screening mechanism, it needs to comply with certain requirements, in particular as regards transparency of rules and procedures, non-discrimination among foreign investors, time frames, protection of confidential information, the right to seek recourse against screening decisions and measures to identify and prevent circumvention by foreign investors.

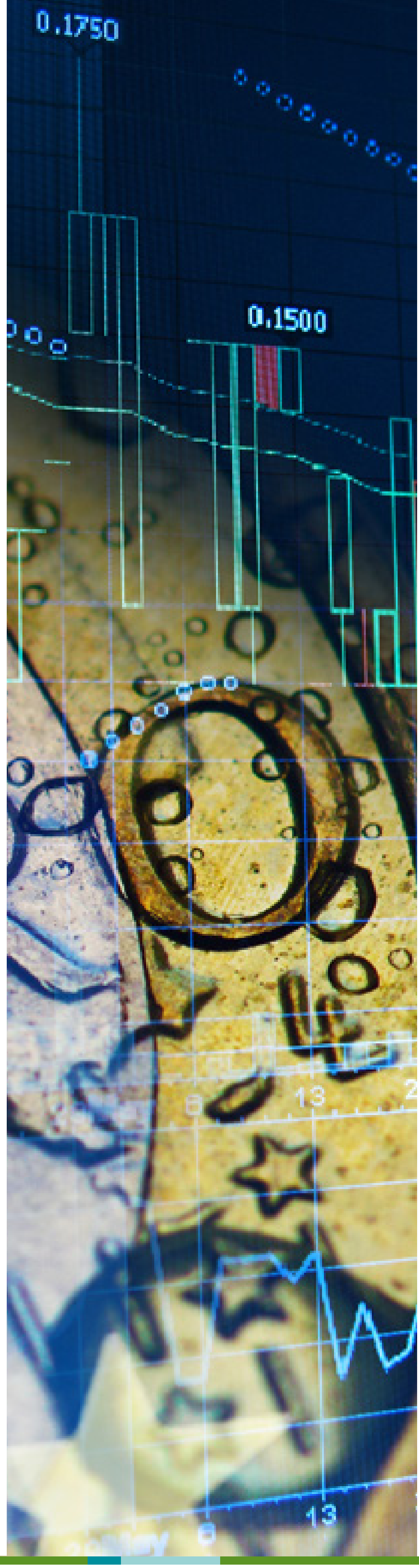
The Member States are obliged to notify the Commission of their screening mechanisms and any amendments thereto and the Commission will make publicly available a list of such national screening mechanisms. Moreover, each Member State must submit to the Commission an annual report including aggregated information on foreign direct investments that took place in their territory and provide aggregated information on the application of their screening mechanism if such a mechanism is in place.

National regimes within the Member States
Although Member States are not obliged to adopt national screening mechanisms, since the outbreak of the Covid-19 pandemic, certain jurisdictions have tightened their foreign investment regimes.

Please find an overview here of the regimes in place in, among others, some EU countries.

Jorge Vázquez
Partner
T +34 91 364 9899
jorge.vazquez@ashurst.com

Francisco Vázquez Oteo
Counsel
T +34 91 364 9806
francisco.vazquezoteo@ashurst.com



3. When might the Government “call-in” transactions?
The Government has intentionally not defined “national security” or identified particular jurisdictions as hostile. The Secretary of State will also have the power to amend the scope to capture evolving national security threats. When deciding whether to “call-in” a transaction and in assessing whether a transaction raises national security threats, it will consider **three risk factors** (as set out in the UK Government’s draft statement of policy intent).

Investors should consider the risk factors from the outset of any potential transaction.

Consideration of the wider commercial implications – how might an investor/transaction be affected?

Impact on Deal Timetables
- Review of transactions by the Secretary of State will take up to 30 working days from notification. If, following that initial review period, the transaction is called in for a detailed national security assessment, the assessment will last an initial 30 working days, extendable by a further 45 working days (with scope for further extensions).

