

# Foreign direct investment reviews 2023: A global perspective

A guide to navigating the rules for investing in countries that require foreign direct investment approval.



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# Navigating foreign direct investment reviews worldwide

**N**ow in its seventh year of annual publication, White & Case's Foreign Direct Investment Reviews provides a comprehensive look into rapidly evolving foreign direct investment (FDI) laws and regulations in approximately 40 national jurisdictions and two regions. This 2023 edition includes more than 15 new jurisdictions in addition to those covered in previous editions and summarizes high-level principles in the European Union and Middle East. Our expansion in coverage reflects the rapid global proliferation of FDI regimes and our market-leading position in the field.

FDI regimes are wide-reaching in scope, from national security to public health and safety, law and order, technological superiority, and continuity and integrity of critical supply chains. They are divergent with respect to jurisdictional triggers across countries, and are almost always a black-box process.

The following are some general observations, in large part based on the 2022 CFIUS and EU annual reports:

- The number of FDI regimes and regulatory enhancements is growing around the world, particularly in Europe. In 2021 and 2022, four EU Member States—Czech Republic, Denmark, Netherlands and Slovakia—implemented new FDI regimes, and in 2023, Sweden and Belgium are slated to adopt FDI screening measures (in addition to non-member Switzerland).
- FDI regulators, at least from allied nations, are collaborating and learning from each other. CFIUS reported at its first annual conference in 2022 that it continues to host training sessions for US allies so that they can adopt similar regimes.
- FDI regulators interpret their jurisdiction and authority broadly, especially if they believe it is in the national interest. Many regulators have “call-in,” “ex officio,” or “non-notified” authority.
- Despite increased regulation, most cross-border transactions are successfully consummated, although there has been an increase in the number of cases clearing with remedies.
- The origin of the investor remains a key concern for Western regulators. For example, China and Russia are included more and more in CFIUS's regular Q&A, asking broader and more invasive questions.

Investors conducting cross-border business need to understand FDI restrictions as they are today—and how these laws are evolving over time—to avoid disruption to realizing synergies, achieving technological development and integration, and ultimately securing liquidity.

We would like to extend a special thank-you to all of our external authors, who have provided some insightful commentary on the FDI regimes in a number of important jurisdictions. The names of these individual contributors and their law firms are provided throughout this publication.

We would also like to extend a special thank-you to James Hsiao of our Hong Kong office and Tim Sensenig of our Washington, DC office for their tireless efforts and dedication to the publication of this edition.



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# Canada

The Canadian government announced a strict framework to evaluate foreign investments in the critical minerals sector by state-owned enterprises and state-linked private investors, especially if from “non-likeminded” countries.

By Oliver Borgers  
McCarthy Tétrault LLP

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The Investment Review Division (IRD), which is part of the Ministry of Innovation, Science and Economic Development Canada (ISED), is the government department responsible for the administration of the Investment Canada Act (ICA), the statute that regulates foreign direct investments (FDI) in Canadian businesses by non-Canadians.

The IRD interfaces with investors and other parties as part of a preliminary (informal) review of an investment to determine whether there are potential national security concerns. Where concerns arise, the IRD will work with the Minister of ISED, in consultation with the Minister of Public Safety and Emergency Preparedness, who may refer investments to the Cabinet (the Canadian Prime Minister and his appointed ministers, formally known as the Governor in Council), who may order a formal review if the investment could be injurious to Canada’s national security.

The national security review process is supported by Public Safety Canada, Canada’s security and intelligence agencies and other investigative bodies described in the National Security Review of Investments Regulations.

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## RECENT UPDATES

As of 2022, investments that are not subject to mandatory review or notification (such as the acquisition of a non-controlling investment or setting up new Canadian entities that do not qualify as “businesses”) may be notified voluntarily to obtain national security clearance. Non-notifiable investments for which no voluntary notification is filed are subject to review for up to five years following the investment.

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## WHO FILES

The ICA is a statute of general application that applies to any acquisition of control<sup>1</sup> of a Canadian business by a foreign investor. If the relevant financial threshold under the ICA is exceeded (subject to certain exceptions), the statute provides for a process of pre-merger review and approval of foreign investments to determine if they are of “net benefit” to Canada, also referred to as “net benefit review”. The indirect acquisition of a Canadian business through the acquisition of a foreign non-Canadian parent is typically exempt from having to obtain approval.

Where approval is required, the investor must file an application for review and the transaction must be approved by the relevant minister. A key element in the application for review is the requirement to set out the investor’s plans for the Canadian business, including plans

related to employment, participation of Canadians in the business, and capital investment. An application for review is a much more detailed document than a notification.

Where approval is not required, the investor has an obligation only to file a simple administrative notification form, which can be filed up to 30 days after closing. In either case (filing of an application for review or just a notification), the Canadian government has jurisdiction for 45 days after receipt of such a filing to order a national security review if there are concerns.

The entry point for national security review screening will usually be the obligatory filing under the ICA (either an application for review if the financial threshold is exceeded and approval is required, or a simple administrative notification form in other cases). The government also has the power to subject non-controlling minority investments to a national security review.

As of August 2, 2022, non-controlling investments in Canadian businesses or establishing new Canadian entities (that do not qualify as Canadian businesses under the ICA) may be notified voluntarily, either before or after closing, pursuant to amendments to the National Security Review of Investments Regulations. For non-notifiable investments for which no voluntary notification is filed, the government has five years following implementation to initiate action.

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1. Generally, an acquisition of greater than 50 percent of the equity or voting interests of an entity, though in certain cases an acquisition of greater than one-third of the voting interests of a corporation, will be considered an acquisition of control.

## TYPES OF DEALS REVIEWED

It is important to keep in mind that the Canadian government has the power to review any transaction (including minority investments) in which there are “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.” Unlike the net benefit review process under the ICA, there is no financial threshold for investments under the ICA’s national security review regime.

Further widening the potential scope of the national security review regime is the fact that there is no statutory definition of “injurious to national security.” This lack of definition creates wide discretion for the minister and some uncertainty for foreign investors.

The types of transactions that have been the subject of formal review under the national security lens include those relating to critical minerals (including lithium), satellite technology, telecommunications, fiberlaser technology and critical infrastructure, as well as where a non-Canadian investor proposed to build a factory located in close proximity to Canadian Space Agency facilities. Investors subject to Canadian national security reviews have included American companies (although ultimately controlled outside the United States), as well as investors from emerging markets, but particular scrutiny can be expected for state-owned investors.

## SCOPE OF THE REVIEW

A national security review will generally focus on the nature of the business to be acquired and the parties involved in the transaction (including the potential for third-party influence). In assessing whether an investment poses a national security risk, the Canadian government has indicated that it will consider factors that focus on the potential effects of the investment on defense, technology and critical infrastructure and supply. The Canadian government will also focus on transactions related to public health or involved in the supply of critical goods and services to Canadians or to the Government of Canada.

Review can occur before or after closing. Transactions that run the risk of raising national security concerns can seek clearance by making any ICA filings well before the proposed time of closing (at least 45 days in advance, although giving the officials more time to review would be prudent). The Canadian government may deny the investment, ask for undertakings and/or provide terms or conditions for the investment (similar to mitigation requirements in the US), or, where the investment has already been made, require divestment.

## REVIEW PROCESS TIMELINE

Obtaining approval under a net benefit review can take anywhere from 45 days to a number of months, depending on the complexity of the investment.

The national security review process can take up to 200 days (or longer with the consent of the investor) from the date the initial notice of the transaction is sent to the Minister of ISED. The minister has 45 days (which can be extended by up to an additional 45 days) after an application or notification under the ICA has been certified, or after the implementation of a minority investment that does not require notification, to refer an investment to the Governor in Council for an order for national security review. If an order is made, it can take 110 more days (or longer with the consent of the investor) for the review to be completed.



**Transactions that run the risk of raising national security concerns can seek clearance by making any ICA filings well before the proposed time of closing**

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Where a transaction gives rise to national security risks, non-Canadian investors should consider filing notice of the transaction with the minister at least 45 days prior to closing to obtain pre-clearance (assuming the minister does not seek further time under the national security review regulations). For an investment that does not require notification (e.g., a minority investment), the Canadian government encourages non-Canadian investors to contact the Investment Review Division at the earliest stage of the development of their investment projects to discuss their investment.

As in other jurisdictions, it is therefore critical for foreign investors to consider Canadian national security review issues in planning and negotiating transactions. In particular, an investor should ensure that it secures a closing condition predicated on obtaining national security clearance in Canada, where appropriate. It may also be appropriate for merging parties to allocate the national security risk.

## LOOKING AHEAD

In March 2021, the Canadian government released revised national security review guidelines, which confirmed that SOEs will receive enhanced scrutiny, provided a non-exhaustive list of sensitive technologies, and expanded the list of national security factors to include critical minerals and sensitive personal data. The sensitive technologies were described as having military, intelligence or dual military/civilian applications, and included a non-exhaustive list of technology areas<sup>2</sup>.

On October 28, 2022, the government announced a further policy, setting out an even stricter framework for evaluating foreign investments in both Canadian entities and Canadian assets in the critical minerals sector by both SOEs and private investors considered to be “closely tied to, subject to influence from, or who could be compelled to comply with extrajudicial direction from foreign governments, particularly non-likeminded governments.” The policy states that investments in the critical minerals sector by SOEs and state-linked private investors pose “inherent economic risk” and will be approved on only an “exceptional basis” under the net benefit provisions. Further, the participation of an SOE or foreign-influenced private investor in an investment in a critical minerals business in Canada will “support a finding” that there are reasonable grounds to believe that the investment could be injurious to Canada’s national security.

Within days of the announcement of the critical minerals policy, in November 2022, the government made the announcement that it had ordered the divestiture of three investments completed in 2022 by Chinese investors. These were three unrelated transactions. These Canadian businesses are active with respect to lithium and, according to the government, other critical minerals. As would be expected, the announcement did not provide any meaningful insight into the nature of the government’s concerns. We note that the announcement did come days after the government’s release of its critical minerals policy, which highlighted the strategic importance of critical minerals to Canada’s and its allies’ economic and military well-being.



2. Advanced Materials and Manufacturing, Advanced Ocean Technologies, Advanced Sensing and Surveillance, Advanced Weapons, Aerospace, Artificial Intelligence (AI), Biotechnology, Energy Generation, Storage and Transmission, Medical Technology, Neurotechnology and Human-Machine Integration, Next Generation Computing and Digital Infrastructure, Position, Navigation and Timing (PNT), Quantum Science, Robotics and Autonomous Systems, and Space Technology.





# Mexico

Foreign direct investments, whether undertaken directly or indirectly, are generally allowed without restrictions or without the need to obtain prior authorization from an administrative agency.

By Henri Capin-Gally Santos, Román González Melo, and Germán Ricardo Macías Salas

The Foreign Investment Act and its regulations (jointly, the FIA) constitute the main statutory framework governing foreign direct investments (FDI). In some specific instances, sectorial statutory frameworks (such as the Credit Institutions Act) or relevant permits, authorizations or concessions complement or supersede the provisions of the FIA.

## RECENT UPDATES

There have not been any major changes to the FIA legal framework in 2022.

## WHO FILES

Under the FIA, FDI is generally allowed without prior authorization from any administrative agency, except with regard to legal entities that are:

- Engaged in the activities described in Article 6 of the FIA (restricted investments) or
- Engaged in the activities provided in Articles 8 and 7 of the FIA, or with assets valued in excess of the monetary threshold set forth in FIA's Article 9, in an amount in excess of the corresponding cap (capped foreign investments)

The scope of restricted and capped foreign investments are set out below.

Applications for prior authorization are generally submitted by the investor to the National Foreign Investment Commission (CNIE).

## TYPES OF DEALS REVIEWED

### Restricted investments

Restricted investments entail the acquisition of a stake—in any amount—of the equity of Mexican companies engaged in land passenger and freight transport services within the Mexican territory or development banking.

Pursuant to the FIA, investments in such ventures are limited solely to Mexican nationals. Foreign investors are statutorily precluded from undertaking a restricted investment.

### Capped foreign investments

Foreign investors cannot acquire more than a 10 percent capital stake in a Mexican cooperative production company, which is a special low-revenue company dedicated to a certain primary activity (such as fishing, artisanal products or agricultural production) with a preferential tax regime.

Foreign investors cannot acquire more than 49 percent of the capital stock of Mexican legal entities that are engaged in one of the following reserved activities:

- Manufacture and marketing of explosives, firearms, cartridges, ammunition and fireworks
- Printing and publication of newspapers for exclusive commercialization within the Mexican territory
- Ownership of agricultural, livestock and forest lands
- Fishing in freshwater, inshore and exclusive economic zones

- Integral port administration
- Piloting services in ports located within the Mexican territory
- Freight shipping within Mexican waters
- Ship, aircraft and rail equipment fuel and lubricant supply
- Broadcasting or
- Air transport services

The CNIE may still authorize any FDI entailing an acquisition of more than 49 percent of the capital stock of a Mexican legal entity engaged in:

- Maneuvering services in ports located within the Mexican territory
- Freight shipping via coastal and ocean navigation
- Aerodrome management or operation
- Education services
- Legal services
- Construction and/or operation of railways, as well as railroad transportation services or
- Holding assets with a book value that exceeds MXN 22.64 billion



**Under the FIA,  
FDI is generally allowed**

## SCOPE OF THE REVIEW

The CNIE has broad discretion whether to approve or deny an investment request. Factors that the CNIE may take into account typically include the following:

- The investment's potential impact on the workers of the investment target entity
- Technological contributions to Mexico
- The investment's potential contribution to the Mexican economy and
- National security concerns

## REVIEW PROCESS TIMELINE

To obtain authorization from the CNIE, interested foreign investors are required to file a preinvestment control notice before the CNIE, attaching as exhibits a duly filled-in questionnaire issued by the CNIE; the financial and corporate documents of the interested foreign investors; a general description of its investment impact in terms of employment, technological contributions and competitiveness increase of the target company; or any other synergy that could derive therefrom; and evidence of payment of filing fees.

Once the pre-investment control notice is duly submitted, the CNIE has 45 business days to authorize the proposed investment. If the CNIE does not issue a decision within that period, the proposed investment will be deemed authorized according to the FIA.

The CNIE can deny an FDI request only for national security purposes. In such a case, the interested foreign investors may file an administrative appellate motion within 15 business days challenging the denial. If the motion is denied, they may file an amparo writ before a court within the following 15 business days challenging both resolutions.

Any FDI in connection with capped investments undertaken without the prior authorization from the CNIE will nullify all the legal acts executed to perform the investment. The CNIE can also fine the involved foreign investors up to MXN 434,400.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors may acquire a non-limited participation in the capital stake of companies engaged in capped activities without prior authorization if the investment is "neutral"—a preferred non-voting financial investment equity that is not characterized as an FDI under the FIA.

Although the FIA is the law generally applicable to FDI, foreign investments can be further limited or restricted by specific regulations or permits applicable to the target company. In any process involving the analysis of potential FDIs, investors should review the terms and conditions provided in the specific regulatory framework and in the permits, authorizations and/or concessions granted to the target company.



**When a transaction is reportable, it is advisable to reach out to the CNIE's officials before the filing**

## LOOKING AHEAD

Recently, the CNIE's officials have continued developing a policy-based approach to review and request additional information in FDI review processes.

Under this approach, when a transaction is reportable, it is advisable to reach out to the CNIE's officials before the filing to discuss the proposed transaction, and understand what information they would like to see explaining the potential benefits of said transaction in Mexico.

Although this would ordinarily require the submitting of additional information to the CNIE and adding to the amount of formal documentation that need to be submitted, it can accelerate the clearance process.

# United States

Most deals are approved, but expanded jurisdiction, mandatory filings applying in certain cases, enhanced focus on national security considerations, and a substantially increased pursuit of non-notified transactions have changed the landscape.

By Farhad Jalinous, Karalyn Mildorf, Keith Schomig, Ryan Brady, Tim Sensenig, Michael Crowley, and David Jividen

The Committee on Foreign Investment in the United States (CFIUS), which is led by the US Department of the Treasury and made up of US national security and economic agencies — including Defense, State, Justice, Commerce, Energy and Homeland Security — conducts national security reviews of foreign direct investment (FDI) into the United States and certain real estate transactions.

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) significantly overhauled the CFIUS process, including by adding new types of transactions subject to CFIUS review, giving CFIUS additional resources to review transactions and address concerns, and, for the first time ever, mandating notification of CFIUS in certain cases. New regulations fully implementing FIRRMA's reforms took effect in 2020, and the CFIUS landscape has continued to evolve since then as CFIUS avails itself of its greater authorities and resources, and the US government makes clear that it views CFIUS as a key national security tool.

## RECENT UPDATES

CFIUS filings have been increasing. In a 39 percent leap from 2020, CFIUS filings reached all-time highs in 2021, the first full year in which FIRRMA was implemented. Although CFIUS has not yet released statistics for 2022, our internal data indicates a further slight increase in filings in

2022 despite overall M&A activity declining compared to 2021

- Despite the increase in cases, CFIUS has generally maintained efficiency in reviewing transactions. In 2021, the one notable decline in CFIUS's efficiency pertained to transactions that were withdrawn and refiled, which is likely due to more time being needed to negotiate mitigation measures in those cases
- The vast majority of CFIUS reviews clear without mitigation, but there has been an uptick in the number of transactions resulting in mitigation. This likely reflects a combination of CFIUS having additional resources—meaning it can require more mitigation as it has greater ability to monitor compliance—and the Biden administration viewing CFIUS as a key national security tool, including as reflected in the September 2022 Executive Order
- The Biden administration issued a new executive order in September 2022 that provides guidance on how CFIUS should examine national security risks associated with a given transaction. President Biden's Executive Order 14083 emphasizes the administration's focus on CFIUS's role in using its foreign investment review authorities to protect US national security and highlights areas of particular national security concern. Although the Executive Order does not change the CFIUS process or authorities—and the factors it sets forth were likely



**In a 39 percent leap for 2020, CFIUS filings reached an all-time high in 2021**

- already being considered by CFIUS in reviews—it provides a useful (but not comprehensive) guide for considering whether contemplated transactions have a potential nexus to national security and could have CFIUS implications
- In October 2022, the US Treasury also published new Enforcement and Penalty Guidelines that provide the first public insight in CFIUS history on the Committee's calculus when determining the appropriateness and number of penalties for violations. Although there has not been a significant number of announced penalty actions since FIRRMA was enacted, we anticipate that CFIUS intends to start using these authorities more going forward, particularly as parties are now on notice about criteria CFIUS will utilize to assess whether penalties should apply

## WHO FILES

CFIUS filings are usually submitted jointly by the parties to the notified transaction—typically the investing entity and the target.

Though the CFIUS regulations now mandate filings for certain

transactions, CFIUS review remains predominantly a voluntary process, as most transactions subject to CFIUS's jurisdiction do not meet the mandatory filing criteria. Even for transactions under CFIUS's voluntary authorities, CFIUS may request parties notify a transaction of interest and has the authority to initiate reviews directly. CFIUS is pursuing non-notified transactions more aggressively, so the risk of CFIUS reaching out on a non-notified transaction has notably increased since FIRRMA was implemented.

Mandatory filing requirements apply only to covered transactions (i.e., foreign investments subject to CFIUS jurisdiction) that involve "TID US businesses," which (as discussed below) are certain US businesses involved with critical technologies, critical infrastructure or sensitive personal data. Specifically, subject to certain exemptions, mandatory filings are required in the following two circumstances:

- The acquisition of 25 percent or more of the voting interests in a TID US business by a person in which a single foreign government holds, directly or indirectly, a 49-percent-or-greater voting interest. All parents in the investor's ownership chain are deemed 100 percent owners, so dilution of ownership interests is not recognized for purposes of this test
- A foreign investment in a TID US business involved with critical technologies, where one or more "US regulatory authorizations" (e.g., export licenses) would be required to export, re-export or retransfer any of the US business's critical technologies to

the investor or any person holding a 25-percent or greater, direct or indirect, voting interest in the investor. With a few exceptions, mandatory filing is required even where such critical technologies would be eligible for export to the relevant foreign person under a license exception

If a mandatory filing applies, notification by a declaration or notice must be submitted to CFIUS at least 30 days prior to the transaction's completion date.

FIRRMA also introduced the concept of "excepted investors," which are not subject to CFIUS's expanded jurisdiction for certain non-controlling investments or real estate transactions and are exempt from mandatory filing requirements. Excepted investors and their parents must meet relatively strict nationality-related criteria related to "excepted foreign states," which are currently Australia, Canada, the United Kingdom and New Zealand (though this list can change). Excepted investors are not exempt from CFIUS's general jurisdiction, only from CFIUS's expanded authorities under FIRRMA.

#### **TYPES OF DEALS REVIEWED**

Consistent with its long standing authorities, CFIUS has jurisdiction to review any transaction that could result in "control" of a US business by a foreign person. Control is defined as the power, direct or indirect, whether exercised or not, to determine, direct or decide important matters affecting an entity. CFIUS interprets control broadly, and notably control can be present even in minority investments. A

"US business" is similarly defined and interpreted broadly by CFIUS.

In addition to its traditional authorities regarding control transactions, under FIRRMA CFIUS now has expanded jurisdiction to review certain "covered investments" in sensitive US businesses referred to as "TID US businesses." "TID" stands for Technology, critical Infrastructure and sensitive personal Data. Specifically, TID US businesses are US businesses that:

- Produce, design, test, manufacture, fabricate or develop one or more critical technologies (i.e., certain items and technology subject to US export controls)
- Perform certain actions in relation to identified critical infrastructure assets, referred to as "covered investment critical infrastructure" or
- Maintain or collect sensitive personal data of US citizens
- A covered investment is a non-controlling transaction that affords the foreign investor any of the following with respect to a TID US business:
  - Access to any "material nonpublic technical information" in its possession
  - Board membership or observer rights (including nomination rights) or
  - Any involvement, other than through voting of shares, in substantive decision-making regarding sensitive personal data of US citizens, critical technologies or covered investment-critical infrastructure

CFIUS also has jurisdiction to review changes in rights that would provide control or, for a TID

US business, covered investment rights, as well as transactions designed to evade CFIUS review.

