

DENTONS

# Interactions between FDI and Merger Control scrutinies in M&A transactions



*\*The views expressed here represents the personal views of the panelist and do not reflect the position of Clariant*

# Outline

- 1. Setting M&A transactions in the geopolitical context**
- 2. FDI and merger control compliance**
- 3. Impact evaluation of filings on M&A contracts**
- 4. Risk assessment of merger control obligations**
- 5. Risk assessment of FDI obligations**
- 6. Drafting M&A contract clauses**
- 7. A practical example**
- 8. Judicial review in merger control and FDI**

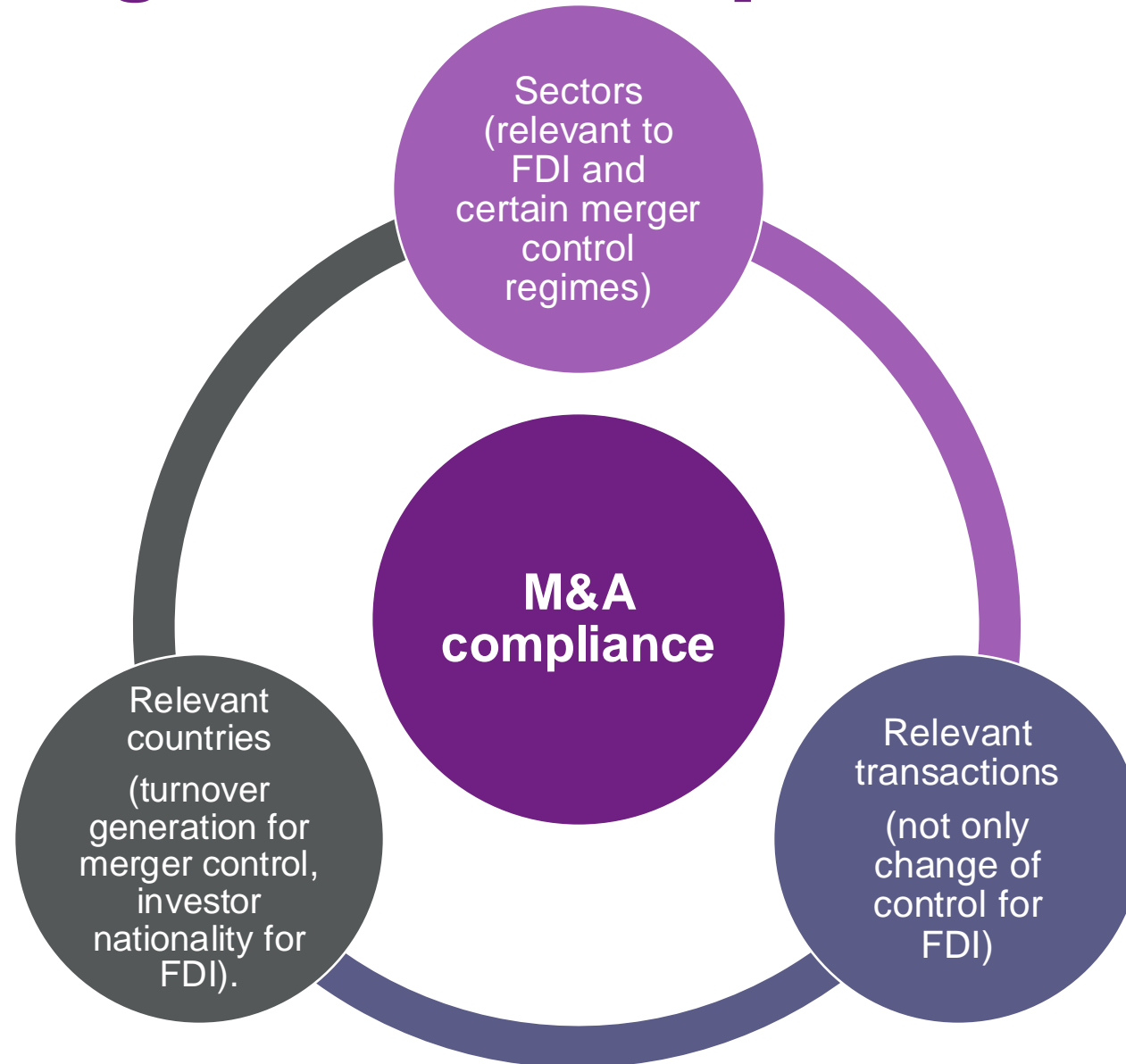
# 1. Setting M&A transactions in the geopolitical context