Reduction in deal certainty and increase in execution risk
- The cost of compliance with the regime will need to be considered when discussing pricing of the transaction.
- Impact on bargaining positions, in particular from the perspective of the target. Where one prospective buyer is more likely to raise national security issues than another, that buyer may be in a weaker position vis-à-vis other buyers and the seller(s)/target company.
- The transaction documentation will need to factor in condition precedent wording within transaction documentation to obtain clearance in respect of the mandatory regime.

Acquirer risk assessment will look through to ultimate shareholders
- An investor contemplating acquiring a company in a core, sensitive area will need to consider whether it, its co-investors or its debt providers are likely to be deemed to raise an acquirer risk (to national security) and if so whether to notify a proposed transaction.
- Assessment of the acquirer may require more detailed compliance checks at the outset of negotiations. This should be factored in to deal timetables.

Wide-reaching applicability of the legislation
- The regime covers both domestic and foreign acquirers.
- There is no turnover or market share thresholds; it is only necessary for the target to carry on activities or supply customers in the UK.
- The regime can catch transactions involving non-UK entities if they carry on activities in the UK or supply goods or services in the UK. The regime will also catch transactions where UK subsidiaries are not the direct targets.

Remedial powers
Remedies are likely to include:
- prohibiting or unwinding the transaction;
- access conditions - for example, limiting access to a particular site or dual-use technology to named individuals;
- information/operating conditions, requiring that only persons with appropriate UK security clearance have access to confidential information or may be part of operational management; and
- conditions requiring the retention of UK staff in key roles at particular sensitive sites.

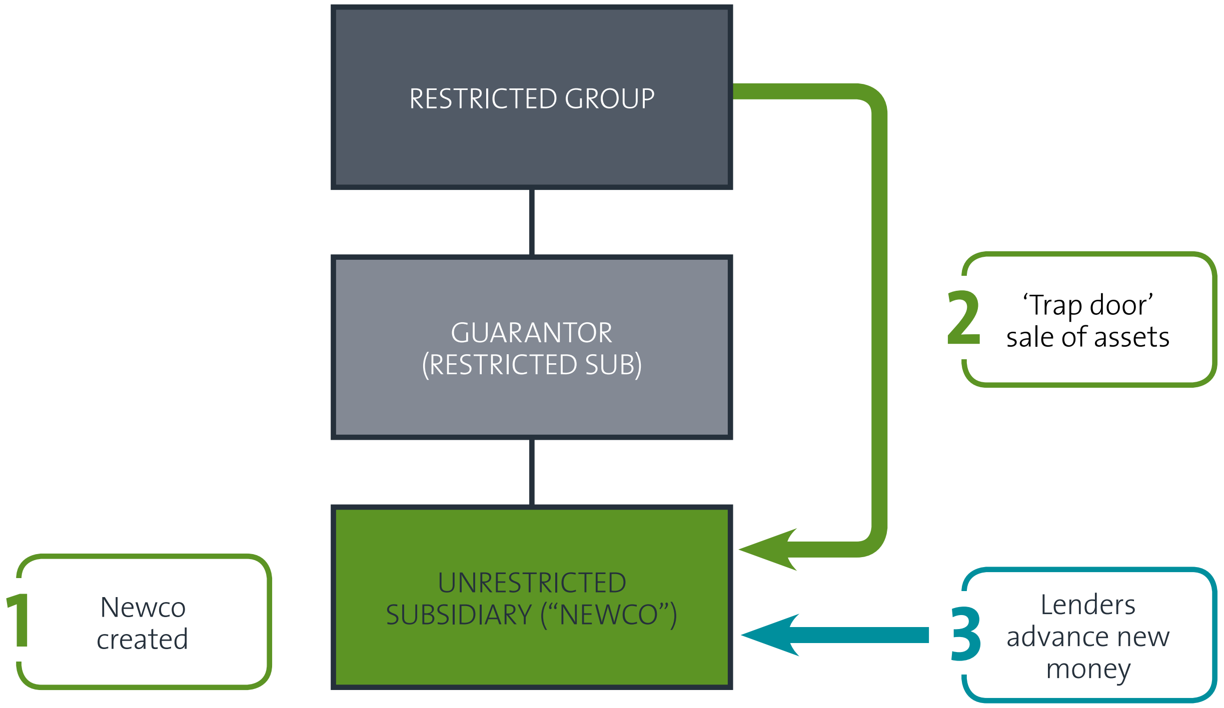
Braeden Donnelly
Partner
T +44 20 7859 2691
braeden.donnelly@ashurst.com