Covered transactions (i.e., those subject to CFIUS's jurisdiction) include deals structured as stock or asset purchases, debt-to-equity conversions, foreign-foreign transactions where the target has US assets, private equity investments (in some cases even where the general partner is US-owned) and joint ventures into which a US business is being contributed.

Beyond its traditional investment focus, CFIUS now also has jurisdiction to review the purchase or lease by, or a concession to, a foreign person or real estate in the US that is located within, or will function as part of, certain air or maritime ports, or is located in or within certain proximity ranges of identified military installations and areas. Real estate transactions under CFIUS's jurisdiction are not subject to mandatory filing requirements.

#### **SCOPE OF THE REVIEW**

CFIUS reviews are focused on national security concerns. CFIUS conducts a risk-based analysis based on the threat posed by the foreign investor, the vulnerabilities exposed by the target US business, and the consequences to US national security of combining that threat and vulnerability.

Based on its risk assessment, CFIUS determines whether the transaction presents any national security concerns. If CFIUS identifies such concerns, it first determines whether other provisions of US law can sufficiently address them. If no other provisions of US law adequately address the concerns,

CFIUS next determines whether any mitigation measures could resolve the concerns. If mitigation is warranted, CFIUS will typically negotiate terms with the parties, which will be a prerequisite to CFIUS clearing the transaction.

If CFIUS determines that mitigation cannot adequately resolve its concerns, CFIUS will typically request that the parties abandon their transaction (or that the foreign buyer divest its interest in the US business if the review happens following closing).

If the parties will not agree to abandonment or divestment, CFIUS can recommend that the President of the United States block the transaction, as only the president has the authority to prohibit a transaction. Presidential blocks are relatively rare, though they have happened more frequently in recent years. It is more typical for parties to agree to terms for abandonment or divestment directly with CFIUS. Although the CFIUS process is confidential, presidential block orders are public.

#### **REVIEW PROCESS TIMELINE**

There are now two options for how parties can notify a transaction to CFIUS: a declaration, which is a short-form filing reviewed on an expedited basis; or a voluntary notice, which is the traditional CFIUS notification mechanism. Both declarations and notices include required information about the investor and its owners, the US business that is the subject of the transaction and the transaction itself,

although notices require more such information (e.g., personal identifier information for directors and officers of the investor and its parent companies). For both declarations and notices, CFIUS will also typically request additional information via Q&A during the review.

Following the initial submission, the declaration process typically takes approximately five to six weeks, and the notice process usually takes approximately three to five months. Following its assessment of a declaration, CFIUS may request the parties file a notice, so in those cases the total process for a transaction notified by declaration will take longer. For complex transactions, deals expected to be more sensitive from a national security standpoint or in cases where parties want to be assured the certainty of CFIUS clearance, it may be advisable for the parties to start with a notice.

Once accepted by CFIUS, a declaration is assessed in 30 calendar days. At the end of the 30 days, CFIUS may take one of four actions: clear the transaction; inform the parties that CFIUS cannot clear the transaction on the basis of the declaration, but not request a notice (commonly referred to as the "shrug"); request that the parties file a notice for the transaction; or initiate a unilateral review.

Though the shrug outcome does not confer "safe harbor" as a clearance does—after a shrug, CFIUS could theoretically request a notice for the transaction in the future—in our experience transaction parties have typically treated the shrug outcome as sufficient for closing.

For a notice, the parties initially submit a draft “prefiling,” on which CFIUS will provide comments and follow-up questions. After addressing those comments, parties will formally file the notice with CFIUS. CFIUS then has to accept the filing, at which time a 45-calendar-day initial review begins. At the end of the review, CFIUS will either clear the transaction or proceed to a 45-calendar-day investigation. About half of cases proceed to investigation.

If a transaction is referred to the President, the President has 15 calendar days to decide whether to prohibit the transaction.

In some cases, CFIUS will need additional time to complete its process, such as when negotiating mitigation measures with the parties. An investigation may be extended for one 15-calendar-day period in “extraordinary circumstances,” though this happens rarely. More typically, in such circumstances, CFIUS will allow the parties to withdraw and resubmit their filing, which restarts the initial 45-day review period. Most transactions are cleared in one CFIUS cycle.

Filing fees apply to notices submitted to CFIUS, but not to declarations—though they apply for notices submitted following CFIUS’s assessment of a declaration. Fees are assessed based on a tiered approach, providing for a proportional cost equal to or less than 0.15 percent of the transaction value. The lowest fee is US\$750 for transactions valued between US\$500,000 and US\$5 million (transactions under US\$500,000 are not subject to fees), and the highest-tier fee is US\$300,000 for transactions valued at US\$750 million or more.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

It is critical for foreign investors to consider CFIUS issues—including assessing jurisdictional matters, whether mandatory CFIUS filing

will apply, and potential substantive risks—as early as possible in cross-border transactions involving foreign investment (direct or indirect) in a US business. Notably, this includes minority and venture capital investments. Given potentially severe penalties for noncompliance, parties need to know early on whether filing will be required—and where it is not, may want to include relevant representations in the purchase agreement to provide additional protection.

In cases where filing is mandatory or the parties voluntarily notify CFIUS, allocation of CFIUS mitigation risk will be a key issue. Most transactions are cleared without mitigation, but when it is required, mitigation can have a substantial impact on transaction goals and present unexpected costs. The range of mitigation measures that can be imposed by CFIUS is quite broad (based on the risk profile of the deal), and it is important for investors in particular to have as

clear an understanding as possible with respect to what mitigation measures would be acceptable to them. Between additional CFIUS resources enabling CFIUS to address concerns in a broader range of transactions and more focused review of certain national security considerations under both FIRRMA and the Executive Order, mitigation may increase in frequency.



### **It is critical for foreign investors to consider CFIUS issues**

#### **LOOKING AHEAD**

- CFIUS continues to approve most notified transactions without mitigation measures, though mitigation frequency may be increasing
- Notwithstanding mandatory filing requirements, CFIUS remains predominantly a voluntary process
- Declarations—short-form CFIUS filings that are reviewed on an expedited basis—can (subject to deal timing and dynamics) be a valuable tool for parties in transactions that are unlikely to present national security concerns
- Where CFIUS has national security concerns, it can impose mitigation conditions that can have significant implications on the foreign investor’s involvement with the US business and also increase costs. It remains critical for investors to consider mitigation risks at the outset and negotiate protections into the transaction agreement
- The decrease in Chinese investment in the US has correlated with a decline in transactions being stopped by CFIUS, though China remains a key CFIUS focus even in non-Chinese transactions
- CFIUS’s aggressive pursuit of non-notified transactions means closed deals could come under CFIUS scrutiny, and parties to new deals should carefully assess CFIUS considerations when determining whether to voluntarily notify CFIUS

# Europe

Driven by the European Commission's guidance, Member States keep expanding their investment screening regimes. Similar trend is observed in Europe at large.

By Tilman Kuhn, Tobias Heinrich, Orion Berg, and Thilo Wienke

While there is no standalone foreign direct investment (FDI) screening at the EU level, the EU continues to push for a coordinated approach among Member States toward foreign direct investments into the EU.

The European Commission (the Commission or EC) also contemplates revising the current EU Screening Regulation<sup>1</sup> to strengthen its functioning and effectiveness, taking into account experience drawn from the past two years of cooperation and the actions taken in the context of the COVID-19 crisis and the aggression of Russia against Ukraine.

While the Screening Regulation as the key FDI instrument has now been complemented by the Foreign Subsidies Regulation (FSR),<sup>2</sup> the EC is further considering whether new tools are necessary with respect to outbound strategic investments controls.<sup>3</sup>

## PART 1: EU DEVELOPMENTS/ EU SCREENING REGULATIONS

The EU Screening Regulation falls short of delegating any veto or enforcement rights to the EU, which means that Member States remain in the driver's seat for FDI controls.

It is primarily a means of harmonizing and coordinating the widely differing review mechanisms in place at the Member State level throughout the EU. It ensures each affected Member State as well as the EU as a whole are aware of ongoing FDI reviews and can weigh in.

In particular, the Regulation introduced a coordination mechanism whereby the EC may issue non-binding opinions on FDI reviews performed in Member States. "Non-reviewing" Member States may provide comments to the "reviewing" Member States. Member States and the EC may also provide comments on a transaction that is not being reviewed because it takes place in a Member State with no FDI regime, in a Member State in which the transaction does not meet the criteria for an FDI review by the government, or the reviewing Member State decided to waive screening of a particular investment. In the latter case, the Member State concerned with the FDI must provide a minimum level of information to the other relevant Member States and/or the EC on a confidential basis without undue delay.

The cooperation mechanism may also apply to a completed investment that is subject to scrutiny under a Member State's post-closing regime (most Member States, however, have adopted pre-closing FDI regimes), or an investment that has not been scrutinized within 15 months after the investment has been completed.

The final say in relation to any FDI undergoing screening or any related measure remains the sole responsibility of the Member State conducting the review pursuant to its national FDI screening procedures. However, it cannot be ignored that (in particular) smaller Member States may find



## The final say in relation to any FDI undergoing screening or any related measure remains the sole responsibility of the Member State

themselves under considerable pressure to conform to opinions or comments issued by the EC or other Member States.

National FDI authorities take different approaches when implementing the EU Screening Regulation. Certain FDI authorities have systematically notified, under the EU cooperation mechanism, every transaction involving non-EU investors, while others do so under specific circumstances only. According to the EC's 2021 Annual FDI Report, while 13 Member States submitted a total of 414 notifications under Article 6 of the FDI Screening Regulation in 2021, five Member States (Austria, France, Germany, Italy and Spain) were responsible for more than 85 percent of them.

Given that the review remains under the control of the Member States, investors may face multiple national FDI notifications in transactions where the target has a multijurisdictional presence in the EU. The EC's 2021 Annual Report shows that 28 percent of the cases notified in 2021 were

1. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. The Regulation entered into force on October 11, 2020.

2. Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 2021/0114(COD).

3. EC's Communication of 18 October 2022, Commission's work program 2023, *A Union standing firm and united*, section 3.3.

multijurisdictional FDI transactions. These transactions concerned predominantly the sectors of information and communication technology (39 percent), manufacturing (20 percent) as well as wholesale and retail (11 percent).

The key effects of the Regulation, therefore, are largely procedural. In particular, the new role of the EC and the other Member States has increased the number of stakeholders weighing in on the national investment screening review processes, which has an impact on timing, albeit it remains clear that the reviewing Member State has the final say.

While the Screening Regulation does not oblige Member States to introduce a national FDI review process, the trend is set: In its 2021 Annual Report, the EC reported that it anticipated all 27 Member States to have one in place in the future. The EU Screening Regulation has prompted Member States to consider establishing a new national security review regime (where one did not already exist). A number of additional Member States have done so over the past year, such as the Netherlands, Sweden, Denmark, Czech Republic, Poland, Slovakia and Ireland, and more are currently contemplating the adoption of FDI regimes. To date, only Bulgaria has not reported any initiative.

In addition, despite the fact that Member States remain responsible for any enforcement action post-FDI, the implementation of the Screening Regulation has created an impetus for Member States to align themselves better with the Regulation. For instance, Germany broadened and clarified the thresholds for mandatory review to align itself more with the EU Regulation, and Hungary enacted legislation to harmonize its national regime with the EU Regulation. However, the EC's 2021 Annual Report still evidences divergence in national schemes (see section below).

In terms of substantive requirements, the Screening Regulation sets out the following cornerstones that an FDI regime should reflect:

- Investment reviews should revolve only around the baseline substantive criteria of “security and public order”

- Investments in the following (non-exhaustive) sector-specific assets and technologies may be problematic: critical infrastructure (whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate, crucial for the use of such infrastructure); critical technologies and dual-use items (as defined in the EU Dual Use Regulation, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum technology, aerospace, defense, energy storage, nuclear technologies, nanotechnologies and biotechnologies); supply of critical inputs, including energy or raw materials, as well as food security; access to sensitive information, including personal data, or the ability to control such information; and media activities as far as freedom and pluralism are concerned and

- Investments may be particularly problematic where a foreign government (including state bodies or armed forces) directly or indirectly—as through ownership structures or “significant funding”—controls the acquirer

In 2022, following Russia's aggression against Ukraine, the EC urgently encouraged Member States to develop FDI screening mechanisms to address transactions that could create a risk to security or public order in the EU.<sup>4</sup>



## The FSR is extremely far-reaching

### ADOPTION OF EU REGULATION ON FOREIGN SUBSIDIES

On November 28, 2022, the Council of the European Union adopted the Foreign Subsidies Regulation (FSR), to address the issue of subsidies granted by non-EU countries (i.e., foreign subsidies) to companies active in the EU, which have so far escaped the control of the EC. The EC believes the FSR closes an important enforcement gap in its toolbox, as it will gain the power to investigate and assess whether companies operating in the EU have been backed by foreign subsidies, and whether these impact competition in the internal market.<sup>5</sup>

The FSR will apply as of July 12, 2023, and the filing obligation for M&A transactions and public tenders will take effect as of October 12, 2023. An implementing regulation as well as the notification forms for M&A transactions and public tenders were published for four-week consultation on February 6, 2023.<sup>6</sup> The final implementing regulation and the notification forms are expected to be adopted by summer 2023.

The FSR targets all companies that are active in the EU and have received any form of direct or indirect foreign financial contributions (FFCs) from a non-EU country.<sup>7</sup> This is particularly the case

4. EC's 2022 Guidance to Member States on FDI from Russia and Belarus.

5. A foreign subsidy shall be deemed to exist where the public authorities of a non-EU country (or private companies the actions of which can be attributed to the State) provides direct or indirect FFCs that confer a benefit to an undertaking engaging in an economic activity in the EU and the contribution is limited to one or more undertakings or industries.

6. [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13602-Distortive-foreign-subsidies-procedural-rules-for-assessing-them_en)



with those companies that engage in M&A transactions or public tenders in the EU.

Unlike the FDI rules, which remain within the competence of EU Member States, the EC will be the sole enforcer of the FSR. It will have far-reaching investigative powers under two regimes: (i) the ex-ante mandatory filing regime and (ii) the ex officio investigation regime.

For M&A transactions, the FSR imposes on the parties filing and standstill obligations for transactions when certain thresholds are met, namely if:

- At least one of the merging companies (in a full merger)/the target (in an acquisition)/a joint venture is established in the EU and has generated an EU-wide turnover of at least €500 million in the previous financial year and
- The parties to the transaction have received combined FFCs exceeding €50 million in the three years prior to the conclusion of the transaction

For EU public tenders, the filing obligation arises where the contract has a minimum value of €250 million (or €125 million if the tender is divided into lots) and if the bidding party or its holding or subsidiaries, or its main suppliers or subcontractors, have received FFCs equal to or more than €4 million per third country in the three years before the filing.

Non-notifiable M&A transactions or EU public tenders may be concluded before they are approved by the EC. However, the EC may also request that it be notified of M&A transactions and EU tenders falling below the filing thresholds before they are concluded if the EC suspects that these transactions may be backed by distortive foreign subsidies. The EC's assessment related to the foreign subsidies will run in parallel with the merger (or FDI) control and the public tender proceedings. If the EC starts a preliminary review in a transaction

that has been subject to an FDI review, it shall inform the relevant Member State(s).

In the case of notifiable transactions, companies should plan for an FSR review, in addition to the merger control and FDI reviews. The FSR covers all economic sectors, including those that are of strategic interest to the EU, as mentioned in the EU FDI Regulation. Deal documentation will have to be adapted accordingly, and deal timing considerations should be taken into account. We are now likely to see more complaints filed with the EC during and after the notification of the M&A deals.

The FSR also grants ex officio powers to the EC, including that it may retrospectively investigate M&A deals and public tenders that have already been concluded, as well as any other market situation, in which foreign subsidies may be involved.

The EC's review procedure will follow a two-tier structure: a preliminary review to assess whether there are sufficient indications that a company has been granted a foreign subsidy that distorts the internal market, followed by an in-depth investigation if that is the case. If such subsidies are deemed to create market distortions, the EC will now have wide-ranging powers to impose corrective measures, block deals or public awards and even dissolve previously concluded concentrations. Companies may be requested to offer far-reaching commitments if they want transactions to be approved or to close the ex officio investigation. The EC can also impose fines and periodic penalty payments for procedural infringements, for failure to notify, and/or for supplying incorrect or misleading information.

In general, a foreign subsidy would be considered distortive if it could improve the business's competitive position in the EU

and, in doing so, negatively affect competition in the internal market. Subsidies likely to be distortive include supporting failing businesses, unlimited guarantees and facilitating a concentration or a participation in a tendering procedure.

If there is a distortion, the EC will conduct a balancing test before deciding whether to block the transaction or award. In such a scenario, the EC will consider the positive effects of the subsidy, such as benefits of the subsidized economic activity on the internal market and whether it supports a broader EU policy.

The FSR is extremely far-reaching and will increase the regulatory risk and burden for companies operating or investing in the EU with support from foreign states. It may also open up new opportunities for strategic complaints by competitors.

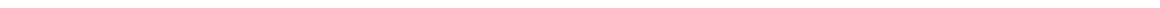
The new measures will add complexity to the regulatory clearance path for M&A by state-backed investors involving EU targets, as in addition to the "regular" merger control at the EU or national level, and the national FDI proceedings, companies will now potentially have to file for an FSR clearance, prior to closing their transactions.

## PART 2: FDI AT THE MEMBER STATE LEVEL

Eighteen of the 27 EU Member States have a screening regime. The regimes differ widely in terms of:

- Whether they provide for mandatory or voluntary filings, or ex officio intervention rights of the government
- Where filing requirements exist, whether there is a threshold related to the percentage of voting rights or shares acquired, a turnover-based threshold, or another type of trigger
- Which industries are viewed as "critical" and may hence trigger a filing obligation and/or government intervention

7. FFCs are defined very broadly and include any transfer of state funds, foregoing of state revenues as well as any provision or purchase of goods or services, which until further guidance from the EC is issued, may be interpreted to include all the contracts of companies with non-EU public bodies (or entities entrusted with public function). These FFCs may come from a central government, but also any public or private entity whose actions can be attributed to a third country. A key factor in the analysis will be whether such financial contributions or contracts with public bodies have been entered at market terms.



- Whether the government has a right to intervene below the thresholds
- Whether they are suspensory (i.e., provide for a standstill obligation during the review)
- Whether they cover only investments by non-EU/EFTA-based investors or by any non-domestic investor and
- The duration and structure of the proceedings, including whether clearance subject to remedies (e.g., compliance or hold separate commitments) is possible

Some regimes are truly hybrid, and the answer to these questions depends on the target's activities and other factors.

### OVERVIEW OF REGIMES WITH/WITHOUT STANDSTILL OBLIGATION

There is broad divergence among legislative regimes regarding whether they provide for mandatory filings, voluntary filings, ex officio investigations or a mixture thereof. The German regime is illustrative— as set out in the chapter “Germany,” it provides for a mandatory filing requirement based on the target's activities, the size of the stake (voting rights) acquired and the “nationality” of the investor.

If these thresholds are not met, the government may still intervene, and investors may hence consider making voluntary filings, under

certain circumstances. For an ex officio investigation, there needs to be a direct or indirect acquisition of at least 25 percent of the voting rights of a German target; an increase of an existing stake above 40, 50 or 75 percent, or an acquisition of “atypical control” by a non-EU/EFTA-based investor— otherwise the government does not have jurisdiction to review the transaction. The regime provides for a standstill obligation where filings are mandatory, but not where they are voluntary.

Country	Defense	Healthcare	Energy	Telecom	Agriculture/ Food production	Transportation	Real estate	Other
Austria	□	□	□	□	□	□		Food, IT, water
Bulgaria	□		□				□	Finance
Bosnia & Herzegovina	□							Media
Croatia								Finance
Czech Republic	□	□	□			□		Finance, data, critical technologies
Denmark	□		□					
Estonia	□		□	□			□	Finance, media
Finland	□							
France	□	□	□	□	□	□	□	Data, media
Germany	□	□	□	□	□	□	□	Media, cloud computing, telematics, finance, dual-use goods, crypto-tech, etc.
Hungary	□	□	□	□	□	□		
Italy	□	□	□	□	□	□	□	Finance, data, media, critical technologies
Latvia			□	□	□		□	Gambling
Lithuania	□		□	□		□		Finance
Malta	□	□	□	□		□	□	
Montenegro	□							
North Macedonia	□							
Norway	□						□	Fundamental national functions
Poland	□	□	□	□	□	□	□	
Romania	□		□	□		□	□	Finance
Russia	□		□	□		□		Media, insurance
Serbia	□							
Slovenia	□	□	□	□	□	□	□	Finance, Insurance, data, critical technologies
Spain	□	□	□	□	□	□	□	Finance, data, critical technologies
Türkiye			□	□		□	□	
United Kingdom*	□							Finance, media

\*Activities most reviewed by the UK government (but not statutory)

## COVERAGE OF INVESTMENTS BY NON-EU INVESTORS ONLY

The various national regimes also differ in terms of whether they only cover investments by non-EU-based investors or any non-domestic acquirer. Some regimes are, again, hybrid: For example, the German regime scrutinizes investments by any non-domestic acquirer in the defense/crypto-tech sector (having a 10 percent stake), while in all other sectors, investments by EU or EFTA-based acquirers do not trigger a filing requirement and cannot be reviewed ex officio (although the government takes a very broad view as to whether an investor is non-EU/EFTA-based).

The French regime captures acquisitions of control by any non-French investor, but minority acquisitions only if the investor is non-EU/EEA-based (having 25 percent of voting rights for all kinds of entities).

In contrast, the Spanish regime only captures acquisitions by non-EU/EFTA investors if they exceed a 10 percent share or control threshold and the target is active in certain sensitive sectors. However, a filing is required irrespective of the target's activities if the investor meets certain circumstances (being government-controlled, being subject to sanctions or illegal activities or having already invested in sensitive sectors in another Member State). In addition, EU/EFTA investors are required to make an FDI filing in Spain if the investment in Spain exceeds €500 million in a non-listed company or involves the acquisition of more than 10 percent of a Spanish listed company.