**Europe must react to a world of less stable geopolitics, where dependencies are becoming vulnerabilities and it can no longer rely on others for its security:** *“Decades of globalisation have produced a high level of “strategic interdependence” between major economies, raising the costs of any rapid disentanglement”*

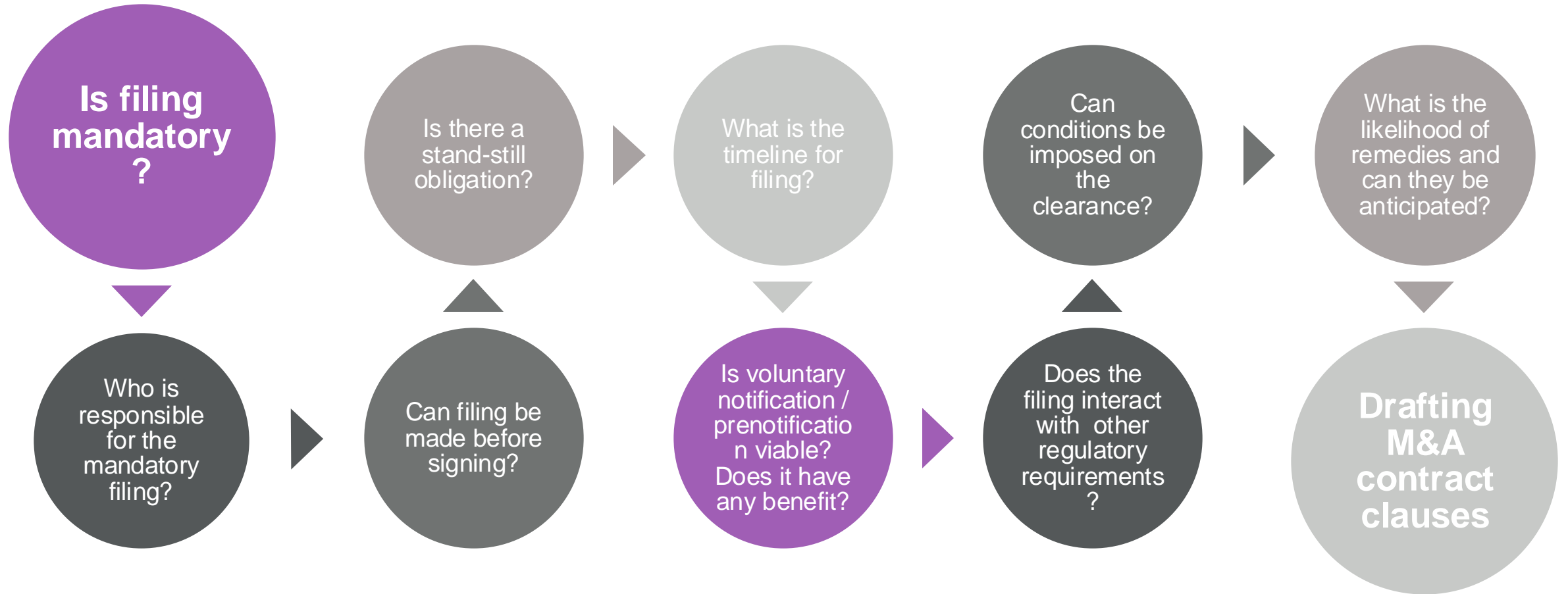
**There should be enhanced coordination in the EU’s foreign direct investment (FDI) decisions:**

*“Asymmetries arising from small Member States negotiating with large foreign investors could lead to unwelcome concessions being extracted by foreign countries, which is particularly concerning when a potential security threat and a geopolitical rival of the EU are involved. To counter these risks, the EU should strengthen its Investment Screening Mechanism. At present, FDI screening is a national competence, with Member States only required to exchange notifications and information. This fragmentation prevents the EU from leveraging its collective power in FDI negotiations and complicates the formulation of a common FDI policy. As outlined in chapter 3, coordination is important for the emergence of joint ventures in strategic sectors and ensuring that EU companies retain relevant know-how and can drive the next wave of innovation”*