Jacob Gold
Senior Associate
T +44 20 7859 2396
jacob.gold@ashurst.com

‘Trap Doors’ and ‘Uptiering’ in the High Yield Market

An introduction to two US liability management techniques

In the current economic climate, there is a lot of interest in restructuring or liability management techniques that allow borrowers to raise additional debt or extend maturities. Two types of such ‘out of court’ transactions from the US that are being discussed a lot in the New York law governed European high yield market are: ‘trap door’ (or ‘drop down’) transactions (for example, JCrew’s 2016 transaction), and ‘uptiering’ transactions. We provide a high-level introduction below to these transactions and their aims, for those unfamiliar with these transactions.



Trap door/drop down transactions – what are they?

The ‘trap door’ involves lenders providing structurally senior financing. This financing is secured by assets which have been transferred outside of an existing security package (through a ‘trap door’ in the existing debt documents), often into an unrestricted subsidiary.

What does a ‘trap door’ transaction seek to achieve?

The aim of the transaction from the borrower’s perspective may be to reduce the overall principal amount of existing debt outstanding, to reduce the interest burden, to manage an upcoming maturity, or to evade potential financial covenant defaults in the future.

From the lender’s perspective, it is a way of improving the priority of existing debt exposures as compared with other lenders within the capital structure.

How is a ‘trap door’ transaction achieved?

By way of an example using unrestricted subsidiaries:

1. The Group would incorporate a subsidiary (**“NewCo”**) that would be unrestricted and therefore would not be required to guarantee any existing loan obligations. As an unrestricted subsidiary, NewCo may also be excluded from the scope of the covenants in the debt documents;
2. The Group would then sell or otherwise transfer assets to NewCo (ie “dropped down”). This transaction would need to fall within the scope of the security release provisions of the existing debt documents (as well as any other applicable provisions);

How is this allowed under existing debt documentation?

The following baskets within New York law governed debt documents have sometimes been identified as permitting this 'trap door': (a) an investments basket which allows loan parties to make investments in unrestricted subsidiaries, (b) a basket which allows investments by loan parties in restricted subsidiaries that are not loan parties and (c) a basket that allowed investments in unrestricted subsidiaries by non-loan party restricted subsidiaries.

However, even where these baskets have been tightened, there are other ways of finding trap doors where the possibility of transfers to unrestricted subsidiaries exists.

Why is this transaction synonymous with J Crew?

In 2016, J.Crew moved approximately $250 million of intellectual property assets from a guarantor restricted subsidiary into an unrestricted subsidiary (via a non-guarantor-restricted subsidiary) and thereby outside of the creditors' security pool and the scope of its covenants. The existing lenders commenced litigation which was withdrawn when the company completed an alternative transaction.

Since JCrew, a number of other borrowers in the US have found ways of doing the same, including Cirque du Soleil, Travelport and Party City. There have also been a number of lenders to other companies which have taken steps to remove or tighten the baskets that might otherwise have been used to achieve similar transactions.

"Uptiering" – what is it and what does it seek to achieve?

Uptiering is a route for lenders to improve the priority of their claims to an existing security and guarantee package, sometimes alongside the provision of new money, without all lenders under the existing debt documents participating. Again, like the 'trap door' transaction discussed above, this is something that has been used in the US as an out of court restructuring and liability management technique.

How is an uptiering transaction achieved?

In short, the borrowers in these transactions obtained consent from a simple majority of lenders to create or increase super senior debt capacity under their existing debt documents.

The borrowers would then offer to consenting lenders (but not to all lenders) the opportunity to exchange their existing debt for super senior debt, which would 'prime' the lenders who were not invited to participate. Doing so would be achieved by the borrowers relying on the open market repurchases language in those credit agreements, which permits the borrower to repurchase its debt on an exchange or on the over-the-counter market.