Similarly, the regime in the Czech Republic defines "foreign investor" for filing purposes as one from a non-EU country.

## INDUSTRIES SUBJECT TO SCRUTINY

Views across the US, Europe and elsewhere keep converging such that so-called "sensitive" sectors need to be protected from what is being described in the US as "adversarial capital" in a more or less coherent way. This trend

is displayed through both the lowering of thresholds that trigger FDI reviews and an expansion of what qualifies as a sensitive sector for purposes of FDI reviews, export controls and international trade compliance. As an example, Germany added 16 new case groups to its screening scope while France supplemented the list of critical technologies with technologies involved in the production of renewable energy.

Sensitive sectors are no longer limited to the traditional sectors associated with national security at a macro level (defense, energy or telecom), but are now expanding to biotechnologies, hi-tech, new critical technologies such as artificial intelligence or 3D printing, and data-driven activities.

Moreover, the COVID-19 pandemic brought FDI into sharper focus and accelerated movement on a national level across Europe. Governments were concerned about foreign investors taking advantage of European companies being in distress and, of course, the crisis led the governments to add the healthcare sector to the sensitive industries. In line with the EU Screening Regulation, FDI screening is also expanding to the area of food security, which has become a priority concern in the EU. Investments in the agri-food sector are subject to review in several Member States like Estonia, France, Germany, Italy, Latvia, Malta, Poland and Spain.

Finally, 5G technology has become a source of concern for certain Member States that had issued specific rules to ensure FDI screening in relation to 5G networks/equipment. In Italy, the government's "Golden Power" pre-clearance process is mandatory for contracts or agreements with non-EU persons relating to the supply of 5G technology infrastructure, components and services. France introduced a specific ad hoc authorization process for operating 5G technology in French territory. In Germany, the Federal Network

Agency has published a security catalog for telecoms and data processing, highlighting the critical nature of 5G networks, and the federal government is contemplating supplementing the technical security check for 5G networks with a political review process.

Despite the converging views as to what sectors are considered critical, the exact definition of critical activities may differ greatly between Member States (e.g., which steps of the semiconductor value chain are covered—only the production as such, or also required equipment, input materials, chip design).

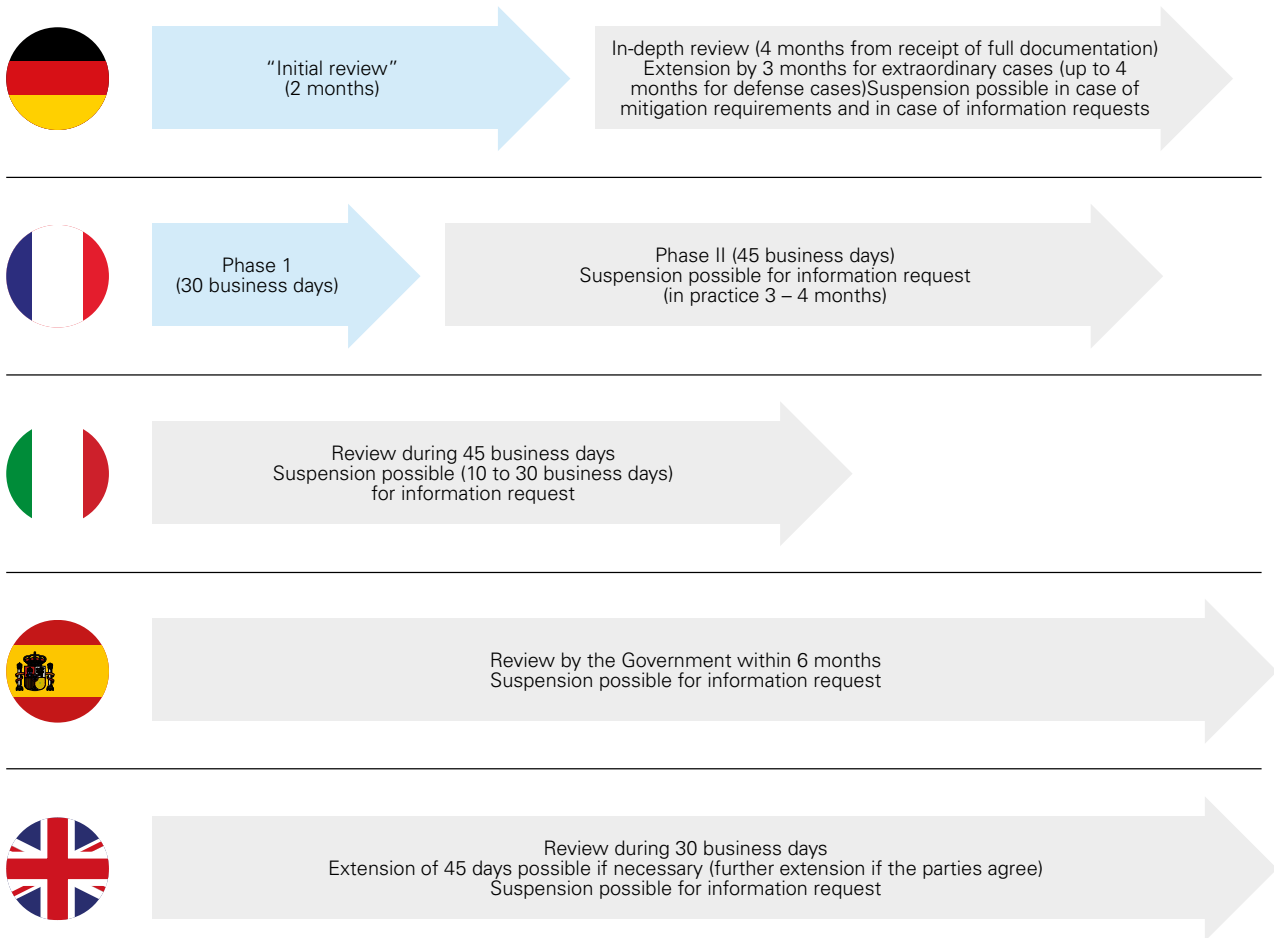
## FILING THRESHOLDS

Some national FDI regimes determine filing requirements or intervention rights based solely on the size of the stake acquired, and cover share deals and asset deals alike; others rely on different or additional factors, such as the target's revenues.

By way of illustrative example, in the healthcare sector, the German regime provides for a filing obligation for an investment by a non-EU/EFTA-based acquirer of:

- At least 10 percent if the target is considered an operator of critical infrastructure (as defined in great detail, for example hospitals handling at least 30,000 inpatient cases/year or diagnostic and therapeutic laboratories handling 1.5 million orders/year)
- At least 20 percent if the target develops or manufactures personal protective equipment; develops, manufactures or markets essential medicines; develops or manufactures medicinal products for diagnosis, prevention, monitoring, predicting, forecasting, treating or alleviation of life-threatening and highly infectious diseases; and develops or manufactures in vitro diagnostics relating to life-threatening and highly infectious diseases

Prior approval is required in Austria only if the target company employs ten persons or more, and if it has



annual turnover and/or annual balance equal to or more than an annual revenue of €2 million or more.

**INTERVENTIONS OUTSIDE THE FORMAL SCOPE**

Even where transactions are out of the formal scope of the FDI regimes, Member States may be prepared to intervene through targeted measures. The following measures adopted in Germany are illustrative:

- Triggered by the COVID-19 pandemic, the German Federal Ministry for Economic Affairs and Energy announced in June 2020 that the state-owned Kreditanstalt

für Wiederaufbau (KfW) will acquire a 23 percent interest in CureVac, a biopharmaceutical company whose focus is on developing vaccines for infectious diseases like COVID-19 and drugs to treat cancer and rare diseases, in order to avoid its potential acquisition by any foreign investor

- Similarly, in July 2018, the German Federal Government decided to prevent the acquisition of a 20 percent stake in the power grid operator 50Hertz by a Chinese investor by arranging for an investment by KfW (because it did not have jurisdiction to

block the deal under the then-pertinent FDI regime). The German Federal Government officially confirmed that the acquisition by KfW was aimed at protecting critical infrastructure for energy supply in Germany

**DURATION OF PROCEEDINGS (INCLUDING SCOPE FOR EXTENSIONS)**

The duration of proceedings differs widely between jurisdictions. Generally, the process takes several months, and many feature a two-phase process (initial review period followed by in-depth

review) and provide for stop-the-clock mechanisms, such as suspension based on information requests, or negotiation of mitigation requirements.

#### **POSSIBLE OUTCOMES FOR PROCEEDINGS**

Blocking decisions on national security grounds remains an exception in most Member States. The EC's 2021 annual report indicates that only 1 percent of all decided cases were eventually blocked by national authorities. Issuing a formal veto to a potential foreign investor may leave the target business without a new investor, as illustrated by the recent Photonis and Carrefour examples in France. In March 2020, the French Minister of the Economy issued an informal objection to US company Teledyne Technologies Inc.'s contemplated investment in Photonis, a French producer and supplier of light intensifier tubes using digital technology with military applications.

Teledyne finally decided to withdraw its offer. In January 2021, French finance minister Bruno Le Maire expressed public opposition to Canadian store operator Alimentation

Couche-Tard Inc.'s proposed €16.2 billion takeover of French retail group Carrefour. Le Maire reportedly said Carrefour is a "key link in the chain that ensures the food security of the French people" and that its acquisition by a foreign competitor would put France's food sovereignty at risk. Couche-Tard finally decided to withdraw its offer.

Clearance with "remedies" (mitigation agreements) is becoming customary in an increasing number of Member States. According to the EC's 2021 annual report, 23 percent of the decisions involved an approval with conditions or mitigating measures. Remedies generally include maintaining sufficient local resources related to the sensitive activities; restrictions on the use of intellectual property rights or on the governance of the target company; mandatory continuation of sensitive contracts to ensure continued services; appointing an authorized security officer within the target company and reporting obligations, etc. In extreme cases, national authorities may also impose mandatory disposal of sensitive activities to an approved acquirer.



## **Blocking decisions on national security grounds remains an exception in most Member States**

#### **INVESTOR ORIGIN**

According to the EC's 2021 annual report, the five main countries of origin of the 414 cases notified to the EC were the US (40 percent), the UK (10 percent), China (7 percent), the Cayman Islands (5 percent) and Canada (4 percent). Russia accounted for less than 1.5 percent of the cases and Belarus for 0.2 percent.

The investor origin continues to be one of the most relevant considerations in making the risk assessment. For example, Germany issued or threatened an increasing number of prohibitions on transactions originating from China and Russia. A prominent recent example concerns the partial prohibition of the proposed investment by Chinese state-owned company Cosco Shipping Group in a container terminal in the Port of Hamburg. While the investment originally was of 35 percent, the German Chancellor only authorized the acquisition of a stake below 25 percent.



## LESSONS LEARNED

### □ While the EU Screening

Regulation is by and large an instrument of “soft law,” it does add substantial complexity and uncertainty to security reviews performed at the Member State level. However, it is worth noting that the EC has not conducted any ex officio screening in application of Article 7 of the FDI Screening Regulation in 2021. Essentially, the EU Regulation puts additional pressure on Member States to consider a broader range of security interests, which is likely to facilitate lobbying efforts from

other stakeholders taking an interest in a transaction

- The EC is ready to revise the EU Screening Regulation to systemize the screening mechanisms through the EU. A study on the FDI cooperation mechanism was conducted in the summer of 2022, and the EC recalled the need to strengthen its functioning and effectiveness in its Communication of 18 October 2022, A Union standing firm and united
- From a practical point of view, the EU Screening Regulation established an automatic information exchange system

between all Member States on every notified transaction. Investors would welcome practical guidance and alignment measures, but in the meantime, they should make sure that a comprehensive multijurisdictional FDI assessment is carried out in transactions involving potentially strategic sectors and a variety of jurisdictions where the target business operates. Investors should also have a proper strategy to deal with multiple parallel notification processes in several Member States to ensure a consistent approach





# Austria

In Austria, the Austrian Federal Investment Control Act (Investitionskontrollgesetz or the ICA) introduced a new, fully fledged regime for the screening of Foreign Direct Investments (FDI) and came into effect on July 25, 2020. With its wide scope of application and extensive interpretation by the competent authority, the number of screened investments has soared.

By Johannes Barbist and Regina Kröll  
Binder Grösswang

Under the previous Austrian FDI regime as set out in the Foreign Trade Act (Außenwirtschaftsgesetz), only 25 cases were reviewed over a period of eight years. This has changed significantly with the introduction of the new FDI regime under the ICA: In the first year alone, the competent authority, the Federal Minister of Labor and Economy (Bundesminister für Arbeit und Wirtschaft, the BMAW) has reviewed 70 cases.

## RECENT UPDATES

- In 2022, the BMAW had to review the first transaction in the defense sector
- As far as we know, the BMAW did not yet block a transaction, but various cases were only cleared with commitments
- Part 1 Item 6 of the Annex to the ICA (research and development in regard to medicinal products, vaccines, medical devices and personal protective equipment) was introduced as a response to the COVID-19 pandemic and supposed to be in effect until December 31, 2022. The legislator decided to prolong the effect of this provision until December 31, 2023.

## WHO FILES

The Austrian FDI regime applies to persons (natural and legal) who are not citizens of or do not have

their seat/headquarters in the EU, the EEA or Switzerland, and are therefore deemed a Foreign Investor.

The primary responsibility to submit an application for clearance under the ICA rests with the acquirer (i.e., the Foreign Investor).

In order to determine whether an investor would be qualified as “foreign” within the meaning of the ICA, the BMAW looks beyond the direct acquirer and its ultimate beneficial owner (UBO) —any non-EU, non-EEA or non-Swiss entities or persons in the ownership structure up to the UBO (vertical chain) may result in the investor being deemed as a Foreign Investor. In other words, while the direct acquirer may not be considered “foreign” (because it is EU/EEA/Switzerland-based), a foreign investment still occurs where an entity at any level in the ownership structure or the UBO is a non-EU, non-EEA or non-Swiss entity or person.

The Austrian target has a separate obligation to notify the BMAW if the investor does not submit an application for FDI approval in regard to the specific transaction.

## TYPES OF DEALS REVIEWED

For an investment to trigger Austrian FDI control, referred to as a “Relevant Investment,” the following conditions have to be met cumulatively:

- An investment by a Foreign Investor. Publicly listed companies are privileged under certain circumstances. Based on a decision by the BMAW, the (many)



**In the first year alone, the competent authority, the Federal Minister of Labor and Economy has reviewed 70 cases**

foreign shareholders of a publicly listed company need not be taken into account provided that such foreign shareholders do not play any active role whatsoever in the transaction and have not entered into any kind of agreement on a shareholder level that points toward a joint acquisition of the Austrian target or a joint exercise of voting rights (directly or indirectly) over the Austrian target

- The target is a company or business in Austria pursuing a commercial activity that may pose a threat to security or public order, including crisis prevention and services of public interest, within the meaning of Article 52 and 65 TFEU and
- The investment concerns the direct or indirect acquisition of
  - An Austrian business or legal entity
  - Material parts of an Austrian business resulting in the acquisition of a controlling influence over such parts of an Austrian business

- A shareholding with which at least 10 percent of the voting rights (if the target is active in a highly sensitive sector) or 25 percent of the voting rights (if the target is active in a "normal" sensitive sector) is reached or exceeded
- Controlling influence over an Austrian business or legal entity

The ICA does not apply to greenfield investments. The ICA would only apply to greenfield investments if they are connected with a notifiable investment. The acquisition of "mere" branch offices or (material) parts thereof also does not come within the ambit of the ICA according to the administrative practice of the BMAW (see also [FAQs BMAW Investment Control](#)).

Furthermore, clearance under the ICA is not required if the target is a micro-enterprise (de minimis rule). A micro-enterprise is defined as an enterprise

- That employs fewer than ten persons and
- Whose annual turnover and/or annual balance sheet total does not exceed the threshold of €2 million

#### SCOPE OF THE REVIEW

The scope of the Austrian FDI regime is very wide (and its interpretation by the BMAW arguably even wider), in particular in regard to the sectors considered sensitive. In its Annex, the ICA distinguishes between

- Particularly sensitive sectors as set out in part 1 of the Annex to the ICA (e.g., defense goods and technologies; operation of critical energy infrastructure; operation of critical digital infrastructure, in particular 5G infrastructure; water; research and development in regard to medicinal products, vaccines, medical devices and personal protective equipment). In case an investment concerns a particularly sensitive sector, the relevant threshold of voting shares is 10 percent and

- "Normal" sensitive sectors as set out in part 2 of the Annex to the ICA (e.g., critical infrastructure, including information technology, health, data processing and storage, etc.; critical technologies and dual-use goods, including artificial intelligence, robotics, semiconductors, etc.; security of supply of critical resources, including energy supply, food supply, etc.; access to and the ability to control sensitive information, including personal data). In case an investment concerns a "normal" sensitive sector, the relevant threshold of voting shares is 25 percent

While the term "critical infrastructures, technologies and resources" is defined in the Annex to the ICA, the sectors explicitly listed in the Annex within the respective category of critical infrastructures, critical technologies or critical resources are per se considered to be critical. The degree of criticality is therefore not part of the jurisdictional assessment as to whether an investment is notifiable to the BMAW.

Whether an investment may pose a risk to security or public order is part of the material assessment of the BMAW. In assessing this risk, the BMAW mainly focuses on the following two factors:

- Investor-related factors, i.e., whether the Foreign Investor is directly or indirectly controlled by the government, including state bodies or armed forces of a third country, including through ownership structure or significant funding; whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or whether there is a serious risk that the Foreign Investor engages in illegal or criminal activities and
- The effect of the investment in the sectors listed in the Annex to the ICA. In this context, the BMAW looks at the nature and scope of

the Austrian target's activities, including the products and/or services offered, the position on the market, customers, competitors and substitute products.

The BMAW's material assessment is not limited to key national security sectors (e.g., the defense or energy sector), but has a much broader focus, taking into consideration security of supply in a wide variety of sectors. Due to the long list of sensitive sectors and the broad categories, a vast number of investments is subject to the ICA and subject to a requirement to submit an application for approval.

A notifiable Relevant Investment may only be implemented following approval by the BMAW. As long as FDI clearance has not been granted, a notifiable Relevant Investment (the underlying transaction agreement) is deemed to have been concluded subject to the condition precedent that approval is granted.

A notifiable Relevant Investment that is carried out without FDI clearance is void under civil law until FDI clearance has been obtained.



**Pay attention to the "domino effect" and map out a filing strategy**

If the BMAW becomes aware of a notifiable Relevant Investment for which the Foreign Investor has not applied for FDI approval, the Foreign Investor is requested to submit an application within three business days from receiving notice from the BMAW. If no such application is timely submitted, the BMAW has to initiate an official approval procedure on its own account and inform the Foreign Investor accordingly. The BMAW often consults the Austrian target to check relevance and notifiability of a transaction under the Austrian FDI regime. Under the ICA, the following outcomes are conceivable:

**Phase 1:**

- Decree that no approval procedure will be initiated because such procedure would be contrary to obligations under union or public international law
- Decree that there are no objections to the acquisition
- Approval by operation of law (legal fiction) in Phase 1 after
- expiry of the one-month period (national level)

**Phase 2:**

- Decree clearing the transaction
- Decree clearing the transaction subject to commitments. The BMAW may impose commitments unilaterally
- Decree prohibiting the transaction
- Approval by operation of law (legal fiction) in Phase 2 after expiry of the two-month period (national level)

In the first 15 months of the new Austrian FDI regime (July 15, 2020 to September 30, 2021), the BMAW reviewed and completed 70 cases. Out of these 70 cases, nine were certificates of non-jurisdictions (Unbedenklichkeitsbescheinigungen) and 61 were full applications for FDI clearance. Out of these 61 full applications, 58 were approved without commitments and three were approved with commitments. No investment was prohibited or cleared by operation of law (legal fiction).

**TRENDS IN THE REVIEW PROCESS**

Further note that transactions in the health sector (in the wider sense, also covering medicinal products, medical devices and personal protective equipment) face a very thorough review by the BMAW. Even without the (immediate) threat of the pandemic, security of supply in these sectors is a priority, often safeguarded by commitments

**REVIEW PROCESS TIMELINE**

FDI proceedings in Austria take on average two-and-a-half to three months and may take up to five-and-a-half to six months.

- Phase 0: Under the Austrian FDI regime, the EU cooperation mechanism is a mandatory step before national proceedings are initiated. Phase 0 takes 35 calendar days on average (but may take considerably longer in case of comments and/or questions from the EC or other Member States). This does not include the time the BMAW takes for notifying the EC that a foreign direct investment within the meaning of the ICA is being made in Austria (which may take up to ten business days)
- Phase 1 (national proceedings): Phase 1 takes one month and typically starts upon conclusion of the EU cooperation mechanism
- Phase 2 (in-depth examination): Phase 2 takes two months. Phase 2 proceedings are only initiated where the BMAW sees the need for further clarification or has substantive concerns.

RFIs in Phase 1 and Phase 2 do not stop the clock unless the BMAW deems the filing incomplete upon initial review (prior to kicking off Phase 0). Usually, the BMAW uses the review periods (close) to the maximum allowed.

**HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Foreign investors should:

- start to think about FDI early on in the transaction planning process
- perform a multi-jurisdictional FDI analysis. Since trigger events and thresholds differ greatly, a diligent multi-jurisdictional analysis is therefore key.
- Pay attention to the “domino effect” and map out a filing strategy. FDI authorities across the EU obtain information about (planned) investments out of the EU cooperation mechanism and other (public) sources, such as merger control filings. Some Member States, including Austria, submit every application to the EU cooperation mechanism. Where an investment is filed in one EU jurisdiction, a cautious approach should be taken in regard to other Member States. If a filing requirement is identified in a number of jurisdictions, a joint filing strategy should be adopted
- Factor in the FDI risk (a prohibition and/or the imposition of (economically) unfavorable commitments) in the contractual framework (CP, long-stop date).