## 2. FDI and merger control compliance



### 3. Impact evaluation of filings on M&A contracts



# 4. Risk assessment of merger control obligations

- **Reportability**

Full-functionality

Control Test

Relevant Thresholds

Local Effects Test/Local Nexus

Party responsible to file

Enforcement of the competition authority

Risk of detection

Timing for clearance

Possible fines, other consequences

- **Sustantive analysis: possible concerns**

Market positioning of the parties

Horizontal overlaps

Vertical integration

Conglomerate effects

New theories of harm

- **Possible remedies (accepted)**

Divestiture of a subsidiary / product facility

Brand divestiture

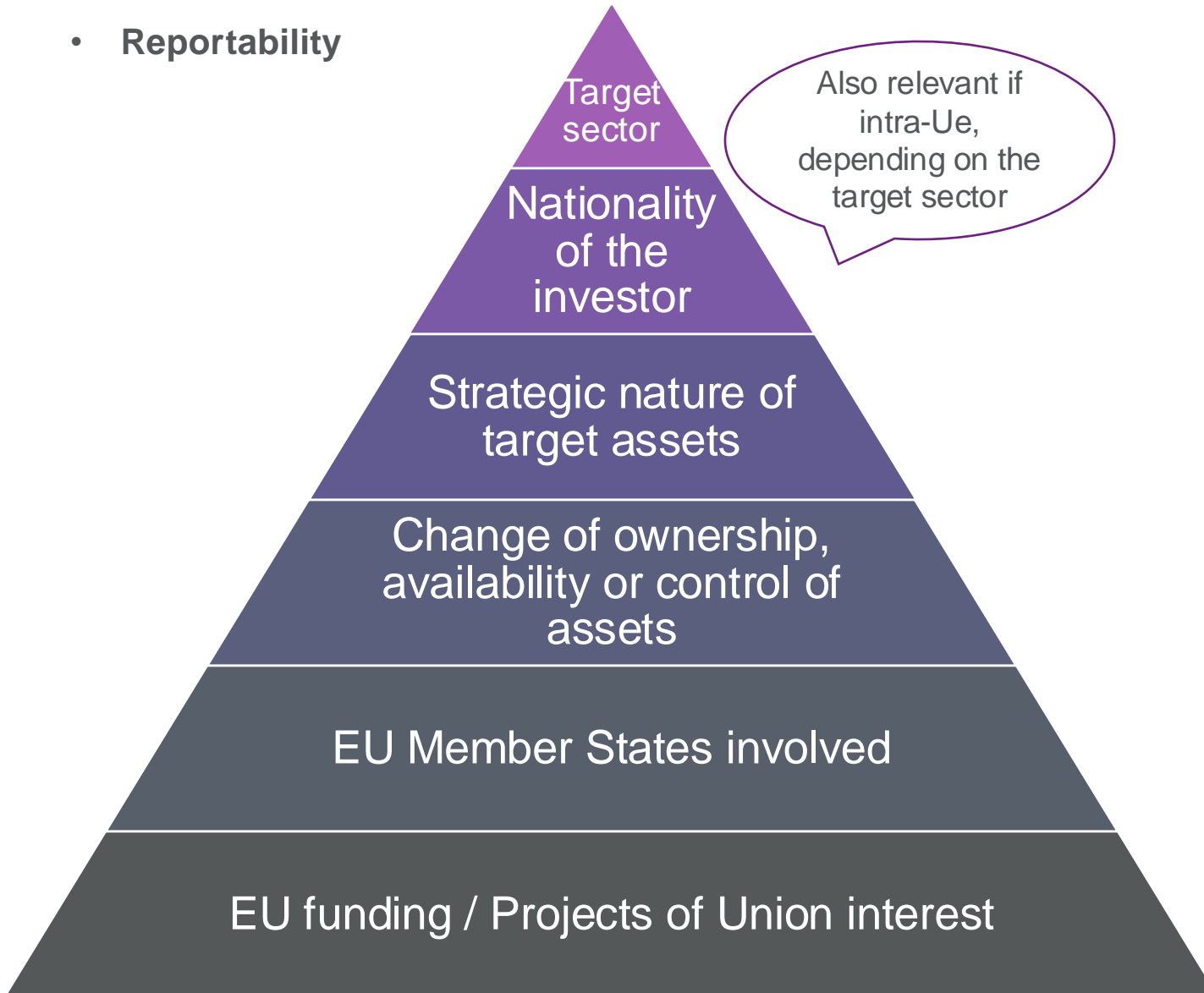
Abstaining from a certain behaviour

Entering a contract

Access to infrastructure / technology

# 5. Risk assessment of FDI obligations

- **Reportability**



- **Substantive analysis: possible concerns**

Focus on use and export of IP

Handling of key personnel

Access obligation to strategic assets

Preventing delocalization, etc.