In some cases, this is accompanied by the injection of super senior new money debt, super senior hollow tranche layering and 'covenant stripping' of the existing debt, all without any prior notice to non-participating lenders.

How commonplace are ‘uptiering’ transactions?

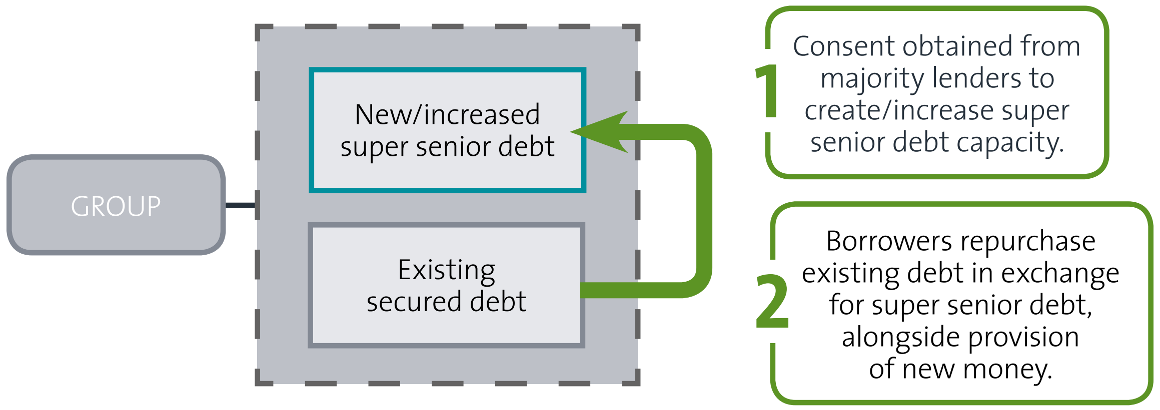
There have been some high profile examples of uptiering in the US high yield markets (eg Serta Simmons, Boardriders and TriMark). However, even there it is relatively rare and it has not been seen in the New York law governed European high yield bond market yet. Along with ‘trap door financings’, these strategies are aggressive from the borrower’s perspective, but as companies’ financial position worsens we may start to see increasing use of them. Their use has primarily so far been seen in the US high yield markets, but there have been instances of borrowers seeking to negotiate similar covenants in the European markets.

Uptiering is also subject to ongoing litigation in the United States. Courts are currently assessing the validity of the transactions in the three high profile ‘uptiering’ transactions mentioned above. A focus of that litigation concerns the open market repurchases language which is a feature of many New York law governed credit agreements and New York law governed bond indentures.

Trap doors and uptiering – how likely is it that they will be widely seen in Europe?

It remains to be seen whether European markets will also start to see these types of transactions. Although there has not been any reported example of a trap door transaction being completed in the European New York law governed high yield market, there are companies which are reported to have considered using unrestricted subsidiary structures. We expect there to be continued interest in these techniques over the next few years.

Uptiering continues to be monitored by those in the New York law governed European high yield bond market and we expect this interest to continue. There are some factors which may make structuring these transactions in that market more complex. For further detail, please refer to our more detailed separate briefing available here.