**LOOKING AHEAD**

- Advisers see an increasing number of in-depth investigations. Among the reasons are the (potential) criticality of the affected sector or delays in the process of gathering information since the other involved stakeholders (ministries, provinces) sometimes fail to give (expert) feedback in time.



# Belgium

Belgium implements an FDI screening regime by July 1, 2023.

By Carlo Meert, Stefania Sacuiu, and Nick Hallemeesch

On November 30, 2022, the Belgian Federal State, the Flemish Region, the Walloon Region, the Brussels-Capital Region, the Flemish Community, the French Community, the German Community, the French Community Committee and the Joint Community Committee (through their respective governments and equivalent executive bodies, together the Belgian Governments), agreed on the final text of a cooperation agreement creating a single, uniform screening mechanism for foreign direct investments in Belgium (the Cooperation Agreement). The Cooperation Agreement fits within the framework created by the EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 (the EU FDI Regulation).

For non-EU investors wishing to make investments in a number of strategic areas, the Cooperation Agreement sets forth an ex ante screening mechanism, which shall be carried out by the Belgian Governments, coordinated by an Interfederal Screening Commission (the ISC). The ISC shall be composed of up to three representatives of the Federal State and one representative of each of the eight Regions, Communities and Committees (together the Federated Entities) mentioned above (the "Representatives") and a chair (who shall be a representative of the Ministry of Economy but shall not participate in the deliberations). Each of the Belgian Governments shall also designate one of their members (each a Minister) who shall, in the event a formal screening procedure

is opened, have the authority to take the final decision on behalf of his or her government.

The Cooperation Agreement shall enter into force once it has been approved by the federal parliament and the parliaments of all Federated Entities. It is expected that this shall be or around July 1, 2023, although this date may still be postponed. The screening mechanism shall apply to investments which are signed after the date of entry into force.

Since 2021, the Flemish Government is authorized by law to cancel or suspend any operation resulting in a foreign investor acquiring control or decision-making power in government agencies or certain legal entities entrusted with missions of public interest, if such would threaten the strategic interests of the Flemish Region or the Flemish Community. It is expected that this authorization will continue to exist in parallel with the federal screening regime implemented by the Cooperation Agreement, although it may become less relevant in practice.

## WHO FILES

The screening mechanism set forth by the Cooperation Agreement covers only direct investments (as further defined below which includes investments in foreign legal entities controlling Belgian entities) by a foreign investor, defined as follows:

- A physical person having its primary residence outside the EU or
- An undertaking (including states, state agencies, public and private companies, associations and foundations, etc.):



**For non-EU investors wishing to make investments in a number of strategic areas, the Cooperation Agreement sets forth an ex ante screening mechanism**

- Which has its registered seat or main activities outside the EU or
- Whose ultimate beneficial owners have their primary residence outside the EU
- Ultimate beneficial owners include, among other things, physical persons owning directly or indirectly 25 percent of the voting rights or exercise control through other means (e.g., a shareholders' agreement) or, in the absence of such persons, the physical persons holding senior management positions

## TYPES OF DEALS REVIEWED

The Belgian federal screening regime covers any kind of investment (including acquisitions of shares, subscription to a capital increase, and public takeover offers) in an undertaking, aimed at developing economic activities within the EU, provided that such investment meets each of the following conditions:

- It aims at establishing or maintaining lasting direct relations between the foreign investor (as defined above) and the undertaking, including, without limitation, investments which allow an effective participation in the management or control of the relevant undertaking and
- It could have negative consequences for the national security, public order or the strategic interests of the Federated Entities

Strategic interests include, among other things, safeguarding the continuity of vital processes, preventing strategic or sensitive information from falling into foreign hands, and guaranteeing strategic independence

The scope of application of the screening regime is not limited to direct investments in legal entities that are established or active in Belgium, but also includes direct investments in foreign legal entities (whether established in EU Member States or in third countries) which control an undertaking that has its registered seat or head office in Belgium, provided that the conditions set forth above are satisfied.

The conditions set forth above are considered satisfied and shall trigger a notification obligation if the envisaged investment would result in a direct or indirect, active or passive acquisition of:

- i 25 percent or more of the voting rights in a Belgian entity the activities of which concern:
  - a Critical infrastructure (both physical and virtual) for energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities, as well as the land and real estate crucial for the use of such infrastructure
  - b Technologies and raw materials that are of essential importance to safety, including public health safety, defense and public order control, military equipment subject to the “Common Military List” and national control, dual-use items, artificial intelligence, semiconductors, robotics, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies and nanotechnologies
  - c Supply of critical inputs, including energy, raw materials and food security
  - d Access to sensitive information (e.g., relating to Belgium’s defense and strategic interests), as well as personal data or the possibility to control such data



## The parties may not proceed with closing of the investment until approval has been obtained

- e Private security (e.g., monitoring and protection of persons and goods) and
- f Freedom and pluralism of the media (e.g., news outlets, broadcasting services, newspapers, etc.)
- ii 25 percent or more of the voting rights in a Belgian entity that: (a) is active in the biotech sector, and (b) has realized a turnover of more than €25 million in the financial year preceding the investment
- iii 10 percent or more of the voting rights in a Belgian entity that: (a) is active in the biotech, energy, defense (including dual-use products), cybersecurity and electronic communication or digital infrastructure sectors, and (b) has realized a turnover of more than €100 million in the financial year preceding the investment

The Belgian Governments may, by unanimous agreement, decrease the 25 percent threshold referred to under (i) and (ii) to 10 percent, and/or increase the 10 percent threshold referred to under (iii) to 25 percent. There is no indication that such is currently contemplated.

## NOTIFICATION

Notifications of direct investments falling within the scope of application must be submitted by the non-EU investor to the secretary office of the ISC, supported administratively by the Federal Ministry of Economic Affairs, which will also play a coordinating role in the process. The notification must be made after signing of the agreement relating to the direct investment but before the closing thereof. Parties may also notify a draft agreement, provided that all parties confirm their intention that the final agreement shall not materially deviate from the draft.

In case of an acquisition of shares in a listed company on the stock exchange, the notification must be done, at the latest, at the moment of the acquisition, but except for any financial rights, all rights attached to such shares will be suspended until the transaction has been approved.

The parties may not proceed with closing of the investment until approval has been obtained or is deemed obtained in accordance with the Cooperation Agreement.

The notification includes, among others, information on the foreign investor (ownership structure, including ultimate beneficiary owners, activities of the investor's group including in non-EU countries), deal value and financing of the investment.

## REVIEW PROCESS TIMELINE

The review procedure can be broken down into two or three phases:

- The secretary office of the ISC will conduct a preliminary review upon receiving the above notification and may send requests for additional information to the parties. In addition, at the latest on the fifth day following the notification, the ISC can request formal advice to multiple relevant official instances, which are mandatory in certain cases. The pre-notification phase, which lasts until the secretary office informs the parties that it considers the notification to be complete, does not have a statutory deadline. In accordance with the EU FDI Regulation, once the notification is complete, the ISC shall inform other EU Member States and the European Commission of the notification, each of which may provide comments within 35 calendar days
- The assessment phase lasts for 40 calendar days and begins when the ISC informs the parties that the notification is deemed complete. During this phase, the ISC will conduct a high-level review of the direct investment and may request additional

information, following which the deadline of 40 calendar days is suspended until all requested information has been received

During the assessment phase, each of the Belgian Governments that is geographically concerned by the direct investment (taking into account the separation of powers between the Federal State and the regional entities) will, under coordination of the ISC, conduct its own investigation. The ISC and each of the relevant Belgian Governments may request the advice from certain federal government agencies, including the General Intelligence and Security Service (whose advice is mandatory in certain cases, e.g., when the undertaking is involved in defense-related industries). The ISC may also decide to appoint one or more experts

During the assessment phase, each of the relevant Belgian Governments shall examine whether the direct investment could result in threats to the public order, national security or strategic interests, whereby it shall take into account the comments from other EU Member States (if any) as well as the following factors:

- Whether the foreign investor is directly or indirectly controlled by a government of a third country through ownership or substantial financing arrangements
- Whether the foreign investors has been involved in activities that might affect national security or the public order of a EU Member state or a third country and/or
- Whether there is a serious risk that the foreign investor is involved in illegal or criminal activities

If one of the relevant Belgian Governments has identified concrete indications that such a threat exist, it may request the ISC to proceed with the screening procedure. If no such threats have been identified, the direct investment shall be approved and the parties shall be informed accordingly. If no decision is made within the deadline of 40 calendar days (as may be extended in case additional information is requested), the direct investment shall be considered approved. The decision whether or not to proceed with the screening procedure is not subject to appeal

- A formal screening procedure will be initiated if one of the relevant Belgian Governments has, within the aforementioned deadline, identified concrete threats to public order, national security, or strategic interests of Belgium or the Federated Entities (as applicable)

Any relevant Belgian Government that believes that the direct investment poses a threat to the public order, national security or strategic interests (each as defined above) may draw up a draft opinion within 14 calendar days following the opening of the screening procedure. Such term can be extended at the request of the relevant Belgian Government in light of the complexity of the matter

Each draft opinion shall be provided to the foreign investor for comments. Following such comments, the ISC or the foreign investor may request an oral hearing to take place within ten calendar days following the opening of the screening procedure (during which the delay of 14 calendar days referred to above shall be suspended). If one of the relevant Belgian Governments proposes to approve the transaction subject to corrective measures, negotiations shall take place between the ISC and the foreign investors in order to agree on the binding agreement relating to such corrective measures as well as the implementation thereof. In case of negotiations, the delay of 14 calendar days shall be suspended for the one month (or longer if agreed by the foreign investor and the ISC)

Each relevant Minister must, on the basis of the draft opinions, take a "provisional decision" as to whether the direct investment shall be rejected or approved (subject to the binding agreement in case a binding agreement has been agreed). The combination of those provisional decisions result in a joint decision of the ISC as follows:

- A negative decision, if (i) the Minister of the Federal Government so decides (such decision requiring approval by the Council of Ministers), or (ii) the Ministers of all relevant Federated Entities so decide unanimously or
- A positive decision (subject to the entering into the binding agreement if applicable) in all other cases



**The implementation of the Cooperation Agreement will have to be closely monitored**



A foreign investor may lodge an appeal against a negative decision with a specialized section of the Court of Appeals of Brussels, which shall hear the case in summary proceedings. The Court may only decide to annul a negative decision (but not replace it by a positive decision). In case of such annulment, the ISC should adopt a new decision in accordance with the above procedure. However, the Court has full powers in relation to fines (i.e., the Court can decide to annul, increase or decrease fines).

The Cooperation Agreement also gives the ISC the option to start ex officio investigations of envisaged direct investments deemed to fall under the screening regime. The ISC does not have to inform the companies involved of such an investigation, but it can advise them to notify the envisaged direct investment. A formal procedure may be initiated in the event of non-compliance or non-cooperation.

#### **CORRECTIVE MEASURES**

Corrective measures referred to above may include requirements related to exchange of sensitive information, security clearance of directors, reporting to Belgian authorities, protection of sensitive technologies/know-how/source codes held by the Belgian entity, continuity of supply of sensitive products/services and, in some cases, corporate or business restrictions on the foreign investor as well as divestment measures.

#### **PENALTIES FOR NON-COMPLIANCE**

A foreign investor may be subject to an administrative fine of up to 10% of the envisaged direct investment in the following events:

- No or incomplete data were provided during a notification or a request for information on which an opinion or a decision was then based
- Additional information is not provided within the time limit set forth in the request for information and
- The spontaneous notification of a non-notified envisaged direct investment is made within a period of 12 months following its completion or when the ISC ex officio initiates a screening procedure within a period of fewer than 12 months following the date of closing of the envisaged direct investment

In addition, a foreign investor may be subject to an administrative fine of up to 30 percent of the envisaged direct investment if:

- The investor fails to comply with the notification obligation, except in the cases expressly provided by the Cooperation Agreement
- Inaccurate or misleading information is provided in a notification or a response to a request for information
- The investor does not comply with the request to cease the completion of the envisaged direct investment or
- Corrective measures are not implemented within the time allowed

#### **LOOKING AHEAD**

The implementation of the Cooperation Agreement will have to be closely monitored, as it could have an impact on Belgium's competitiveness in attracting foreign capital. Companies looking for foreign direct investment will indeed have to be attentive and reassuring, in order to guarantee to potential investors that a direct investment can be carried out without pitfalls.

Belgium will have to guarantee a high degree of efficiency and predictability in the execution of the screening mechanism. In this context, competitive auction procedures involving companies active in sensitive sectors could benefit prospective investors from EU Member States, to the detriment of non-EU investors, who are increasingly subject to regulatory constraints such as the screening procedure set out above.

Over time, the application of the foreign direct investment screening procedure will increase certainty and clarity regarding the types of investments that are considered to fall within the scope of the Belgian framework and those that are likely to raise concerns.



# Czech Republic

The new Foreign Investments Screening Act took effect in May 2021, and completed its first full year in operation in 2022.

By Ivo Janda

The Foreign Investments Screening Act (the “Act”) was passed by the Czech Parliament on February 3, 2021 and took full effect on May 1, 2021. It establishes rights and duties of foreign investors whose ultimate beneficial owner is from non-EU countries. It also set screening requirements in relation to certain target persons or owners of target objects in Czechia, which pose important security or public order concerns on the Czech Republic. The relevant entrusted authority remains the Czech Ministry of Industry and Trade (the “Ministry”).

## RECENT UPDATES

- First Annual Report on Foreign Investments Screening in the Czech Republic was published in 2022, and accounted for the time period between May 1, 2021 and April 30, 2022
- The Report does not share detailed information on specific cases but stated that among 12 cases that were investigated during the review period, no transaction had been prohibited by Czech authorities, although in two cases investors withdrew their filings
- The Ministry received 389 notifications of FDIs from EU Member State partners
- In line with the European Commission calling for a stricter assessment of Russian and Belarusian investments, the Ministry has been paying close attention to all security-relevant Russian and Belarusian FDIs and investors

- Following the onset of the Russian–Ukrainian conflict and due to the aftereffects of the COVID-19 pandemic, the number of FDIs in Czechia has dropped, though a rise is expected to occur in 2023

## WHO FILES

In general, the FDI investor should be the applicant. Request for approval of FDI or a consultation proposal is to be submitted in a form specified by Government Decree No. 178/2021 Coll., signed by a statutory representative of the applicant. Together with the application for the approval of FDI, the applicant shall submit a questionnaire containing additional information about the foreign investment. Under Section 33 and the Act No. 500/2004 Coll. of the Rules of Administrative Procedure as amended, the applicant may be represented in the proceeding of the investment screening by a proxy with power of attorney. The power of attorney needs to be signed by the party to the proceedings (applicant) —the signature does not need to be officially certified.

## TYPES OF DEALS REVIEWED

Details or substance of the deals reviewed have not been disclosed. However, based on information available in the public domain, cases that have been reviewed since the Act came into force included ten consultations, three of which proceeded to the full screening procedure. Two cases were reviewed in the screening regime only. In one case, the case was commenced through a filing by the investor as required by law; in the second case,



## The Ministry has been paying close attention to all security-relevant Russian and Belarusian FDIs and investors

the Ministry started the screening procedure on its own initiative.

## SCOPE OF THE REVIEW

Foreign investment into the following targets will require prior approval from the Ministry:

- A target person who performs manufacturing, research, development, innovation or organization of the life cycle of military material, or into a target object through which the said activity is performed
- A target person who operates a critical infrastructure element determined by the relevant central administrative authority
- A target person who is an administrator of an information system belonging to the critical information infrastructure, administrator of a communication system belonging to the critical information infrastructure, administrator of an information system belonging to an essential service, or operator of an essential service
- A target person who develops or manufactures the dual-use goods, or target object through which such goods are developed or manufactured

Even if an FDI does not require prior approval, the Czech government has the power to commence ex post facto review of an FDI if it determines that such FDI may endanger the security or internal or public order of the Czech Republic. Such investments can be screened by the Ministry retrospectively for up to five years from the date of the investment. When deciding whether the FDI endangers the security of the Czech Republic or its internal or public order, the Ministry would usually look at the FDI's potential impact on, among other things:

- Infrastructure, including energy, transportation, water management and medical infrastructure, data processing and storing infrastructure, aviation and cosmic infrastructure, defense, and other infrastructure important for the security of the Czech Republic and its internal or public order, as well as access to land and property essential for the usage of such infrastructure
- Access to critical technologies and dual-use goods, including AI, robotics, semiconductor and cybersecurity technologies, aviation and rocket technologies, defense technologies, chemical technologies, energy-storing technologies, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies
- Access to supplies that are related to energy, raw material or food security
- Security of access to information that is important for the security of the Czech Republic or its internal or public order, including personal data, or ability to control this information
- Possibility of significant influence over public opinion through

information spread by the media

- Critical information infrastructure, important information systems and essential services
- Non-military objects important for state security and
- Other technologies, malicious use of which poses a potential threat to the Czech Republic or its internal or public order, or any other factors important from the perspective of security of the Czech Republic or its internal or public order

Where the foreign investor has an intention to carry out an FDI that does not require prior approval under the Act, he/she may nonetheless ask the Ministry for a consultation as to whether it might be considered as endangering security, or the internal or public order of the Czech Republic. If the result of this consultation is negative, the Ministry will not screen this investment ex officio. The consultation is voluntary except for FDI directed at a target who owns a nationwide radio or TV broadcast license, or who is a publisher of a periodical that has an overall minimum average circulation of 100, 000 prints per day in the past calendar year.

#### REVIEW PROCESS TIMELINE

- Screening of FDI that was not found to pose a risk: 90 days
- Screening of FDI that has been identified as risk-prone, including discussion time required by the government of the Czech Republic: 135 days

These dates can be extended by 30 days in complicated cases. In certain cases, such as where the foreign investor has to enter into negotiations with the Ministry regarding conditions surrounding the FDI, the above timelines may be paused.

- Timeline for the Ministry to provide a response if an investor were to submit a request for consultation: 45 days

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

- Potential investors are encouraged to take steps to confirm whether they fall under the definition of a foreign investor or whether the envisaged activity represents an FDI that requires prior review under the Act, before finalizing any transaction document
- If an investor is unsure about whether an FDI may bring security or public policy concerns to the Czech government, the investor may want to consider submitting a request for consultation so as to speed up any potential FDI application process

#### LOOKING AHEAD

- The Ministry anticipates that they would have to assess more FDIs in 2023 (as compared to 2022) given the more promising economic outlook and an expectation that there would be accelerated willingness to invest into Czechia
- The Ministry is also taking steps to hasten the screening process by providing more guidance to large investment institutions on how to approach FDI impact assessments
- A second annual report will likely be published by the Ministry in the coming year, which will provide further information and statistics on FDI into Czechia

# Denmark

The scope of the Danish FDI regime is comprehensive and requires a careful assessment of investments and agreements involving Danish companies.

By Jesper Fabricius and Rikke Sonne  
Accura Advokatpartnerselskab

The Danish Investment Screening Act (DISA) was entered into force on July 1, 2021 and applies to foreign direct investments and “special financial agreements” (certain specified supplier, operating or service agreements and cooperative agreements on R&D) made or entered into on or after September 1, 2021. The DISA is administered by the Danish Business Authority (DBA).

## RECENT UPDATES

There has been no evaluation of or changes to the DISA or the Executive Orders in 2022. There have also not been any official guidelines issued by the DBA in 2022.

## WHO FILES

Foreign direct investments and certain special financial agreements are investments/agreements that are made or entered into by the following foreign investors/service providers (Foreign Investor(s)):

- Non-Danish citizens
- Companies that are not domiciled in Denmark (even if the company has a permanent establishment in Denmark)
- Companies domiciled in Denmark if the company is a subsidiary or a branch of a company not domiciled in Denmark; or
- Companies domiciled in Denmark if a non-Danish citizen or a company not domiciled in Denmark has control over or significant influence on it

The Foreign Investor is responsible for digitally filing to the DBA, using the forms made available on the DBA's website.

The Foreign Investor must provide detailed information regarding the nature of the investment/agreement, the Foreign Investor and the Danish target company.

In addition to the application/notification form, the following documents must be submitted to the DBA:

- Ownership structure chart of the Foreign Investor
- Ownership structure chart of the Danish target company before and after the investment/agreement (a chart after only applies to investments)
- EU-notification form (if the transaction concerns an investment pursuant to the DISA Section 5 or Section 10) and
- Contracts, declarations of intent or other documents confirming the validity of the transaction

## TYPES OF DEALS REVIEWED

The DISA distinguishes between foreign direct investments in and certain special financial agreements with Danish entities that operate:

- Within certain particularly sensitive sectors or activities. In this area of business, prior approval from the DBA is mandatory if the Foreign Investor directly or indirectly acquires or controls at least 10 percent of the ownership shares or voting rights or equivalent control by other means in the Danish target. In terms of investments, this scheme applies to all Foreign Investors. In terms of certain special financial agreements, this scheme only applies to Foreign Investors domiciled or controlled outside the EU/EFTA (Mandatory Application Scheme)



## The Foreign Investor is responsible for digitally filing to the DBA

- Outside the particularly sensitive sectors or activities. In this area, notification is voluntary but should be considered (i) if an investment/agreement is made or entered into by a Foreign Investor domiciled or controlled outside the EU/EFTA; (ii) the investment leads to direct or indirect possession of or control over at least 25 percent of the ownership shares or voting rights or equivalent control by other means in the Danish target; and (iii) the investment could pose a threat to national security or public order in Denmark. The DBA may initiate an investigation up to five years after completion of an investment/agreement covered by this scheme if the investment/agreement could pose a threat to national security or public order and has not been approved (Voluntary Notification Scheme).

Particularly sensitive sectors and activities include: 1) companies in the defense sector; 2) companies in the field of IT security functions or the processing of classified information; 3) companies producing dual-use items; 4) companies within the critical technology sector; and 5) companies within the critical infrastructure sector.