- **Possible remedies (imposed)**

Duty to supply

Veto rights on strategic decisions

Abstaining from a certain behaviour

Preventing delocalization

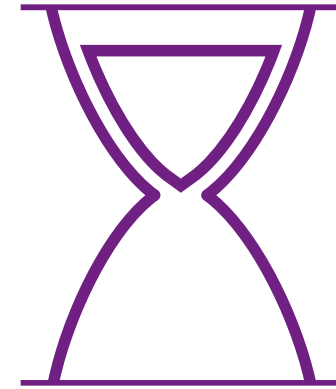
## 6. Drafting M&A contract clauses



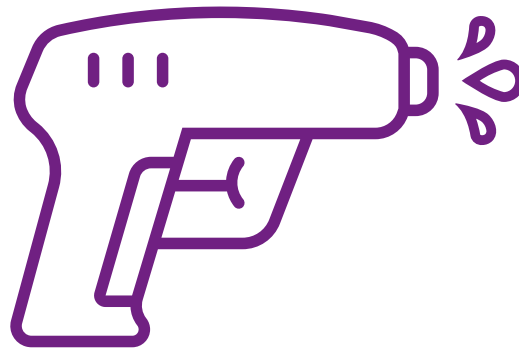
Condition  
Precedent



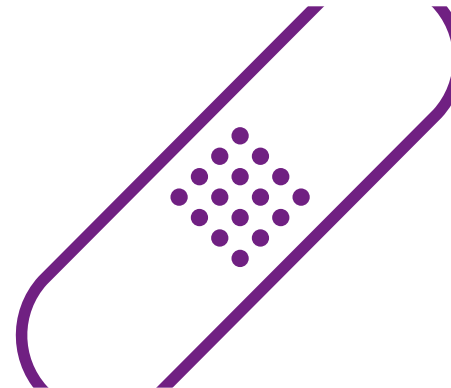