Ru-Woei Foong
Partner
T +44 20 7859 3158
ru-woei.foong@ashurst.com

Richard Bulmore
Senior Associate
T +44 20 7859 1036
richard.bulmore@ashurst.com

Natalia Sokolova
Counsel
T +44 20 7859 1029
natalia.sokolova@ashurst.com

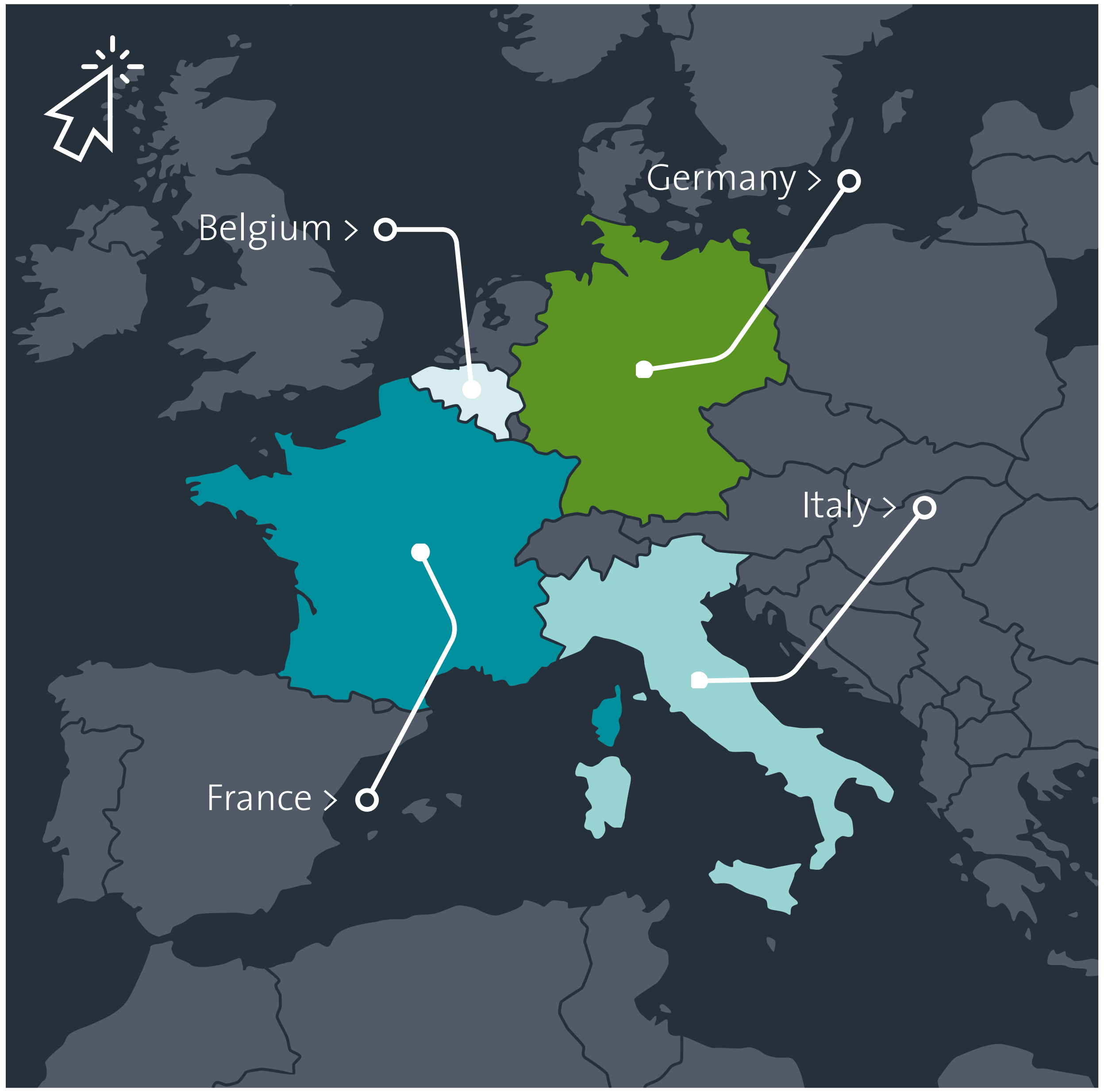
“Taking advantage of (intentional or otherwise) loopholes in finance documents is not a new technique and borrowers have been relying on it for years but we are now seeing a renewed sense of ‘boldness’ in the priming approach stressed borrowers are using, particularly on the other side of the pond. It remains to be seen if any of these will be judicially successfully challenged and on what grounds.”

RICHARD BULMORE, 2021

European Round Up

Industry focused updates from Germany, Italy, France and Belgium

In this section, we are focusing on certain key legislative or policy changes across key European jurisdictions, which are likely to affect attractiveness and ease of doing business in those countries in particular sectors.



GERMANY

Digitalisation and big tech: Competition law

The 10th Amendment to the German Competition Act – also referred to as the Digitisation Act – entered into force on 19 January 2021. The key changes concern various areas of competition law.