## SCOPE OF THE REVIEW

When assessing whether a foreign direct investment or a special financial agreement may constitute a threat to national security or public order, the DBA will take all relevant circumstances and available information into account with respect to the Danish target and the Foreign Investor, including, inter alia, the following criteria:

### The Danish target

- Whether the Danish target operates within or influences the critical infrastructure sector
- Whether the Danish target processes or has access to classified information or sensitive personal data
- The Danish target's position on the Danish market, including opportunities for substitution
- Whether the Danish target belongs to the defense industry, produces dual-use items or other critical technology of importance to national security or public order and
- Whether the Danish target deals with supply of critical raw materials, including energy and food safety

### The Foreign Investor

- Whether the Foreign Investor is directly or indirectly controlled by a foreign government, including foreign government agencies or foreign armed forces of a third country, including through ownership or substantial financing
- Whether the Foreign Investor is or has been involved in activities affecting security or public order in an EU Member State or in other friendly and allied countries
- Whether there is a serious risk that the Foreign Investor will engage in or has relationships to illegal or criminal activities significant to national security or public order and
- Whether there are indications that the Foreign Investor is deliberately

trying to circumvent the screening rules, e.g., through the use of front companies

The DBA will consult with other relevant Danish authorities, EU Member States and the EU Commission when assessing whether a foreign direct investment or a special financial agreement may constitute a threat to national security or public order in Denmark.

## REVIEW PROCESS TIMELINE

Within the Mandatory Application Scheme, the DBA has 60 business days from receipt of a complete application to decide whether or not the DBA will approve the investment/agreement or whether the investment/agreement must be submitted to the Minister of Business for further consideration. The DBA may extend the deadline to 90 business days, e.g., if the case requires further investigation. If the DBA exceeds these deadlines, it does not prima facie entitle the Foreign Investor to complete the investment/agreement. If the investment/agreement is submitted to the Minister for approval, there is no deadline for the Minister's approval. In practice, uncomplicated transactions are approved within 35 to 45 business days from the submission of a complete filing.

Within the Voluntary Notification Scheme, a notification may be made at any time, before or after completion of the investment/agreement. The DBA has 60 business days from receipt of a complete notification to decide whether or not the DBA will approve the investment/agreement or whether the investment/agreement must be submitted to the Minister of Business for further consideration. If no decision has been made by the DBA within the 60 business days, the investment/agreement is considered approved. The 60 business days deadline may be extended.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

The scope of the DISA is very broad. In particular, the assessment of whether a Danish target can be considered to operate within the particularly sensitive sectors and activities requires a careful assessment and thorough insight into the target's business activities.

A pre-screening option is available, allowing a Foreign Investor to get a fast-track assessment from the DBA as to whether a Danish entity falls within the sensitive sectors of critical technology or critical infrastructure. This option still requires a digital application to the DBA with information on the Danish target as well as on the Foreign Investor. The information required for the application is limited, and a response from the DBA can generally be expected with two to three weeks. Pre-screening is only available to determine whether a Danish entity falls within the sensitive sectors of critical technology or critical infrastructure, not whether it falls into any of the other sensitive sectors and activities, and the DBA tends to request a full filing if it cannot easily determine if the Danish entity is not operating in critical technology or critical infrastructure.

It should be noted that the DISA also applies to a Foreign Investor's investment in targets outside Denmark, if the target has a Danish subsidiary operating within the particularly sensitive sectors and activities, and the



**In 2023, the DBA is expected to issue further guidance**



Foreign Investor indirectly acquires at least a 10 percent interest in the Danish entity.

The DBA has a duty to offer reasonable guidance to citizens and businesses that are or may be subject to the DISA. Although the scope of this duty is relatively opaque, the DBA is generally quite forthcoming in rendering informal guidance on the application of the DISA. If circumstances are sensitive, however, very little upfront guidance can be expected.

There are no fines for not complying with the DISA. As regards foreign investment in ownership shares, the main sanction is that the Danish authorities may request that the foreign investor dispose of its investment—or in the alternative—may repeal any voting rights on such ownership shares. Depending on the circumstances, this could potentially end up in the Danish target being dissolved. As regards special financial agreements, these may eventually become null and void.

## LOOKING AHEAD

An evaluation of the DISA will be initiated in 2023 and a report will be submitted to the Danish Parliament. The report will form the basis for considerations of whether there is a need to amend the DISA.

In 2023, the DBA is expected to issue further guidance on areas where the DBA has now gained more experience from the practical handling of the DISA, including guidelines on the application of the DISA to intra-group transfers.





# Estonia

Estonia will have in place an FDI review regime by September 2023.

By Kevin Gerretz  
Ellex Circle Law Firms

**E**stonian security policy considers the well-being of the economy as dependent on both (1) exports to stable and trustworthy foreign markets on one hand and (2) reliable foreign investments into the Estonian economy on the other hand. It is therefore of national importance to ensure investments into strategic companies (primarily energy, transport and communications) are beneficial to their sustainable development and quality of services. At the same time, Estonia is one of the few EU Member States where there has been no foreign direct investment (FDI) review mechanism in place.

Following the COVID-19 pandemic and resulting global economic retrenchment, including relocation of resources and lines of power, coupled with Russia's military aggression against Ukraine, Estonia has acknowledged that its small and open economy is an attractive and vulnerable target for achieving geopolitical ambitions and recognizes that the establishment and implementation of measures for FDI control is important and relevant.

Therefore, a Foreign Investment Prudential Assessment Act (unofficial translation from Estonian, the FIPAA) was adopted by the Parliament on January 25, 2023. The FIPAA will regulate foreign investments into companies active in pre-defined economic sectors for the purpose of preventing adverse effects on Estonian security and public order. In practical terms, this means that as the FIPAA comes

into force on September 1, 2023, certain foreign investments will need to apply for clearance before the transaction can be closed.

## RECENT UPDATES

Estonia contemplated changes to its FDI regime, which were adopted in early 2023.

## WHO FILES

The FIPAA is intended to apply to any direct or indirect acquisition of (i) significant holding in, (ii) control over, or (iii) a part of (incl. assets) an Estonian target undertaking by a foreign investor.

A significant holding is defined as (A) holding (i) at least 10 percent of shares, or (ii) at least 10 percent of votes; or (B) giving decisive influence over the management by other means. Control is defined as either: (i) holding of the majority of votes represented by shares; (ii) the right to appoint or remove the majority of management members; (iii) control over the majority of votes pursuant to an agreement entered into with other shareholders; (iv) exercise or the power to exercise dominant influence or control.

The term "foreign investor" within the meaning of the FIPAA includes a (i) natural person who is a national of a third country (in case of dual- nationality, at least one nationality of a third country) or stateless; (ii) undertaking (within the meaning of competition law) which is established under the laws of a third country; (iii) any undertaking under the control of a natural person



**Estonia has acknowledged that its small and open economy is an attractive and vulnerable target for achieving geopolitical ambitions**

specified under (i) or undertaking specified under (ii) regardless of the country of establishment. "Third country" is defined as any non-EU country.

If the relevant transaction is subject to the FIPAA, the law provides for a process of review and approval of foreign investments to determine whether the foreign investments bring about negative effects on Estonian (or any other EU Member State's) security and public order. The FDI regime is mandatory and suspensory in nature, meaning that if the transaction is subject to review in accordance with the FIPAA, the foreign investor must file an application for review and the transaction is subject to a standstill obligation until the clearance has been issued by the competent authority (Consumer Protection and Technical Regulatory Authority).

The review will start upon making a complete obligatory filing under the FIPAA by the foreign investor. The FIPAA does not allow voluntary

filings. If the transaction is not subject to FDI control, the authority will terminate the process. However, the competent authority may be approached before filing in order to request a preliminary assessment as to whether the transaction is subject to a mandatory filing requirement or not.

#### **TYPES OF DEALS REVIEWED**

The FIPAA provides for an exhaustive list of economic sectors and/or criteria to determine if the Estonian target will be subject to the mandatory FDI review process and approval. The types of targets in scope include e.g., providers of vital services (such as suppliers of electricity, natural gas or liquid fuel; providers of data transmission services, payment services and cash circulation services; providers of district heating and water supply and sewage), all state-owned companies (in which the state holds a significant holding), suppliers of military or dual-use goods, providers of nationwide TV and radio services, newspapers, magazines and online/print news, railway infrastructure managers, certified operators of aerodromes, heliports and air navigation service providers; as well as operators of Estonian maritime ports that are a part of the trans-European transport network.

#### **SCOPE OF THE REVIEW**

During the review process, the authority will assess the impact of the foreign investment on the security and public order of Estonia or any other EU Member State (where such Member State raises concerns) in regard to the foreign investor target's economic activities, and the economic sector in which the target operates.

Review must always occur before closing, and a standstill obligation applies until approval is obtained. Transactions that run the risk of being subject to FDI review should seek clearance by submitting an application to the authority well before the planned date of closing (at least 30 calendar days, although the review process may be extended up to 180 calendar days in certain cases—see further details on timing below). If the foreign investment would be blocked under the FIPAA, the authority may clear the foreign investment conditionally, whereby the foreign investor or the target is obligated to offer remedies to avoid risks to the security or public order of Estonia or any other EU Member State, including to divest a certain shareholding in the target or maintain existing service or supply agreements.

The authority may annul an earlier clearance after it has been

issued on certain grounds, including where the investor does not comply with conditions specified in the decision (in case of a conditional clearance) or the investor has submitted false or misleading information and/or documents that constituted a decisive factor for the clearance. Upon annulment, the foreign investor or the target is required to immediately reverse the transaction (by returning to the initial state of affairs to the maximum extent possible).

Where a foreign investment subject to the FDI regime is completed without a clearance, the authority may issue a precept requiring (i) divestment of the shareholding or business; (ii) reversal of the transaction; or (iii) the taking of any other measures to return to the initial state of affairs.



**The FIPAA will enter into force on September 1, 2023**

## REVIEW PROCESS TIMELINE

The process can take up to 180 calendar days from the date of submission of a complete application to the authority. By default, the authority is required to adopt a decision within 30 calendar days from the submission of a complete application. The process may be extended once by up to 90 calendar days where (i) this is necessary for the assessment of the foreign investment's impact, or (ii) another EU Member State or the European Commission intends to provide comments on the foreign investment in accordance with Regulation (EU) 2019/452. Furthermore, where clearance can be given only conditionally, the authority may extend the above deadlines by up to 60 calendar days for discussions on remedies.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Where a transaction gives rise to the risk of being subject to FDI review and approval, non-EU investors should consider filing the application with the authority at least 30 calendar days prior to the planned closing. For a foreign investment that risks having an adverse effect on the security and public order of either Estonia or another EU Member State, the time of filing an application should be brought further forward to account for the potential extension of the review process up to a total of 180 calendar days.

After the FIPAA enters into force on September 1, 2023, it will therefore become critical for foreign investors to consider also Estonian FDI review issues in planning and negotiating transactions. In particular, a foreign investor must ensure that it includes a closing condition predicated on obtaining FDI clearance in Estonia, where appropriate, and take this into account for setting the long-stop date. It may also be appropriate for the parties to assess the national security risk.

## LOOKING AHEAD

The FIPAA will enter into force on September 1, 2023. Thereafter, non-EU investors must consider Estonian FDI review issues in planning and negotiating transactions. Attention should be given also to those transactions that have been signed but have not yet closed at the time the FIPAA enters into force. It is currently estimated that the number of potential Estonian targets within the scope of the FDI review process is approximately 330 companies. Given that there are no turnover thresholds and also indirect acquisitions of minority shareholdings ( $\geq 10$  percent) may be caught, an Estonian FDI filing might pop up from the most unexpected situations.



# Finland

Deals are generally not blocked in Finland.

By Janko Lindros and Marika Harjula

The Finnish government views foreign ownership positively, as a catalyst for increasing internationalization and competitiveness. The Finnish Monitoring Act enables the government to monitor foreign investment and to restrict it where necessary in light of national interests. Monitoring is focused on the defense and security sectors. Deals may also be covered by the Monitoring Act if the target can be considered critical for securing vital functions of society.

## RECENT UPDATES

There have not been any major changes to the Finnish FDI regime in 2022.

## WHO FILES

The notification is made by a “foreign owner”, i.e., the person gaining control of at least one-tenth, one-third or one-half of the aggregate number of votes in a Finnish company or equivalent actual decision-making power. The Ministry may also request a foreign investor to submit a notification in relation to a measure that increases the foreign investor’s influence but does not exceed the threshold mentioned above.

In the defense sector, monitoring covers all non-Finnish acquirers; in other sectors, monitoring only concerns non-EU/EFTA acquirers.

The notification must be made by the potential foreign owner, and not (for example) by a Finnish holding company set up by the potential foreign owner.

## TYPES OF DEALS REVIEWED

All acquisitions concerning the defense (including dual-use) sector require advance approval by the

Finnish Ministry of Economic Affairs and Employment (the “Ministry”). Advance approval is also required for acquisitions of companies operating in the security sector, i.e., companies that provide products or services that are deemed vital for national security.

Where the target is not active in the defense/security sector, but may be considered “critical for securing vital functions of society”, notification to the Ministry is not mandatory, but foreign investors are encouraged to make a notification prior to closing. The Ministry intentionally does not define the phrase “company considered critical for securing vital functions of society” because the definition evolves over time.

## SCOPE OF THE REVIEW

The Ministry shall approve a transaction unless it would endanger a key national interest. If the Ministry finds that the transaction may endanger a key national interest, it transfers the matter to the government’s plenary session for resolution. The government’s plenary session then decides whether or not to approve the deal, depending on whether it believes the deal poses a threat to the national interest. The vast majority of notifications to date have been approved.

The Ministry may also approve a transaction subject to conditions and, where necessary, enforce compliance through fines. If the Monitoring Act is breached, the transaction can be declared null and void.

## REVIEW PROCESS TIMELINE

The review process starts when a foreign investor submits a notification to the Ministry. There is no official filing form, but the Ministry has published instructions concerning

the contents of the notification. The Ministry then has six weeks to open an investigation or to determine that the acquisition does not fall within the scope of the Monitoring Act.

After receipt of the notification, the Ministry asks for input from other relevant Finnish authorities. If deemed necessary, the Ministry may disclose confidential documents and information to these authorities.

All notifications are processed promptly, in the order of receipt. In practice, the duration of the review depends on the case load of the Ministry and other authorities taking part in the review process.

The Monitoring Act states that a transaction is deemed to have been approved if the Ministry does not make a decision to open a review within six weeks of notification, or if the notification has not been transferred to the government’s plenary session within three months dating from the day when all necessary materials were received. In practice, review takes approximately two months.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors should consider the potential timing implications of a review (up to three months) even when no issues are expected to arise.

## LOOKING AHEAD

No major developments are expected in the next year. However, the volume of notifications appears to be increasing every year, which may result in case backlog and longer processing times.



# France

In France, FDI screening authorities have issued new guidelines to improve the transparency of the FDI process.

By Orion Berg

The Bureau Multicom 4 of the Ministry of Economy (MoE)'s Treasury Department is responsible for FDI review in France. Though FDI screening remains mainly confidential in France, the MoE is working on making the process more transparent in order to increase predictability for foreign investors. No major reforms of existing FDI screening laws and regulations are expected in the coming years.

## RECENT UPDATES

- No major changes in the legislation. As planned, the Ministerial Order of 10 September 2021 "relating to foreign investments in France" came into force on January 1, 2022. This Order supplements the list of critical technologies involved in the production of renewable energy
- The MoE published for the first time the FDI annual report in March 2022 and the FDI Screening Guidelines ("the Guidelines") in September 2022. These publications offer more transparency for foreign investors, especially following the expansion of the scope of the FDI control regime and MoE's powers in past years
- In 2022, we noticed increasing attention to transactions related to public health, food security and early-stage R&D activities. Inbound investments in defense-related activities and in certain key French industries like nuclear are still subject to close monitoring by French FDI screening authorities. We anticipate that those trends will continue

## WHO FILES

The foreign investor files a mandatory request for prior authorization, which includes information listed in the 2019 Ministerial Order, concerning the investor (incl. its structure, the composition of its board of directors, a list of its French and foreign competitors), the target (incl. a list of its French competitors and competitors operating in the EU), a list of its French clients, a list of intellectual property (patents, trademarks, licenses) held or used, and the investment (incl. the amount, the structure, the strategies).

## TYPES OF DEALS REVIEWED

The transactions captured by the French FDI screening rules are:

- Acquisitions by a foreign investor (i.e., non-French investor or French investor not domiciled in France) of (i) a direct or indirect controlling interest in a French entity and/or (ii) whole or part of a branch of activity of a French entity
- Acquisitions by a non-EU/EEA investor (acting alone or in concert with others) of more than 25 percent of voting rights of a French entity, whether made directly or indirectly. Decree No. 2020-892 of 22 July 2020 lowered this voting rights threshold to 10 percent for investments in French listed companies (this measure is temporary and has been extended to December 31, 2023)
- FDI review is triggered only where the target conducts sensitive activities, as listed in the French Monetary and Financial Code (MFC). They include inter alia the following sectors: defense and

security, public health, big utilities and critical infrastructures (i.e., energy, telecoms, transportation, water supply), R&D in critical technologies and activities relevant in terms of food security

## SCOPE OF THE REVIEW

The MoE review is mandatory and suspensory. Therefore, the parties must wait for the MoE decision in order to complete and implement the transaction.

The MoE examines whether the investment may distort public order, public safety or national security. Other ministries interested in the investment are consulted. The MoE may clear the transaction with conditions such as continuity of supply of the sensitive activities, maintaining sufficient capacities and IP rights in France to keep supplying those activities, and/or duty to report to French authorities. In exceptional cases, the MoE may also impose the divestment of the sensitive activities.

Follow-up Q&As are customary. The Guidelines formalize the possibility to hold informal exchanges with the Ministry, both for the target and the investor, to clarify the purpose of the investment prior to the notification.

Any transaction that closes without the MoE's authorization is null and void. To remedy such a situation, the MoE can enjoin the investor to file for prior authorization. In case of a breach of FDI screening rules, the MoE has the power to take interim measures to suspend the investor's voting rights in the target, prohibit or limit the distribution of dividends to the foreign investor, temporarily suspend, restrict or prohibit the free disposal of all or part of the assets related to the sensitive activities

carried out by the target, and appoint a temporary representative within the company to ensure the preservation of national interests.

The MoE may also impose financial sanctions (i.e., up to twice the value of the investment; 10 percent of the annual turnover of the target; or €1 million for natural persons or €5 million for legal entities). More generally, in the application of articles 458 and 459 of the French Customs Code, any infringement to FDI screening requirements may be subject to criminal penalties (i.e., up to five years imprisonment; confiscation of the property and assets; and a criminal fine).

The Guidelines specify that the amount of penalty will depend on the context and the behavior of the investor. The Guidelines also provide that if the authorization is granted following omission or fraud, the MoE can withdraw its authorization at any time.

Following a conditional clearance, if an investor fails to comply with the commitments, the MoE can withdraw the clearance or oblige the investor to comply with the initial/new commitments. The sanctions listed above also apply.

#### **REVIEW PROCESS TIMELINE**

The MoE has 30 business days to indicate whether a transaction falls outside the scope of the review, is cleared unconditionally or requires further analysis. When further analysis is required and mitigating conditions are necessary, the MoE has an additional period of 45 business days to provide the

investor with its final decision, i.e., clearance with conditions or refusal of the investment. In practice, the process can last approximately three months. In the absence of a response from the MoE within the stated time limit, the application is deemed to be rejected.

Decree n°2020-892 of 22 July 2020 introduced a fast-track procedure for investments from non-EU/EEA investors in French listed companies beyond a 10 percent threshold in voting rights. Unless the MoE objects, the authorization is deemed granted within ten days from the notification.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Foreign investors must anticipate foreign investment control issues before planning and negotiating transactions. The responsibility for filing lies primarily on the buyer and, if the transaction reaches the thresholds, prior clearance by the MoE should be a condition of the transaction including a break-up fee or opt-out clause in case it is impossible to fulfill the demands of the MoE.

The Guidelines specify that it is possible to seek a letter of comfort when the transaction is only an investment project, if the parties prove their intentions to invest. In this case, the MoE has two months to respond.

Preliminary informal contacts with French authorities may also be advisable to determine the impact on the timeline. The seller's cooperation in the preparation and review of the filing remains important.

## **LOOKING AHEAD**

Recent data shows that prohibitions are scarce, but conditions are customary. These trends are likely to continue in 2023. In 2021, out of the 124 authorized investments, 54 percent were subject to conditions. Among the authorized operations, 13.7 percent concerned the defense and security sector and 29.4 percent concerned mixed sectors.

With an increasing number of EU Member States adopting new screening mechanisms, we expect the MoE to keep working along with other EU authorities within the framework of the EU cooperation mechanism.



**We expect the MoE to keep working along with other EU authorities**



# Germany

The Federal Ministry for Economic Affairs and Energy continues to tighten FDI control, but the investment climate remains liberal in principle.

By Tilman Kuhn, Lars Petersen, Thilo-Maximilian Wienke, and Victor A. Thonke

Germany remains open for foreign investors. However, the German Federal Ministry for Economic Affairs and Climate Action (the BMWK) has significantly tightened its FDI review, particularly for PRC and Russian investors. Investors should therefore carefully consider potential FDI restrictions at an early stage of the transaction when pursuing investment opportunities in Germany.

## RECENT UPDATES

- Germany's new coalition government took office at the end of 2021 with the Green party taking over the Foreign Ministry and—for the first time—the BMWK. Since then, the BMWK intervened in a record number of transactions, particularly by Chinese Investors
- The BMWK has significantly bolstered its FDI resources. In 2022, it has grown from one unit to two units, with more than 20 government officials working on FDI cases
- Clearance decisions in cases without national security concerns remain swift. Defense-related cases and cases in the tech industry typically require more time
- Sensitive industries for Germany's production (e.g., semiconductors and other high-tech products) and investments in critical infrastructure are under particularly tight scrutiny
- Germany significantly broadened the scope of its FDI regime in 2021. In 2022, it further

expanded its definition of critical infrastructures and will likely continue on this path

- BMWK continues to interpret German FDI rules broadly both in terms of its scope of application and potential national security concerns

## WHO FILES

The direct acquirer is obliged to submit the filing, even if it is a mere SPV and/or located in Germany. BMWK accepts filings by legal counsel on behalf of the direct acquirer with proper power of attorney. If the direct acquirer has not yet been determined or established (e.g., in cases of a shelf company or a new SPV), the BMWK normally accepts the filing by the indirect acquirer.