Cooperation  
clause



Long Stop Date



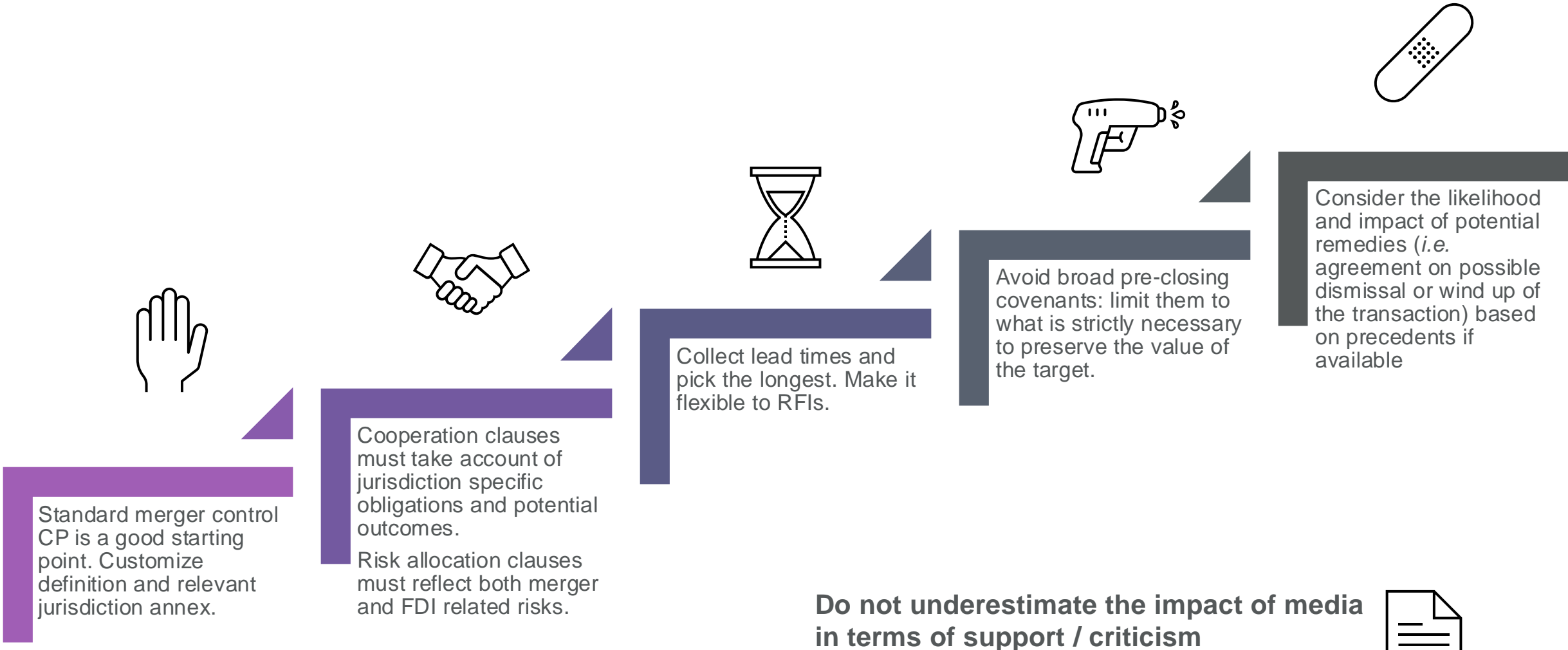
Gun jumping



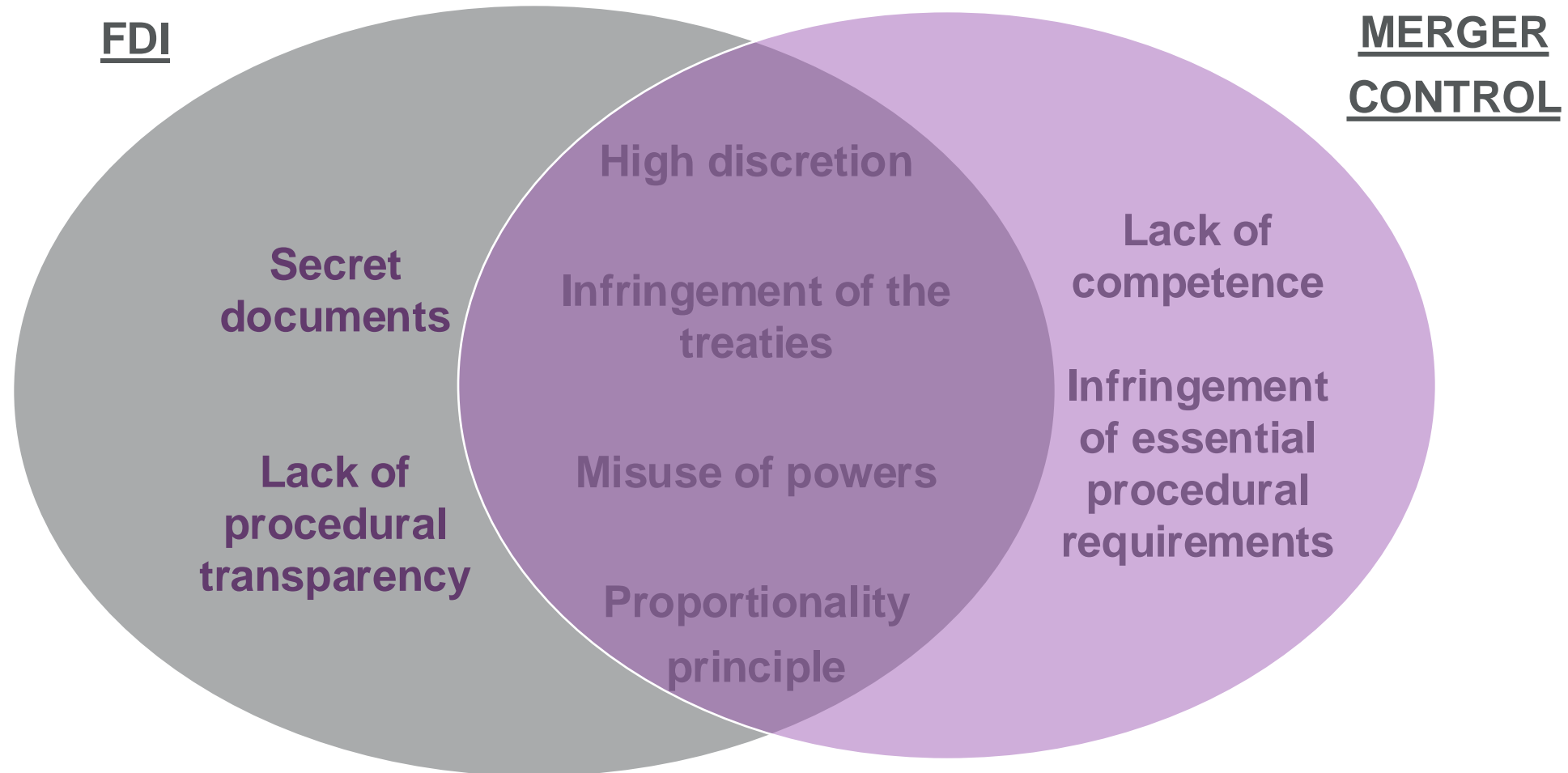
Potential  
remedies



# 7. How it works in practice



# 8. Judicial review in merger control and FDI



# Want to know more? Tell us



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