Key changes for M&A transactions are:

- **M&A/merger control:** The Amendment includes a significant increase in the domestic turnover thresholds resulting in far fewer transactions being subject to German merger control in the future. While this may affect certain sectors (eg real estate) more than others we expect the number of filing requirements to be reduced by approximately one third.

  Transactions now only require a merger control notification to the German Federal Cartel Office (FCO) if they meet the following three cumulative thresholds:

  1. the combined worldwide turnover of all participating companies exceeds **EUR 500 million**;
  2. at least one participating company has a German turnover exceeding **EUR 50 million** (previously: EUR 25 million); and
  3. (a) at least one further participating company has a German turnover exceeding **EUR 17.5 million** (previously EUR 5 million); or (b) the transaction value amounts to more than **EUR 400 million** and the target has significant activities in Germany, but achieves a German turnover below **EUR 17.5 million** (previously EUR 5 million) and – as an unwritten requirement – the turnover of the target does not reflect adequately its market position and competitive potential (for further information on the transaction value test, see Ashurst's Newsletter of August 2018).

- Digital economy/big tech and platforms in the focus of the FCO: The Amendment will give the FCO far-reaching powers to intervene in "companies with overwhelming importance for competition across multiple markets" (so-called "super-dominant companies"), the intended targets being digital giants like Google, Apple, Facebook and Amazon as well as platforms.
- Co-operation between competitors: The Amendment enables companies in the future to formally ask the FCO for a decision within six months on the legal conformity of an envisaged cooperation, which will result in more legal certainty in cooperation projects.
- Cartel fines/compliance efforts are "rewarded": The Amendment introduces the possibility to recognise adequate and effective compliance measures and post-infringement behaviour to prevent/detect infringements as a mitigating factor for the calculation of a cartel fine. This will make it even more crucial for companies to implement an effective compliance system.

For further information on the Amendment, please see here.

Michael Holzhäuser
Partner
T +49 69 97 11 28 50
michael.holzhaeuser@ashurst.com

Maria Held
Counsel
T +49 89 24 44 21 176
maria.held@ashurst.com

> *"Against the backdrop of ever-increasing regulation and digitalisation, there is massive inbound interest from investors and market participants in the German healthcare industry for specialised advice."*
>
> MATTHIAS WIEDENFELS, 2021

GERMANY

Healthcare: Update on regulatory restrictions for financial investors in German healthcare centers

Following the introduction of new healthcare sector regulations in 2019, some practitioner groups called for further regulatory changes to regulate private investment in the German statutory healthcare sector. A recent independent study, commissioned by the Government to assess (among other things) if and how financial interests impact or impair doctors' medical discretion and the autonomy of their patient-oriented treatment recommendations, did not recommend restricting financial investment in medical centers. In this sector, policymakers need to balance a multitude of interests. However we do not expect regulation in this sector to change dramatically – and in particular not to an extent that investment in medical care centers is impaired in general.

Background: On 11 May 2019, the "Schedule Service and Procurement Act" (**"TSVG"**) for the German healthcare sector entered into force, aiming to improve patients' service levels in the statutory German healthcare system. The TSVG also contained rules regarding financial investments in medical care centers (**"MCC"**, or **"MVZ"**). Those rules and regulations were addressed at pushing back a supposed trend of over emphasising returns over proper patient care, allegedly driven by financial investors. The TSVG introduced a quota system for dental MCCs and tightened the establishment of MCCs as an investment vehicle in the dialysis market and, therefore, non-medical dialysis providers and dental MCCs in particular. Other rules aiming at preventing market-dominant positions were of a rather formal nature with smaller impact.

Almost two years after the introduction of the TSVG, market participants have now started to draw conclusions regarding the effectiveness of the new rules and regulations. On the basis of their own observations and an expert opinion rendered by IGES - Institute for Infrastructure and Healthcare, practitioners and their professional associations continue to claim that financial investors compromise the diversity of medical procurement and facilitate market-dominance.

The Government reacted to the continuing criticism by commissioning an independent study monitoring if and how financial interests impact or impair doctors' medical discretion and the autonomy of their patient-oriented treatment recommendations.