## TYPES OF DEALS REVIEWED

The activities of the target and the "nationality" of the investor determine the review process. German FDI review covers both direct and indirect acquisitions by foreign investors. Further, the BMWK is entitled to review all types of acquisitions, including share deals and asset deals.

Regarding certain highly sensitive industries such as arms and military equipment, encryption technologies and other key defense technologies, acquisitions of at least 10 percent of the voting rights by any foreign (i.e., non-German) investor are subject to a mandatory review (so-called "sector-specific review") and trigger a filing (and a standstill) obligation.



## German FDI review covers both direct and indirect acquisitions

Any other type of investment may only be scrutinized if the investor is based outside the EU/EFTA (so-called "cross-sectoral review") and acquires a share of at least 10, 20 or 25 percent of the voting rights depending on the industry at-issue. Whether a filing is required (and a standstill applies) depends on the target's activities. Sectors that trigger a mandatory cross-sectoral filing inter alia include (as defined in great detail):

- Critical infrastructure
- Software for critical infrastructure
- Telecommunications monitoring
- Cloud computing
- Telematics infrastructure
- Media industry
- Services for state communication infrastructures
- Medical/Pharmaceutical industry
- Other critical industries (AI, robotics, semiconductors, nuclear, aviation and aerospace, quantum, satellite, additive manufacturing, IT, etc.)
- Critical raw materials
- Security of food supply (>1,000 hectares)

In all other cases, the government has a call-in right for any transactions involving the direct or indirect acquisition of at least 25 percent of a German company's voting rights by a non-EU/EFTA investor if the government is concerned the transaction may impede public security or order in Germany, another EU Member State, or certain EU programs.

#### **SCOPE OF THE REVIEW**

A transaction must be filed to the BMWK if the foreign investor acquires (i) voting rights in a German entity active in a critical business sector and reaches certain investment thresholds (10 percent or 20 percent, depending on the industry at-issue) or (ii) a certain scope of assets of such entity. In assessing the investment thresholds, the BMWK takes a broad approach and looks at all entities in the entire acquisition chain (without any dilution of the shareholding) from the direct acquirer to the ultimate parent, and arguably also at shareholders such as limited partners (to be assessed on a case-by-case basis). Additional mandatory filings are triggered when subsequently reaching thresholds of 20 percent (in case the initial threshold was 10 percent), 25, 40, 50 and 75 percent. All transactions triggering mandatory filings are subject to a standstill obligation, i.e., the transaction must not be consummated before it is cleared by the BMWK. In particular, it is prohibited to allow the acquirer to directly or indirectly exercise voting rights or grant the acquirer access to certain sensitive data before clearance has been or is deemed to be granted.

Outside the scope of mandatory review, the BMWK can call in acquisitions of at least 25 percent subject to cross-sector review, in cases of "atypical" control (a somewhat vague threshold that takes into account any influence beyond the shareholding acquired by the investor, in particular by means of additional board seats, veto rights or access to certain information), or in certain settings that allow for an aggregation of shareholdings, e.g., in case of shareholdings by several different investors controlled by the same foreign state.

The standard of German FDI review is to ensure public order and (essential) security interests. In its assessment, the BMWK will in particular consider the origin of the investor, the foreign government influence on the investor, and the track record of the involved parties with BMWK filings. Further, general political considerations like securing supply chains or industrial policy play an increasing role.

In order to safeguard public order or security, the BMWK may—in accordance with other Federal Ministries—prohibit transactions or clear a transaction subject to mitigation measures or "remedies." These typically take the form of a trilateral agreement between the ultimate acquirer parent, target and the German Federal Government ("mitigation agreement"), but the government could also impose certain measures unilaterally. The contents of the measures will depend on the concerns to be resolved, and can include safeguarding pre-transaction volumes of supply, not relocating facilities/ know-how, reporting obligations, etc.

To enforce a prohibition, the BMWK can prohibit or restrict the exercise of voting rights in the acquired company, or appoint a trustee to bring about the unwinding of a completed acquisition at the expense of the acquirer.

#### **REVIEW PROCESS TIMELINE**

The review process timeline is split into two phases.

Phase I begins with the BMWK obtaining knowledge of the transaction (either by notification or by other means) and lasts up to two months, during which the BMWK will determine whether to open a formal review (phase II) or clear the transaction.

Phase II begins with the BMWK opening a formal review and requesting further documentation regarding the transaction, the scope of which lies within the broad discretion of the BMWK. The formal review starts upon receipt of that documentation and lasts another four months; however, the BMWK can extend it by another three months in exceptionally complex cases (plus another additional month in case of defense deals). In addition, the timeline is suspended in case of additional information requests by the BMWK, and for as long as negotiations on mitigation measures are conducted between the BMWK and the parties involved. Such considerations outside the official review timeline can therefore have a significant impact on the transaction timetables.

If at the end of phase I or II the BMWK has not issued a decision, the transaction is legally deemed to be cleared (for phase II, only in cases subject to cross-sectoral review).



## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Parties to transactions should carefully consider the risk of foreign investment control procedures early in the process (ideally starting at the front end of the due diligence process). Given the potential for considerable FDI review risks, it may be appropriate for the parties to initiate discussions with the BMWK even before the signing and/or announcement of a binding agreement. In any event, parties should factor in sufficient time for the (German and potentially other) FDI reviews when negotiating long-stop dates. For example, in critical cases the BMWK has a tendency to wait until PRC merger clearance has been obtained (to factor in any implications of PRC remedies) — which had previously been the long pole in many transaction timetables.

Clearance provides a safe harbor for any transaction. In case no filing was submitted, the BMWK can take action ex officio for acquisitions in scope of German FDI review within

a maximum period of five years from signing (but no later than two months after receiving knowledge of the acquisition) and even prohibit them retrospectively.

In order to protect oneself from such retrospective review in cases without filing obligation and to obtain legal certainty (in particular where German FDI clearance is a closing condition), foreign investors can voluntarily apply for a certificate of non-objection (Unbedenklichkeitsbescheinigung) as a safe harbor. Outside the scope of German FDI review, the investor can request an informal notice of non-applicability by the BMWK. The BMWK typically issues such notices as an administrative practice without binding effect or legal basis.

Lastly, any BMWK decision can be challenged before a German court. However, court action often is not a practical option for the parties (sometimes in light of timing or publicity concerns), and the BMWK enjoys broad discretion as to the interpretation of the legal provisions.

## LOOKING AHEAD

- Germany's new coalition government will likely keep up the intensified scrutiny of foreign investments under German FDI rules
- The German government is re-evaluating its dependencies and trade relationships with certain countries, including China. This could potentially lead to even stricter scrutiny of investments from these countries
- FDI reviews in critical companies tend to get increasingly politicized. Decisions in these transactions are increasingly taken with the involvement of the entire cabinet or the Federal Chancellery



# Hungary

The need for FDI screening remains in focus for deals with Hungarian dimensions.

By Iván Sólyom  
Lakatos, Köves és Társai Ügyvédi Iroda

**H**ungary has currently two separate FDI regimes in force.

The first regime, the so-called “General FDI Regime,” which was introduced on January 1, 2019 to basically implement EU Regulation no. 2019/452, has a relatively narrow scope regarding the sectors covered (national security, public utility services, certain financial services).

The second FDI regime in effect is the “New FDI Regime,” which has been adopted due to, and in connection with, the COVID-19 pandemic. Compared to the General FDI Regime, the New FDI Regime covers a wider number of sectors and activities. It, however, also contains significant exceptions (such as the exception for indirect transactions), which are commonly used in practice to avoid the need for FDI screening.

The basic concept of Hungarian FDI screening is that transactions which fall under either the General or the New FDI Regime require both notification to and acknowledgement by the competent minister as a precondition to the implementation of the deal. The competent ministers are (i) the Minister leading the Prime Minister’s Cabinet Office for the General FDI Regime and (ii) the Minister of the Economic Development under the New FDI Regime.

Although the New and the General FDI Regimes are regulated in separate pieces of legislation, which do not refer to each other, the subject matter (FDI screening) is similar, and so their main logic is the same, focusing on the origin of the investor and the activities of the Hungarian target companies. However, despite their similarities,

there are major differences between the two regimes (e.g., the “foreign investor” definitions in the two regimes do not match, different exemption rules apply, etc.). As the similarities and differences between them make the Hungarian FDI screening system complex and often confusing, we set out the applicable rules separately in the sections below where needed.

## RECENT UPDATES

The most recent legislative developments concerning the Hungarian FDI systems is that the Hungarian legislator has adopted an emergency Government Decree under no. 561/2022, which decree slightly extended the scope of the notifiable transactions under the New FDI regime. The new rules are effective as of December 24, 2022 and reflected in our summary above. Another material development, that the final date of the interim extension to the General FDI Regime’s scope (i.e., investments by EU/EEA or Swiss entities are also caught as referred above) remains to be effective until June 1, 2023 at the date of this summary.

## WHO FILES

In case of both regimes, the foreign investor shall make the FDI notification to the competent minister. However, the foreign investor definitions of the regimes differ.

## General FDI Regime

Under the General FDI Regime, any natural person or legal entity qualifies as a foreign investor if it is (i) citizen of/registered in a country outside of the EU, EEA



**Despite their similarities, there are major differences between the two regimes**

or Switzerland or (ii) a legal entity registered in the EU, EEA or Switzerland but controlled by a non-EU/EEA/Swiss person/entity (EU entity controlled by a non-EU investor). According to COVID-19-related interim measures to the General FDI Regime, any natural person or legal entity citizen of/registered in a Member State of the EU/EEA or Switzerland is also considered as a foreign investor until June 1, 2023.

## New FDI Regime

According to the New FDI Regime foreign investors are those (natural or legal) persons or organisations which are (i) citizens of/registered in a country which is outside of the EU, EEA or Switzerland; or (ii) legal entities registered in the EU, EEA or Switzerland, if they are under the majority control of (natural or legal) persons or organisations citizens of/registered in a country which is outside of the EU, EEA or Switzerland (EU entity controlled by non-EU investor). The New FDI Regime also applies to EU/EEA/Swiss investors (natural and legal persons) if they acquire majority control and the investment exceeds approx. EUR 880,000 (i.e. HUF 350,000,000 as set out in the New FDI Regime).

## TYPES OF DEALS REVIEWED

Covered transaction types under the General FDI Regime are:

- A foreign investor establishes a new Hungarian company or acquires an existing Hungarian company (solely or together with other foreign investor(s)) equity exceeding 25 percent (for privately held companies) or 10 percent (in publicly listed companies); or acquires a “dominant influence” in such company
- Foreign investor(s) acquire(s) equity of less than 25 percent in a privately held company registered in Hungary, but the total equity held by foreign investor(s) exceeds 25 percent as a result
- A foreign investor registers a branch office in Hungary for the purpose of carrying out listed strategic activities
- A foreign investor acquires a right to operate or use infrastructure or assets that are indispensable for carrying out listed strategic activities or
- A company registered in Hungary in which foreign investor(s) hold equity equivalent to that in (1) or (2) above takes up a listed strategic activity

Covered transaction types under the New FDI Regime are:

- Acquisition of ownership interest
- Capital increase
- Mergers, demergers, transformations to another company form
- Issuance of bonds that are convertible or convert to equity or provide preferential subscription rights
- Establishing usufruct<sup>1</sup> right over equity provided that, as a result of such transaction, the foreign investor would acquire

- Majority control (by way of ownership, voting rights, appointing management or otherwise) if the investment reaches or exceeds HUF 350 million (approx. €880,000) or
- At least 5 percent ownership interest (or 3 percent ownership interest in case of public companies), if the investment reaches or exceeds HUF 350 million (approx. EUR 880,000) or
- An ownership interest reaching 10 percent, 20 percent or 50 percent in a strategic company or any level of interest which, if computed together with any other foreign investors’ interest, exceeds 25 percent

In addition, irrespective of ownership thresholds or transaction sizes, the transfer of using/operational rights of infrastructures and assets that are “indispensable for the operation of strategic companies” (including the pledging of these assets and infrastructures) require both notification to and acknowledgement by the competent minister.

Please note that in relation to transactions caught by the New FDI Regime, indirect acquisitions and higher level intragroup restructurings fall outside its scope provided that there is no direct ownership change in relation to the Hungarian target company.

## SCOPE OF THE REVIEW

### General FDI Regime

The minister reviews whether the triggering event “harms Hungary’s security interests,” which is not defined in the relevant laws and thus gives a broad framework for discretion to the competent minister.

In case of an EU entity controlled by a non-EU investor, a blocking decision can only be made in the case of circumvention, i.e., if it can be established that the EU entity’s involvement in the transaction is for the purpose of circumventing the FDI screening rules. This could be the case, in particular, if the EU entity controlled by a non-EU investor does not carry out any actual economic activities or has no real presence in the EU Member States.

### New FDI Regime

Under the New FDI Regime, the minister evaluates the following criteria:

- Whether the proposed transaction endangers or threatens to endanger the national interest, public order or public security of Hungary with particular attention to the security of supply relating to the basic needs of the society, in accordance with the relevant articles of the Treaty on the Functioning of the European Union (TFEU Art. 36, 52 (1) and 65 (1), which invoke, among others, public policy, public security or public health issues)
- Whether the foreign investor is directly or indirectly under the control of any administrative agency of any non-EU state (including its ownership structure or financing)
- Whether the foreign investor is or was involved in any activity relating to public security or public order in any other Member State
- Whether there is substantial risk that the applicant will commit any crime or illegal activity

1. Meaning a right to enjoy the use of and benefits from equity, absent or in lieu of ownership.

## REVIEW PROCESS TIMELINE

### General FDI Regime

The foreign investor must make a notification to the Minister leading the Prime Minister's Cabinet Office before implementation and within ten days of:

- Signing the contract, in the event of equity acquisitions and operation right acquisitions
- The registration of the newly subscribed strategic activity in the company registry, for strategic activities

The deadline for review by the minister is 60 days (extendable by 60 days) from the date of filing.

### New FDI Regime

The foreign investor shall make a notification to the Minister of Economic within ten days from signing the transaction documents. The minister has 30 business days to decide on the transaction, which deadline may be extended by 15 business days.

Based on our experience, the relevant ministries do not always comply with the deadlines set out in relevant laws, therefore substantial delays may occur in certain cases, and there are no effective remedies against such delays.



**Conducting FDI analysis at the initial stages of the intended transaction is critical**

## OUTCOMES

### General FDI Regime

Under the General FDI Regime, the minister either issues a clearance decision or a veto decision, the latter if the triggering event “harms Hungary’s security interests.” In the case of an EU entity controlled by a non-EU investor, a veto decision can only be made in the case of circumvention, i.e., if it can be established that the EU entity’s involvement in the transaction is for the purpose of circumventing the FDI screening rules. This could be the case, in particular, if the EU entity controlled by a non-EU investor does not carry out any actual economic activities or has no real presence in the EU Member States.

A veto decision can be challenged by the foreign investor or by the affected company only on a procedural basis (i.e., if the procedural rules of FDI screening have been materially breached). The only exception is that a veto decision can be challenged on a substantive legal basis concerning the ministry’s opinion on whether or not the EU entity controlled by a non-EU investor carries out actual economic activities or has real presence in the EU Member States.

### New FDI Regime

If the minister finds that any of the conditions for a veto decision apply (see points (a)-(d) above at “SCOPE OF REVIEW”), it shall issue a decision that forbids the completion of the contemplated transaction; otherwise the Minister shall acknowledge the notification.

The Minister is obliged to set out the reasons for any veto decision. However, in practice, the vagueness of the terms of relevant laws allows the Minister to deliver decisions in a discretionary or arbitrary manner.

The decision of the Minister cannot be appealed, but is subject to a challenge before the Metropolitan Court of Budapest, which has 30 days to deliver its decision.

If the court establishes that the rejecting decision was unlawful, it shall set aside such decision and order the minister to conduct a new review.

As mentioned earlier, unfortunately there is no public register on FDI decisions, therefore the proportion and number of denials or any other information relating to the FDI notifications made are not publicly known.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Conducting FDI analysis at the initial stages of the intended transaction is critical if the contemplated transaction touches on Hungarian companies/assets. In certain cases where whether FDI screening is needed based on the applicable legal provisions, an informal discussion with the competent ministry or a written request to express their views on the transaction on a no-name basis can be useful. However, it shall be highlighted that the ministries are not keen to provide such opinions and those opinions would be on a non-reliance basis.

If the initial FDI analysis is that an FDI notification is necessary

under the General FDI Regime, then the FDI notification is mandatory. However, if the initial FDI analysis indicates that an FDI notification is necessary under the New FDI Regime, there are some exceptions to explore before making such a notification:

- Potential structuring of the transaction to avoid the effects of the New FDI Regime by making the transaction indirect from the Hungarian company's perspective or
- Consider if an adjustment can be made to the registered activities of the target company so as to avoid unnecessary strategic activities. Hungarian targets may sometimes register a broad list of activities, even though the actual activities of the target are narrower and do not include strategic activities

Further, if a filing is necessary, then the process can be expedited if the filings are well prepared, address potential questions, and appropriate communications and advocacy efforts with relevant authorities are undertaken during the process.

#### **TRENDS IN THE REVIEW PROCESS**

The scope of the Hungarian FDI Regimes is drafted in a broad way and applicable FDI laws are

vague, which makes it very difficult in certain situations to decide whether a transaction is subject to the mandatory screening or not. The ministries' guidance in these situations is that in case of doubt, it is advisable to file the transaction.

As the General FDI Regime focuses on more sensitive areas like national security, FDI screening under that regime usually takes more time and requires more information to be disclosed to the competent minister.

As there is no public register relating to FDI proceedings and FDI decisions under either regime, the number of FDI notifications and the ratio of acknowledged and vetoed transactions are not publicly known. Based on our past experience, the ministries approve most of the notified transactions. However, where natural resources are concerned, the ministry acts with greater scrutiny (for example, one veto decision was due to the fact that the target owned a natural water spring). There is no question that due to the emerging energy crisis and the armed conflict between Russia and Ukraine, companies that are active in the energy sector or that pursue national security-linked activities are and will be treated with much higher scrutiny.

#### **LESSONS LEARNED**

- The relevant ministries always extend the deadlines even in the simplest cases, and they tend to deliver their decisions on the last days of such extended deadlines. It is important to note that in certain cases they do not comply with the applicable deadlines set out in the relevant laws, therefore substantial delays may occur and there are no effective remedies against such delays
- As there are overlaps between the scope of the two FDI regimes and as they fall within the jurisdiction of different ministries, it is possible that, in certain transactions, two different FDI notifications are needed



**The scope of the Hungarian FDI Regimes is drafted in a broad way**



# Ireland

Ireland anticipates adopting and implementing an FDI screening regime by Q1 2023.

By Philip Andrews  
McCann Fitzgerald LLP

Ireland's proposed new law on the screening of foreign direct investments, the Screening of Third Country Transactions Bill 2022 (the TCTB), scheduled to be adopted in Q1 2023 and entered into force soon after, will for the first time "...provide the Government with powers to protect security or public order from hostile actors using ownership of, or influence over, businesses and assets to harm the State."

The TCTB, to give effect to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, will require pre-notification to and prior approval of the Irish Minister of Enterprise, Trade & Employment on a wide array of transactions. Importantly, the TCTB will also have retrospective effect, allowing the Minister to review transactions that were completed in the 15 months prior to the law's entry into force.

## RECENT UPDATES

Ireland contemplated changes to its FDI regime, which were adopted in early 2023.

## WHO FILES

The TCTB is generally applicable to an acquisition of control (broadly defined) of an Irish business by an investor (or "persons connected with" such an investor) from anywhere other than an EU Member State, a member of the EEA, or Switzerland.

The obligation to notify applies to all parties to a notifiable transaction, meaning both buyer and seller. An exception applies for a "party

to a transaction ... where it is not aware of the transaction," even if it is unclear when such an exception might apply or how it might be demonstrated.

Of note, the TCTB explicitly provides for a process to permit one notifying party consent to another party notifying on its behalf and thereby relieve that party of its notification obligation.

## TYPES OF DEALS REVIEWED

The TCTB covers any transaction, acquisition, agreement or other economic activity involving change of control of an asset in Ireland or the acquisition of all or part of any interest in an Irish company. Such transactions must be pre-notified and cleared by the Minister if they meet all of the following criteria:

- A third-country investor (as described below), or a person connected with such investor, is a party to the transaction
- The transaction "directly or indirectly" relates to, or impacts upon, one or more of the relevant matters (as described below)
- The value of the transaction is equal to or greater than an amount to be specified by the Minister (or, in the absence of specification, €2 million) and
- The transaction relates to an Irish asset, business or firm

A transaction that results in the acquisition of shares or voting rights in an undertaking (as opposed to a change of control of an asset) is not notifiable unless: (i) all of the above criteria are satisfied; and (ii) the percentage of shares or voting rights held by the person in the undertaking changes from:



**The TCTB explicitly provides for a process to permit one notifying party consent to another party notifying on its behalf and thereby relieve that party of its notification obligation**

- 25 percent or less to more than 25 percent; or
- 50 percent or less to more than 50 percent.

Reflecting Article 4(1) of Regulation (EU) 2019/452, the TCTB applies to transactions that "relate to, or impact upon, one or more of the following matters":

- Critical infrastructure, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities, including the land/real estate necessary for the use of such infrastructure
- Critical technologies and dual-use items including AI, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies
- Supply of critical inputs, including energy or raw materials, as well as food security
- Access to sensitive information, including personal data or the ability to control such information and

- The freedom and pluralism of the media

In addition, the TCTB gives the Minister sua sponte powers to instigate review of a foreign investment if the transaction might impact security or public order. These “not notifiable” transactions are not subject to mandatory approval, but can be called in by the Minister if he or she has “reasonable grounds” for believing that the transaction affects or would likely pose a risk to the security or public order of the state.

### SCOPE OF THE REVIEW

In reviewing a transaction, the Minister will assess whether the transaction affects, or would be likely to affect, the security or public order of Ireland, with regard to the following factors:

- Whether a party to the transaction is controlled by a government of a third country and the extent to which such control is inconsistent with the policies and objectives of Ireland
- The extent to which a party to the transaction is already involved in activities relevant to the security or public order of Ireland
- Whether a party to the transaction has previously taken actions affecting the security or public order of Ireland
- Whether there is a serious risk of a party to the transaction engaging in illegal or criminal activities
- Whether the transaction presents, or is likely to present, a person with an opportunity to undertake actions that are disruptive or destructive to persons in Ireland; improve their access to sensitive undertakings, assets, people or data; or undertaking espionage affecting or relevant to the interests of Ireland
- Whether the transaction would likely have a negative impact in Ireland on the stability, reliability, continuity or safety of the relevant matters (as set out above)

- Whether the transaction would result in persons acquiring access to information, data, systems, technologies or assets that are of general importance to the security or public order of Ireland
- Comments of EU Member States and the opinion of the European Commission and
- The extent to which the transaction affects, or is likely to affect, the security or public order of another EU Member State or the European Union

The Minister is required to take into account written submissions made by the parties to the transaction and to consult with an “advisory panel,” comprising civil servants drawn from a number of key government departments, as well as other government ministers.

### Powers of the Minister

If the Minister finds that a transaction affects, or would be likely to affect, the security or public order of the state, the Minister will be empowered to direct the parties:

- Not to complete the transaction, or such parts of the transaction as the Minister may specify
- Not to complete the transaction, or such parts of the transaction as the Minister may specify, before or after such date or dates as the Minister may specify
- To sell or divest itself of any matter, including businesses, assets (tangible or intangible), shares, real property or intellectual property
- To modify or constrain its conduct or practice in specified ways
- To cease a specified conduct or practice
- To prevent the flow of competitively sensitive information between undertakings or within divisions, units, departments or other organizational units within an undertaking
- To report to the Minister, on such terms as the Minister may

specify, on the parties’ compliance with conditions imposed or

- To pay to the Minister, or such other person as the Minister may specify, such amounts as the Minister may specify in order to meet the reasonable costs associated with monitoring compliance with conditions imposed by the Minister

The Minister will also have power to review non-notified transactions retrospectively up to five years from the completion of the transaction or six months from when the Minister becomes aware of the transaction, whichever is later.

### REVIEW PROCESS TIMELINE

#### Review Timetable & Suspensory Effect

The TCTB requires the Minister to issue a written “screening notice” to the parties “as soon as practicable” following the commencement of a review. The screening notice summarizes the reasons for which the transaction is being reviewed and provides the parties the option to submit written submissions.

The effect of issuance of a screening notice is that the notified deal cannot be completed and the parties cannot take action furthering the transaction until the Minister makes a screening decision approving the transaction.

It follows that deals that manifestly do not risk raising national



**The TCTB requires the Minister to issue a written “screening notice” to the parties “as soon as practicable” following the commencement of a review**

security or public order concerns can be completed without prior approval of the Minister, although risk is on the parties in this case.

A “screening decision” must be adopted by the Minister within 90 calendar days of receipt of a filing (in the case of a notified transaction) or issuance of a screening notice (where a transaction has not been notified but the Minister exercises the power to “call in” a transaction for review), although this 90-day period can be extended to 135 calendar days effectively on election of the Minister.

Where the transaction has already been completed (e.g., a non-notified transaction), the Minister may direct the parties to the transaction to take such actions as the Minister may specify for the purpose of protecting the security or public order of Ireland (including divestment of the business, shares, assets, property or intellectual property in question).

The Minister may, at any time following the commencement of a review, issue a “notice for information” where further information is considered necessary. The issuing of a notice for information suspends the review timetable, starting from the date on which the notice is issued until the date on which the Minister confirms that the relevant party has provided all of the requested information.

### Penalties for Non-Compliance

The TCTB will make it a criminal offense to:

- Fail to notify a notifiable transaction as required under the Bill
- Complete the transaction, or take any action for the purpose of completing or furthering the transaction until the Minister makes a screening decision approving the transaction, where a screening notice has been issued with respect to a transaction
- Complete the transaction other than in accordance with the conditions, where a transaction is subject to a conditional screening decision
- Complete the transaction, or take any action for the purpose of completing or furthering the transaction, where the Minister makes a screening decision blocking a transaction
- Provide the Minister with information that the party knows is false in a material respect, or is reckless as to whether it is false in a material respect
- Criminal penalties for non-compliance on any of these grounds may apply to companies and individuals, and include fines of up to €4 million and/or a term of imprisonment of up to five years (for conviction on indictment).

## LOOKING AHEAD

As noted, the TCTB will be Ireland’s first-ever law on foreign investments into the country. Already, however, a number of points are clear.

First, given the law’s broad application, and particularly that it will apply to UK investments (including from Northern Ireland), a key issue will be legal certainty particularly for no-issues deals. Guidance from the department on deals unlikely to give rise to a screening notice would be particularly welcome.

Second, the speed, efficiency and transparency of the new regime will be important. The Irish mergers and antitrust regulator, the CCPC, has a strong record of clearing uncontroversial deals quickly and of adopting clear, well-reasoned decisions that provide a body of precedent for practitioners to rely on. But the TCTB will likely require a much higher number of filings than Ireland’s merger control rules, and it will be important that the Department for Enterprise, Trade and Employment is sufficiently well resourced.

Finally, guidance on the level of diligence required by practitioners and deal-makers in determining whether a “connected person” with a foreign investor involved would be welcome. The TCTB defines a “connected person” as (a) a spouse, civil partner, parent, sibling or child of a foreign investor; (b) a person acting in the capacity as trustee of any trust, the principal beneficiaries of which are: (i) a foreign investor; (ii) a spouse, civil partner, parent, sibling or child of a foreign investor; or (iii) an undertaking controlled by a foreign investor or connected person, or (c) in partnership with a foreign investor or connected person. This will clearly require significant understanding of the ownership and control structure of foreign investors.



# Italy

Italian “Golden Power Law”: Ten years old and continuously expanding its reach.

By Leonardo Graffi and Sara Scapin

The Italian FDI regime is also known as the “Golden Power Law” or “Golden Power regime” in Italy, as it gives the Italian government “golden” or special powers to approve or veto FDIs.

Since 2012, the Italian government has reviewed all transactions relating to Italian companies that carry out “strategic activities” or hold “assets with strategic relevance” in certain sectors deemed critical for Italy.

In the past three years, FDI control has expanded to further protect Italian strategic assets against potentially predatory transactions.

## RECENT UPDATES

The year 2022 brought both substantial and procedural changes to the Italian FDI screening regime, including:

- The expansion of FDI control to transactions in which the acquirer or ultimate beneficial owner is an Italian or EU person resulting in the:
  - Acquisition of a controlling interest in target companies in the energy, transportation, communication, health, agri-food and financial (including credit and insurance) strategic sectors (Key Other Sectors) or
  - Change of ownership, availability or change in the use of strategic assets of target companies in the Key Other Sectors
- The introduction of an obligation to file for the target company in addition to the purchaser and

- The adoption of a new pre-notification (pre-signing) procedure, pursuant to which:
  - Any company is entitled to file a voluntary pre-notification based on the information available as of the date of the pre-filing and
  - Within 30 days of the pre-filing, the government must complete an assessment with one of the following outcomes: (1) out of scope—in which case no filing is due; (2) in scope—in which case filing is due; or (3) in scope but evident that no special powers will be exercised—in which case no filing is due.

## WHO FILES

The Golden Power filing must be made by:

- Any company adopting a resolution in connection with a transaction including, without limitation, asset sales, mergers, demergers, transfer of headquarters outside of the Italian territory, or changes to the corporate purpose, which would result in a change of ownership, availability or use of strategic assets (Strategic Company Transactions) or
  - Each of the purchaser and the target company in connection with the acquisition, direct or indirect, of an equity or debt interest or the voting rights in a target company holding strategic assets under the Golden Power Law (Strategic Acquisitions)
- As further discussed below, in addition to applying to non-Italian

and non-EU persons, the Golden Power Law and relevant filing obligation may also apply to Italian and EU persons depending on the relevant strategic business sector and the type of transaction subject to notification and review.

## TYPES OF DEALS REVIEWED

Under the Golden Power Law’s permanent measures, Golden Power clearance is mandatory for any:

- Strategic Company Transaction carried out:
  - In the defense and national security sectors by any investor
  - In the Key Other Sectors, by any EU (including Italian) investor or
  - In strategic sectors other than defense and security and 5G technology, but including the Key Other Sectors, by any non-EU investor (the Other Sectors)
- Transaction resulting in the assignment by guarantee of the strategic assets to any investor, in the defense and national security sectors
- Strategic Acquisition of:
  - An equity interest exceeding certain thresholds (currently 3, 5, 10, 15, 20, 25 and 50 percent) by any investor, other than the Italian State or any Italian public or publicly controlled entity, for the defense and national security sectors
  - A controlling interest by any EU (including Italian) investor, for any Key Other Sector or
    - (i) A controlling interest, or
    - (ii) at least 10 percent of the corporate capital or voting

rights (and any subsequent acquisition exceeding 15, 20, 25 and 50 percent), so long as the investment value is equal to or exceeds EUR 1 million, in each case by any non-EU investor, for any Other Sector or

- Agreements involving the acquisition of, or the provision of services in connection with, 5G technology, solely to the extent that non-EU investors are involved.

### SCOPE OF THE REVIEW

The implementing decrees of the Golden Power Law set out the strategic businesses and/or assets falling within the industrial sectors subject to FDI review, as summarized below. However, the scope of “industrial sectors” remains broadly defined.

The main businesses or assets in each sector are:

- Defense and national security:
  - All businesses operating in the sector or
  - Businesses producing dual-use products with revenues greater than €300 million
- Energy:
  - Platforms for the supply of energy and gas
  - Critical infrastructure and real estate connected to the nuclear, oil & gas sectors or
  - Businesses operating in the energy sector with

revenues greater than €300 million and employing more than 250 workers

- Critical infrastructure, transportation and telecommunications:
  - Essential infrastructure for the safekeeping of the state’s well-being and vital functions, as well as aerospace infrastructure
- Financial, insurance and credit:
  - Critical technologies in the financial, insurance and credit sectors or
  - Businesses operating in the financial, insurance and credit sectors with revenues greater than €300 million and employing more than 250 workers
- Media:
  - Registered media companies
- Critical technologies:
  - Essential technologies for the safekeeping of the state’s well-being, vital functions and economic progress (e.g., AI, MTM communication, cybersecurity, aerospace and robotics)
- Healthcare and pharma:
  - Critical technologies in the healthcare sector
  - Businesses operating in the healthcare sector with revenues greater than €300 million and employing more than 250 workers or
  - Strategic resources for the supply of medicines, medical

devices and other medical equipment, and critical diagnostic technologies

- Supply of critical inputs, agri-food:
  - Essential goods and services for the safekeeping of the state’s well-being and vital functions (e.g., steel, semiconductors etc.) or
  - Strategic supply chain activities
- Access to sensitive information:
  - Essential information for the safekeeping of the state’s well-being and vital functions
- 5G technologies
  - All transactions involving 5G technologies

### REVIEW PROCESS TIMELINE

Filings must occur within ten days after the execution of a binding agreement or adoption of a relevant corporate resolution, as applicable.

The review period:

- Is 45 business days (30 for filings relating to 5G technologies), during which the transaction cannot be completed and any voting rights with respect to the transaction are frozen until clearance is given
- May be extended only once, for a maximum of ten or 20 additional business days, if the Italian government requests additional information from, respectively, the filing person or from a third party
- May be extended twice for a maximum period of 20 additional

business days per each extension, exclusively with reference to filings relating to 5G technologies

- Will be suspended (up to 35 days from receipt of the notification), if an EU Member State or the EU Commission determines to review the transaction, until the observations or opinion of the relevant EU Member State or the EU Commission have been delivered, unless further extended to receive additional information and
- Will start from the date the Italian government determines that a breach of the filing obligation has occurred, if the Italian government initiates a Golden Power review independently in the absence of a filing

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

The first step for foreign investors interested in entering into a transaction in relation to any Italian company operating (or arguably operating) in any strategic sector should be an evaluation of whether a filing pursuant to the Golden Power Law is required. This analysis should be undertaken before entering into any such transaction, so as to limit unnecessary transaction costs.

The Golden Power Law operates on a principle of substance

over form. It follows that when structuring a transaction, the creation of corporate, fiduciary or contractual investment structures will not limit the applicability of the Golden Power regime if the ultimate beneficial investor falls within its scope of application. Therefore, it is crucial for foreign investors to consider the risk that, in the event that a transaction ultimately falls within the scope of the Golden Power Law, the Italian government could veto, condition, or make material recommendations with respect to the transaction.

Given the broad and imprecise applicability of the Golden Power Law and its implementing decrees, investors should consider using the newly introduced pre-notification procedure to help reduce uncertainty.

Additionally, before entering into any acquisition agreement, it is key that foreign investors consider the filing (and pre-filing, as applicable) timeline. Filing obligation terms, long-stop dates and regulatory-clearance closing conditions in acquisition documentation must take into account the latest timelines and conditions relating to the Golden Power Law, as amended from time to time by the Italian legislature.

#### **LOOKING AHEAD**

Amendments to the Golden Power Law, enacted in recent years, have caused numerous complex interpretational issues, including due to the extremely broad definition of the strategic sectors falling under FDI control.

This has led business actors to proceed with increasingly frequent precautionary filings to the Italian government, resulting in a significant shift in the number of filings over recent years (from approximately 83 known filings in 2019 to almost 500 filings made in 2021). This in turn leads to increased transaction costs for investors and prolonged timeframes for deal completion. In this respect, the new pre-notification procedure should be considered a key tool to limit uncertainty.





# Republic of Latvia

The Russian Federation's invasion of Ukraine has precipitated the inclusion of provisions blocking Russian and Belarussian nationals from direct investment in a number of sectors.

By Liga Merwin and Tomass Brinkmanis  
Ellex Circle Law Firms

**W**hile there is no general obligation to notify investments in Latvia

by foreign investors, rules in several sectors either prohibit foreign direct investment without notification or block foreign investment outright.

Such sectors are:

- Companies of significance to national security (pursuant to the National Security Law)
- Critical infrastructure (pursuant to the National Security Law)
- Land and agricultural land acquisition (pursuant to the Law on Land Privatization in Rural Areas and the Law on Land Reform in Cities of the Republic of Latvia)
- Gambling (pursuant to the Law on Gambling and Lotteries)
- Banking and insurance (pursuant to the National Security law)

The National Security Law defines companies of significance to national security as a company registered in the Republic of Latvia that:

- Is an electronic communications merchant with significant market power, where liabilities have been imposed for tariff regulation and cost accounting
- Is an audible electronic mass medium, where, using technical means for terrestrial broadcasting, the coverage zone includes Latvia or at least 60 percent of its territory
- Is an audio-visual electronic mass medium, where, using technical means for terrestrial broadcasting, the coverage zone of the program includes Latvia or at least 95 percent of its territory

- Has received a license in the Republic of Latvia for transmission, distribution, storage of natural gas or has, in its ownership, a liquefied natural gas facility connected to a transmission system
- Is an electricity or thermal energy producer whose installed actual capacity exceeds 50 megawatts
- Is a thermal energy transmission and distribution operator that has heat supply networks in its ownership covering at least 100 kilometers
- Has received a license for electricity transmission in the Republic of Latvia
- Is the owner of a forest land in the Republic of Latvia in the area of at least 10,000 hectares
- Is the owner of agricultural land in the Republic of Latvia with an area of at least 4,000 hectares or
- Has received the special permit (license) for commercial activities with goods of strategic significance or a military manufacturer certificate issued by the Ministry of Defense, and it has a valid strategic partnership contract with the Ministry of Defense

Additionally, irrespective of the type of investor (local or foreign), objects with "critical infrastructure" status (Critical Infrastructure Objects) cannot be transferred without the permission of the Cabinet of Ministers. Critical infrastructure objects are categorized as:

- Category A, which includes especially important state-level critical infrastructure, where the

destruction of or reduction of operational capabilities of such infrastructure would significantly endanger administration of the state and national security

- Category B, which includes important state-level critical infrastructure, where the destruction of or reduction of operational capabilities of such infrastructure would endanger administration of the state and national security or
- European critical infrastructure, which has been granted a status of European critical infrastructure because its destruction or disturbance of its operation would significantly impact at least two EU Member States

Critical Infrastructure Objects are identified by various state agencies; however, such identification is not publicly available and is considered a state secret. Persons already in possession of these objects are aware of the status.

Acquisition of land as FDI is subject to the receipt of consent from the local municipality council if such transactions are allowed by law:

- The purchase of agricultural land in urban administrative territories is generally limited only to investors from Latvia and the EU. Other Foreign Urban Land Investors (see definition below) cannot acquire agricultural land, forest land, land in the border areas and in the protection zones of water bodies in urban administrative territories
- The purchase of agricultural land in rural administrative territories

is generally limited only to investors from Latvia, the EU, the EEA or the OECD. "Other Foreign Rural Land Investors" (see definition below) cannot acquire agricultural land, forest land, land in the border areas, land in the protection zones of water bodies, land in protected areas of nature reserve zones and lands in mineral deposits of national importance in rural administrative territories

- In relation to land in rural administrative territories, one natural or legal person may acquire up to 2,000 hectares of agricultural land. Related parties may acquire up to 4,000 hectares of agricultural land

Gambling company-related transactions are also restricted, pursuant to the Law on Gambling and Lotteries:

The percentage of foreign members or stockholders in the share capital of a capital company cannot exceed 49 percent. Foreign members do not include investors from the Member States of the European Union, the States of European Economic Area and the Member States of the Organization for Economic Co-operation and Development (residents). Different regulations for foreign investments provided for by international agreements ratified by the Parliament may also provide different cases. Change of investors as allowed by law must further be notified to Lotteries and Gambling Supervision Inspection in accordance with the Law on Gambling and Lotteries, which further specifies licensing requirements.

## RECENT UPDATES

No significant updates exist regarding the FDI regimes in 2021 for Latvia.

## WHO FILES

### Companies of significance to national security:

- For the below-mentioned activities in companies of significance to national security, the permission must be obtained by everyone, regardless of foreign investor or resident status
- An absolute ban has been introduced on Russian and Belarussian state companies, legal persons registered in Russia or Belarus, and Russian or Belarussian nationals from performing the actions noted below (see TYPES OF DEALS REVIEWED section as it relates to companies with significance to national security)

As regards acquisitions of land, different rules apply whether the land to be acquired is located in urban administrative territories or rural administrative territories and whether the intended use of the land is agricultural or other:

Agricultural land and land with other designated use located in urban administrative territories may be purchased by:

- Citizens of Latvia and citizens of other Member States of the European Union
- A company registered in the Republic of Latvia or another European Union Member State where:

- a More than half of the equity capital belongs to citizens of Latvia or citizens of other European Union Member States, individually or collectively
  - b More than half of the equity capital belongs to natural or legal persons from countries with which the Republic of Latvia has entered into international agreements on the promotion and protection of investments, which have been approved by the Saeima as of December 31, 1996 (pre-1997 countries). For natural or legal persons from countries where international agreements have been entered into after December 31, 1996 (post-1997 countries), if those countries provide for a reciprocal right of natural persons and legal persons registered in the Republic of Latvia to purchase land in that country, then the abovementioned rule shall also apply
  - c More than half of the equity capital belongs to several entities referred to in (a) and (b) above
  - Other foreign investors not listed above (the Other Foreign Urban Land Investors) may purchase land with other designated use only, which requires approval by the relevant institution
- Agricultural land and land with other designated uses located in rural administrative territories may be purchased by:
- 1 Citizens of the Republic of Latvia and citizens of other European Union Member States, and also citizens of the countries

of the European Economic Area, the Swiss Confederation, and the Member States of the Organisation for Economic Co-operation and Development

- 2 A company registered in the Republic of Latvia, and also a capital company registered in another European Union Member State or country of the European Economic Area, the Swiss Confederation or Member State of the Organisation for Economic Co-operation and Development that, in accordance with laws and regulations, is a taxpayer in the Republic of Latvia and:
  - a All shareholders of said company are the subjects referred to in Clause 1 or 2 above each individually or jointly
  - b All shareholders of said company are natural or legal persons from pre-1997 countries. For natural or legal persons from post-1997 countries, if those countries provide for a reciprocal right

of natural and legal persons registered in the Republic of Latvia to purchase land in that country, then the abovementioned rule shall also apply

- c All shareholders of which are several subjects referred to in (a) and (b) above together
- Another natural or legal persons registered in another European Union Member State, country of the European Economic Area, the Swiss Confederation, or Member State of the Organisation for Economic Co-operation and Development which is considered equivalent to the persons referred to above.

The purchase of agricultural land in rural administrative territories by investors mentioned above must be approved by the relevant institution. Other foreign investors not listed above (the “Other Foreign Rural Land Investors”) may purchase land in rural areas with other designated use only, which requires approval by the relevant institution.

#### TYPES OF DEALS REVIEWED

For companies of significance to national security, the Cabinet of Ministers must be notified and permission must be acquired for the following activities:

- In relation to capital companies:
- Obtaining of qualified holding
  - Obtaining of decisive influence
  - Transition of an undertaking
  - Changing of the beneficial owner
- In relation to partnerships:
- Joining of a new member
  - Changing of the beneficial owner

The requirements for acquisitions of land and agricultural land does not apply to acquirers of agricultural land, if the total area of agricultural land in the acquirer’s possession does not exceed ten hectares for natural persons or five hectares for legal persons or if the agricultural land to be acquired is the result of insolvency proceedings.