The study: The results of the study are fairly unambiguous. It concludes that current regulation provides for a sufficient level of patient protection and healthcare procurement. Furthermore, the authors of the study could not find convincing evidence that financial investments in the dental care sector jeopardise patients' treatment more than general practice and, therefore, concluded that there is little reason to introduce a quota system for dental MCCs. The study recommends a large number of specific adjustments to the current rules, none of which should directly impede financial investments.

The outcome of the study is in line with the current Federal Health Minister's political view that previous and current legislation already sufficiently balances (a) the financial interests of investors in the MCC market with (b) healthcare practitioners' legitimate interest in safeguarding their medical autonomy, (c) professional healthcare associations' interest in a diverse procurement environment, (d) patients' need for unbiased medical recommendations and (e) the social security system's interest in economic healthcare spending.

Matthias Wiedenfels
Consultant
T +49 69 97 11 28 59
matthias.wiedenfels@ashurst.com

ITALY

Defence, Infrastructure, Networks and other critical industries – 'Golden Power' transaction veto

The Italian FDI rules (the so-called "Golden Power") have been recently strengthened in connection with the Covid-19 pandemic. In particular:

- the sectors subject to the FDI procedure (originally limited to defence, security, energy networks, communication, transports and 5G sector) have been broadened to include companies active in (or owning assets belonging to) the financial, credit and insurance sectors, critical infrastructure and technologies including energy, transport, water and healthcare, food safety, access to sensitive information, including personal data, artificial intelligence, robotics, semi-conductors and cybersecurity, as well as nanotechnology and biotechnology and media freedom and pluralism;
- Until 30 June 2021, the FDI screening has been temporarily extended to: (a) transactions carried out by EU entities concerning the acquisition of control of "assets with strategic relevance"; (b) transactions having a value greater than EUR 1 million carried out by non-EU resident persons concerning an acquisition of shareholdings greater than 10% in companies owning "assets with strategic relevance"; and (c) transactions carried out by non-EU resident persons involving the acquisition of shareholdings in companies owning "assets with strategic relevance" exceeding the thresholds of 15%, 20%, 25% and 50%.

The following chart summarises the transactions which may be scrutinised:

Sector	Share Deal	Asset Deal
Defence and national security	Affecting EU and non-EU entities	Affecting EU and non-EU entities
5G	Affecting non-EU entities	Affecting non-EU entities
Energy, transport and communication networks	Affecting non-EU persons (and until 30 June 2021 also EU entities or acquisition by non-EU entities of shareholdings >10% and having a value >Euro 1 million as well as acquisition >15%, 20%, 25% and 50%)	Affecting EU and non-EU entities
Other sectors	Affecting non-EU persons (and until 30 June 2021 also EU entities or acquisition by non-EU entities of shareholdings >10% and having a value >Euro 1 million as well as acquisition >15%, 20%, 25% and 50%)	Affecting non-EU entities (and until 30 June 2021 also EU entities)

"The new Golden Power legislation provides clear boundaries for foreign investors looking to the increasingly attractive Italian market"

ANDREA DI ROSA, 2021

To recap the Golden Power: under the FDI rules, the Italian government has the power to review any transaction which may damage or constitute a material threat to Italy's essential interests and/or Italy's fundamental interests relating to the security and public order, the operation of networks and systems and the continuity of supplies. In such cases, the Italian Government may exercise a veto right on the transaction/corporate action or impose specific restrictions or conditions with respect to the security of supply and business continuity. So far, a full veto has been imposed only once, in the defence & security sector. In all the other cases where the Government has intervened, it imposed conditions mainly aimed at fulfilling the FDI's purpose of protecting Italy's fundamental interests.

If the imposed conditions are not met, material fines may apply and the voting rights attached to acquired shares are suspended. In particular, the purchaser [(or the company in case of an asset deal)] violating the prescription is subject to administrative fines of up to twice the value of the transaction and in any case not less than 1% of the last financial year's turnover [(of the investor in the event of a share deal and of the target in the event of an asset deal)]. In addition, the relevant deed or transaction is deemed null and void. With respect to 5G Assets, the administrative fine is up to 150% of transaction's value and, in any case, not lower than 25% of transaction's value.

The FDI rules have an impact on transaction timing. The Italian Government must be notified of a relevant transaction falling within the FDI regulations and provided with the relevant documentation within 10 business days from the date of signing the transaction and/or adoption of the relevant resolution and in any case, before they become effective. The process - save for information requests by the Government - lasts 45 business days starting from the date of notification. In addition, in case the notification obligation is not fulfilled the Government has an autonomous power to activate the procedure and in such case the 45 business days term starts from the date on which the unfulfillment of the notification obligations has been ascertained. Transaction deeds and/or corporate actions can be adopted until Government consent is given, but to be effective the transaction will need the Government's clearance (including the "silent-consent").

In the context of a transaction financing, the FDI process may apply also to security interests created over stakes of companies active in a strategic sector or assets related to such strategic sectors. The creation of security over a strategic asset does not usually in itself trigger the application of FDI rules (except if the security gives a pledgee the right to exercise voting powers) but, in case of enforcement of security over a "strategic asset", the notification obligation applies.

Fabio Niccoli
Partner
T +39 02 85423440
fabio.niccoli@ashurst.com

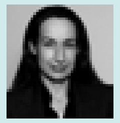
Andrea Di Rosa
Senior Associate
T +39 02 85423441
andrea.dirosa@ashurst.com

FRANCE

Biotechnology and other industries – Foreign investment controls

The current trend in France is to strengthen control of foreign investment ("CFI") rules and recent cases in France indicate that the French government is applying them particularly vigilantly. The recent changes, which were combined with a clearer and simpler CFI procedure, included (i) adding biotechnology to the list of the technologies used within a sensitive sector which may trigger CFI approval procedures (effective since April 2020), and (ii) as a temporary measure due to the Covid-19 pandemic, the threshold for requiring CFI approval of non-EU investment in French listed companies active in a sensitive sector was lowered to 10% of the voting rights (versus 25%, previously). This lower threshold now applies until 31 December 2021; however a specific shorter CFI process applies to these proposed investments.

Furthermore, the recent refusal by the Ministry of Defence to allow the acquisition of Photonis from a US investor, and the recently vetoed proposed merger between the Canadian Couche Tard and the French convenience-store Carrefour (before a request had even been filed) illustrate the particular attention and vigilance of the French government.



Anne Reffay
Partner
T +33 1 53 53 54 99
anne.reffay@ashurst.com

"Given the current trends in France, checking ahead whether an M&A transaction will fall under the French FDI control is a key step in the process more than ever."

ANNE REFFAY, 2021

BELGIUM

Real estate – Property law reform

A major reform of Belgium's property law will come into force on 1 September 2021. The reforms will have a significant impact on the structuring of real estate transactions. Notable developments include:

- Rights in rem such as leasehold rights and building rights will be re-defined. Non-compliance with the new definitions may lead to a recharacterisation of real estate transactions, which may have significant consequences from a legal and tax perspective. The new definitions may raise doubts as to the validity of certain structures commonly used, such as leasehold rights with far-reaching contractual restrictions to modify the building (eg. hotel contracts) and building rights created on existing buildings.
- The maximum term for usufruct and building rights will be increased to 99 years. The new definitions may create doubts as to the legality of certain structures which were often commonly used in the past, such as building rights created on existing buildings.
- A building right may even be perpetual if and as for so long as it is used in order to (amongst other things) set up a volume ownership: the division of a complex and heterogeneous real estate in volumes that (i) have different purposes (ii) can be managed independently and (iii) do not share any common areas (eg a shopping centre with an underground parking). Setting up a volume ownership will enable owners to structure a real estate project outside of the burdensome regime of organised co-ownership when the owners intend to bring about a perpetual vertical split ownership.

Most of the provisions of the new law are of a facultative nature, so parties may agree alternative contractual arrangements. However some of the new provisions, for example the definitions and durations of rights in rem, are mandatory law and parties will not be able to contractually derogate from them.

David Du Pont
Partner
T +32 2 626 1923
david.dupont@ashurst.com

Arnaud Wtterwulghe
Partner
T +32 2 626 1914
arnaud.wtterwulghe@ashurst.com