#### SCOPE OF THE REVIEW

##### Companies of significance to national security and critical infrastructure objects:

In determining the FDI review, the Cabinet of Ministers shall evaluate the restrictions on the rights of the person, its commensurability with the national security interests, and the opinion of a state security institution, as well as the conformity with the principle of legitimate expectations.

The Cabinet of Ministers may decide to refuse the permit if:

- The issuing of the permit threatens interests of the national security



**The percentage of foreign members or stockholders in the share capital of a capital company cannot exceed 49 percent**

- The person who has submitted the application has failed to submit additional information or documents necessary for preparation of opinion of the state security institutions within the period of time set by the Ministry of Economics and the state security institutions
- The Ministry of Economics or the state security institutions establish that they have been provided with false information

**Acquisition of land:**

For the acquisition of land, the municipality council makes a decision based on all received information to evaluate whether the acquirer meets the requirements in the law, restrictions in the law are met, and indicated further use of the land is not in contradiction with the spatial plan or detailed plan of the municipality.

**REVIEW PROCESS TIMELINE**

**Companies of significance to national security and critical infrastructure objects:**

The Cabinet of Ministers shall make a decision within one month from the moment of receiving the application. The term can be prolonged to four months.

**Acquisition of land:**

- Application for change in agricultural land ownership will be reviewed within 20 days from the day of receiving an application in urban administrative territories
- Application for change in non-agricultural land ownership will be reviewed within 20 days from the day of receiving an application in rural administrative territories

- Application for change in agricultural land ownership will be reviewed within one month from the day of receiving an application in rural administrative territories

As mentioned above, the requirements and restrictions for FDI are quite imperative and defined broadly. As such, formal compliance to the requirements will not always result in permission and a positive outcome.

The Russian Federation’s invasion of Ukraine has precipitated the inclusion of provisions blocking Russian and Belarussian nationals from direct investment in separate sectors.

In the ambit of national security, the trend will be even more rigorous checks and more stringent rules in the coming years.

**HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Investors should make sure the contracts contain a contract termination clause should the relevant permissions not be granted.

**LOOKING AHEAD**

- Processing times should be taken into account when submitting an application to the Cabinet of Ministers regarding companies of significance to national security or critical infrastructure. In the majority of cases, the Cabinet of Ministers reaches a decision within one month, but occasionally the decision-making process is extended by an additional month and can take up to four months
- It should be noted that the corresponding municipality holds pre-emption rights to land located in its administrative territory. Should the municipality have use for the land, for example, new infrastructure or public services, it can take the buyer’s place in the property purchase contract for the land
- The zoning laws in the municipality should be taken into account as well regarding land purchases



**In the ambit of national security, the trend will be even more rigorous checks and more stringent rules in the coming years**

# Lithuania

All investments concerning national security are under the scope of review.

By Dr Robertas Čiočys and Ieva Krivickaitė  
Ellex Circle Law Firms

The Foreign Direct Investment (FDI) regime in Lithuania was introduced back in 2018. The FDI regime essentially remains unchanged to this date. Thus, this lays out reasonable expectations for foreign investors.

Under the Law on the Protection of Objects of Importance to Ensuring National Security of the Republic of Lithuania (the “Law”), only specific FDI into entities, infrastructure or sectors deemed of importance to national security are subject to the FDI screening process. Otherwise, investors are not bound to have their FDI reviewed.

The supervision of FDI review is assigned to the Commission for Coordination of Protection of Objects of Importance to Ensuring National Security (the “Commission”) formed by the Government of Lithuania. In rare cases, sensitive to national security interests, a special purpose commission is formed where the Commission is supplemented with the Minister for the relevant area/sector and other politicians. In extreme cases, the final decision of FDI review is adopted by the Government of Lithuania or the Parliament.

## RECENT UPDATES

Despite the changed geopolitical background, the Government of Lithuania continues to welcome FDIs and the Lithuanian FDI authority has maintained a business-friendly approach. The grounds for FDI Screening and its scope remained the same.

However, it is now recommended in case of doubt of whether an FDI is subject to the Screening to notify the Commission and to obtain certainty before the transaction is implemented.

In 2022, no major changes in legislation concerning foreign investors were made.

From March 2022, it is forbidden to enter into a transaction while the FDI screening is ongoing and the execution of an existing transaction must be suspended in case of post-transaction screening.

## WHO FILES

An investor (natural person or legal entity) seeking to invest in an entity, infrastructure or sector deemed of importance to national security must disclose and obtain the clearance to proceed with the investment. FDI regulation applies equally to both foreign and national investors if their investment falls under the scope of review.

However, a distinction is made between when the FDI is made by an investor from (a) EU, NATO, EFTA, OECD countries or (b) other countries.

This distinction becomes relevant as, in the case of countries named in (a), an investor is deemed to be conforming to the interest of national security. Thus, FDI screening may be less burdensome in those cases. Otherwise, in the case of countries named in (b), the full scope of FDI screening is conducted. Further, certain laws prohibit investors from countries in (b) from certain types of FDI in Lithuania.

## TYPES OF DEALS REVIEWED

In Lithuania, only certain FDI are required to be notified for FDI screening (the “Screening”). The Screening procedure is required for the following pillars of national security:

**Enterprises important to national security.** Investment into a specific company explicitly recognized as strategically important to the national security interests of Lithuania for its intended purpose and/or because of the nature of its activities. Such companies are listed in the Law and assigned into one of the following groups: (i) the enterprises solely controlled by the state; (ii) the enterprises in which at least 2/3 of shares are state-owned; and (iii) entities that are not owned by the state.

**Infrastructure or area important to national security.** The acquisition of assets or investments into areas essential to national security. The Law provides a list of such assets, e.g., airports, railways, secured national data transmission networks, LGN terminal, etc. The list is provided for territory and land as well. The two categories are usually closely related, meaning that the territories important to national security are most likely the zones around the assets important to the national security.

**Five economic sectors important to national security.** Investment into the following sectors (i) energy, (ii) transport, (iii) information technology, telecoms and high-tech, (iv) finance and credit, and (v) military equipment.

The government determines and specifies which activities are considered a part of the five economic sectors. The list consists of 54 activities in total, and thus requires individual assessment on a case-by-case basis.

Nonetheless, if the FDI falls into one of the four categories mentioned above, it does not necessarily result in a mandatory Screening procedure. For example, it is mandatory to file for FDI review if an investor seeks to acquire more than 25 percent of securities or votes in state-owned enterprises (or if the state owns at least 2/3 of shares) which are provided in the Law, and more than 33 percent of securities or votes if the enterprise is not owned by the state. The 25 percent threshold is also applied for FDIs in an economic sector of strategic importance to national security.

#### SCOPE OF THE REVIEW

The objective of the review is to ensure the investor conforms with and the investment does not adversely impact the national security interest of Lithuania.

During the Screening, the Commission evaluates the identity of the investor itself and its ownership structure, including the ultimate beneficial owners. The source of funds for the FDI is also taken into account. In addition, the scope of review and the list of the required information will be wider for FDI into enterprises important to national security and narrower for FDI into economic sectors.

Further, the Commission will evaluate the findings about the investor from the State Security Department, Ministry of Foreign Affairs, Ministry of Interior, Police Department and the General Prosecutor's Office. The Commission has the discretion to request other institutions to present their findings about the investor as well.

#### REVIEW PROCESS TIMELINE

The process can take up to 40 working days from the day after the Commission receives the initial notice of the FDI together with all necessary information. The Commission shall immediately request the institutions responsible for the findings regarding compliance with national security. In 15 working days (which can be extended by up to 5 working additional days) after the request, the institutions shall provide findings: If no findings are provided, it is considered that the investor is not contrary to national security.

The Commission has 20 working days (which can be extended by up to an additional three working days) to provide the conclusion of whether the investor is contrary to national security interests. The final decision is adopted by the government in up to 15 working days after the receipt of the negative conclusion of the Commission. If the decision by the government is not adopted, it is considered that the investor is not contrary to national security.

Since Russia's war in Ukraine began in 2022, the Commission started to take a more conservative approach when deciding if FDI needs to undergo Screening. Whereas in the past, FDI that would have been uncertain if it required FDI screening (i.e., for FDIs in economic sectors), it is now advised to undergo the Screening.

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Investors should carefully consider if the anticipated FDI falls under the scope of FDI screening, especially when the investment is made into one of the five economic sectors important to national security. Given the current trends, the principle of "when in doubt, undergo FDI Screening" should be applied.

In all cases, the Screening should be initiated before closing. Otherwise, if the Commission or government authority decides to initiate post-investment FDI screening and the investor fails to satisfy the national security interests requirements, the Commission has the discretion to recognize the transaction as null and void.

#### LOOKING AHEAD

- The most common types of transactions falling under the mandatory FDI screening are the investment into one of five economic sectors of strategic importance.
- The screening procedure may also be started unilaterally, at any time, at the initiative of the national authorities. Therefore, in case of doubt, an application for the screening procedure is recommended.
- The post-transaction screening procedures initiated by public authorities may also result in reputational damage for the target and the investor, and may put the investor under the watch of FDI authorities in relation to future transactions, thus it is highly recommended in case of doubt to always notify for screening prior to the transaction.

# Luxembourg

Luxembourg has introduced a bill of law to regulate foreign direct investments. The law is currently being discussed before the Luxembourg Parliament.

By Arnaud Cagi-Nicolau and Olivier Poinsignon

**B**ill of law No. 7885 (the “Bill”) aims at establishing a screening mechanism for foreign direct investments (FDIs) that may adversely affect national security or public order in the Grand Duchy of Luxembourg. The Bill was first presented on September 15, 2021 and is currently being discussed before the Luxembourg Parliament.

## RECENT UPDATES

There were no major changes in 2022.

## WHO FILES

The Bill requires Foreign Investors contemplating an FDI covered by the Bill to make a notification to the Luxembourg Ministry of Economy prior to closing of the FDI.

A “**Foreign Investor**” is an individual or a legal entity who is not a national of a Member State of the European Union or of a state party to the European Economic Area, and who intends to complete or has completed an FDI.

## TYPES OF DEALS REVIEWED

The screening mechanism contemplated in the Bill applies to (i) FDIs (ii) made by Foreign Investors (iii) that may adversely affect national security or public order (iv) in Luxembourg entities carrying out critical activities in Luxembourg.

A “**foreign direct investment**” (FDI) is defined by the Bill as an

investment of any kind made by a Foreign Investor, acting alone, in concert or through interposition, and is designed to create or maintain long-term and direct relationships between the Foreign Investor and the Luxembourg entity in which the Foreign Investor invests, thus allowing the Foreign Investor to effectively participate in the control of that entity for the purpose of exercising a critical activity in the Grand Duchy of Luxembourg.

According to the Bill, the following activities are deemed critical (the “**Controlled Activities**”):

- Dual-use goods
- Energy
- Transport
- Water
- Healthcare
- Telecommunications
- Data storage
- Aeronautics Defense
- Finance and
- Media

The Bill further deems critical:

- Research activities related to the activities listed above
- Production activities related to the activities listed above
- Ancillary activities that may grant access to sensitive information directly connected to the activities listed above and
- Ancillary activities that may grant access to places where the activities listed above are carried out

It should, however, be noted that portfolio investments are expressly excluded from the scope of the Bill.

## SCOPE OF THE REVIEW

The Bill requires Foreign Investors intending to make FDIs in relation to Controlled Activities to notify the Luxembourg Minister of Finance. Any such notification must be made prior to the completion of the FDI.

The Bill also provides that, by derogation to the above, if a Foreign Investment exceeds 25 percent of the shareholding of a Luxembourg entity following a corporate event amending the allocation of the share capital of that entity, then the Foreign Investor should make a notification within fifteen (15) calendar days.

The notification must include information regarding the proposed transaction and the Foreign Investor as set out in the Bill.

In case the screening mechanism is activated, the following factors will be considered in order to determine whether the FDI adversely affects national security or public order:

- The integrity, security and continuity of supply of critical infrastructure;
- The sustainability of activities related to critical technologies and dual-use goods;
- The supply of essential inputs including raw materials and food safety;
- Access to sensitive information, including personal data, or the ability to control such information; and
- Media freedom and pluralism.

The following factors may also be considered:

- Whether the foreign investor is directly or indirectly controlled by the government of a third country, including public bodies or the armed forces
  - Whether the Foreign Investor has already participated in activities that infringe the security or public order of a Member State and
  - Whether there is a serious risk that the Foreign Investor carries out illegal or criminal activities
- Whether the FDI is approved or not is then presented to the Foreign Investor.

Approval may be subject to conditions taking into account the screening factors listed above.

#### **REVIEW PROCESS TIMELINE**

Under the Bill, following notification of the FDI by the Foreign Investor, the Minister of Finance would ordinarily acknowledge receipt.

Within two (2) months following the acknowledgment of receipt, the Minister of Finance will notify the Foreign Investor whether the screening mechanism is activated. If the information to be provided as part of the notification made by the Foreign Investor is incomplete (or in case additional information is required), the procedure is suspended until the relevant information is provided.

The screening procedure cannot exceed sixty (60) days. The decision to approve (as the case may be, subject to conditions) or reject the FDI is announced before the end of the sixty (60)-day period. The Minister of Finance may also request additional information, which would suspend the timelines until the additional information is furnished.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Foreign Investors must carefully assess whether or not the FDI is likely to be subject to the Luxembourg screening mechanism.

Investors may also try to restructure their investment(s) such that they qualify for the portfolio investment exemption. According to the Bill, a portfolio investment is an acquisition of securities made for the purpose of completing a financial investment without acquiring control of the entity. Thus, investing in an investment fund managed by an asset manager alongside other investors should exempt investors from the requirements under the Bill.

Alternatively, the Foreign Investor may seek to ensure that it will not control the relevant entity, as control is one of the triggers for FDI notification.

#### **LOOKING AHEAD**

The Bill is expected to be passed in 2023 but remains subject to discussions by the Luxembourg Parliament. Indeed, the Luxembourg Council of State provided comments and recommendations in 2022 on the Bill, so we would expect another version of the Bill to be released with changes.



# Malta

Malta's recently introduced FDI regime captures a substantial number of transactions that must be notified to the authorities and, in some cases, will be subject to screening.

By Luca Amato  
Fenech and Fenech Advocates

Malta's foreign direct investment (FDI) regime was introduced in 2020 by virtue of the National Foreign Direct Investment Screening Office Act (Chapter 620, Laws of Malta) (the "Act"), which in turn implements the provisions of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the Union.

The Act establishes the Maltese FDI screening office (NFDISO), whose role is to exercise regulatory functions regarding the screening of FDIs in Malta on grounds of security or public order. To this end, the NFDISO's functions inter alia include: (i) establishing a mechanism, rules and procedures to screen FDIs carried out in Malta that may affect the security or public order of Malta; (ii) commencing ex officio investigations on investments that may qualify as FDIs; (iii) carrying out screening procedures; (iv) assessing, investigating, authorizing, conditioning, prohibiting and unwinding FDIs on grounds of security or public order in Malta; (v) reporting FDI data to the European Commission on an annual basis; (vi) establishing, implementing and participating in the cooperation mechanism established in Regulation (EU) 2019/452; and (vii) liaising with responsible authorities of third countries on issues relating to the screening of FDIs.

The provisions of the Act cover certain FDIs made or planned to be made in Malta and applies to all persons involved in such FDIs, including foreign (non-EU) investors aiming to establish or to maintain lasting and direct links in order to carry out economic activity in Malta, and include investments that enable effective participation in the management or control of a company carrying out an economic activity in Malta and any investments made pursuant to a public procurement process. It does not, however, apply to portfolio investments.

"Foreign investor" is defined as a natural person or an undertaking of a third (non-EU) country intending to make or having made an FDI in Malta.

FDIs that fall under the jurisdiction of the Act need to be notified to the NFDISO, which will, in certain cases, determine that the transaction shall be subject to screening in terms of the screening mechanism outlined in the Act.

## WHO FILES

The Act obliges foreign investors and all persons involved in an FDI that falls under the jurisdiction of the Act to notify NFDISO regarding the investment and to provide certain information regarding the entity carrying out the investment. Such information includes the ownership structure and ultimate beneficial ownership of the investor, the value



**The provisions of the Act cover certain FDIs made or planned to be made in Malta and applies to all persons involved in such FDIs**

of the investment, the products, services and business operations of the foreign investor, and the source of funds for the investment. Additionally, the NFDISO may request any other information as it may reasonably require for the proper performance of its functions under the Act.

The notification is made via NFDISO's online portal and must be signed by a company director of the foreign investor and the relevant advisory firm or agent assisting with the notification.

## TYPES OF DEALS REVIEWED

The Act covers certain foreign direct investments made or planned to be made in Malta. A "foreign direct investment" is defined as an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links to carry on an economic activity in Malta, including investments that enable effective participation in the management or control of a company based in Malta.

“Management or control” is in turn defined in the Act as the possibility of exercising decisive influence on an undertaking, in particular: (a) through ownership or the right to use all or part of the assets of an undertaking; or (b) through rights or contracts that confer decisive influence on the composition, voting or decisions of the organs of an undertaking; provided that even persons or undertakings not holding such rights or entitled to such rights under the contract concerned are deemed to have acquired control if they have the power to exercise the rights deriving therefrom.

The Act outlines a number of scenarios where mandatory notification of FDIs is required, as follows: (a) where an investment that affects any of the factors or activities mentioned in the Schedule of the Act is planned to be carried out in the future; (b) where, having carried out an investment in Malta, the business activity of a foreign investor is changing to one that affects any of the factors or activities mentioned in the Schedule of the Act; (c) where, having carried out an investment in Malta that affects any of the factors or activities mentioned in the Schedule, the ownership structure of an investor changes such that at least 10 percent becomes owned by foreign investors; (d) where, having carried out an investment, the direct or indirect controlling interest of a company or a group company changes and passes onto a foreign investor.

When the foreign investor is a body corporate, then the obligation to notify the investment to the

NFDISO in the above instances is triggered where at least 10 percent of the share in the investor is directly or indirectly owned by a third (non-EU) country national or an undertaking of a third country.

The activities and factors that are mentioned in the Schedule of the Act are considerably wide and, when considered together, capture a substantial number of FDI investments.

The activities are:

- Critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure
- Critical technologies and dual-use items as defined in point 1 of Article 2 of Council Regulation (EC) No. 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies
- Supply of critical inputs, including energy or raw materials, as well as food security
- Access to sensitive information, including personal data, or the ability to control such information and
- The freedom and pluralism of the media

The factors to be considered are:

- Whether the foreign investor is directly or indirectly controlled

by the government of a third country, including state bodies or armed forces, through ownership structure or significant funding

- Whether the foreign investor has already been involved in activities affecting security or public order in an EU Member State or
- Whether there is a serious risk that the foreign investor engages in illegal or criminal activities

#### **SCOPE OF THE REVIEW**

Once an investment has been notified to the NFDISO, it shall within five (5) days determine whether the investment will be subject to screening. In reaching its decision, the NFDISO will consider whether the investment may affect the security or public order of Malta on the basis of the aforementioned activities and factors. In making its assessment, the NFDISO may request any necessary additional information from the foreign investor and may seek the clarifications and explanations that it may deem necessary for its deliberations and conclusions.

Where the NFDISO concludes that the foreign direct investment shall not be subject to screening, it shall, within five (5) business days from the date of its decision, inform the foreign investor of its decision.

If the NFDISO concludes that the foreign direct investment shall be subject to screening, it shall inform the foreign investor within five (5) business days from the date of its decision, and trigger the cooperation mechanism in terms of articles 6 and 7 of Regulation (EU) 2019/452, and it shall, within sixty (60) calendar days, determine whether the foreign

direct investment may affect the security or public order of Malta.

Where the NFDISO concludes that the foreign direct investment affects the security or public order of Malta, it may condition, prohibit or unwind such an investment, as the case may be, and it shall inform the foreign investor in writing of its decision. The notification of the decision shall include the NFDISO's reasoning and justification. In such cases, the investor shall not be entitled to claim any compensation or reimbursement.

If the NFDISO determines that an investment shall be subjected to one or more conditions, it shall permit the foreign investor to take all necessary measures in order to satisfy the said conditions within a reasonable time period. Should the investor fail to satisfy these within the prescribed period, the NFDISO shall prohibit or unwind the investment.

Similarly, if an investment is declared unwound, the NFDISO shall permit the foreign investor to reverse or modify the investment within a reasonable time period. Failure to do so within the prescribed time would entitle the NFDISO to commence judicial proceedings before the Civil Court for the unwinding of the investment.

The NFDISO is also empowered by law to impose administrative penalties ranging from not less than €1,000 for failure to provide information, to not more than €100,000 for providing incorrect, inaccurate or incomplete information.

Appeals to any decision of the NFDISO or the imposition of administrative penalties are allowed by bringing an action before the Administrative Review Tribunal.

Due to the broad wording of the law, the Maltese FDI law covers a substantial number of transactions, particularly in the context of the notification requirement. This is because the activities that are mentioned in the Schedule are drafted in a broad manner, particularly under limb (a) which covers sectors ranging from energy and health, to more commonplace industries such as media, communications and data processing or storage.

Nonetheless, the number of investments that are actually subjected to screening have been low because the NFDISO considers whether the investment is occurring in a company that impacts the security or public order in Malta.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Prudent foreign (non-EU) investors would do well to take a cautious approach and notify the NFDISO whenever an investment is planned in a Maltese business that operates in the relevant sectors. Maltese law does not outline a specific point when the investment needs to be notified. In practice, it makes sense to notify the NFDISO whenever an investment is reliably deemed to occur, such as the period immediately following the signature of a share purchase agreement. Indeed, it is nowadays commonplace to include the obtaining of regulatory consent by the NFDISO as a condition precedent to completion in such agreements.



**Due to the broad wording of the law, the Maltese FDI law covers a substantial number of transactions**



# Middle East

The Middle East continues opening to foreign investment, subject to licensing approvals and ownership thresholds for certain business sectors or in certain geographical zones.

By Tamer Nagy, Nazly Khedr, Jad Slim, Lars Petersen, Orion Berg, Tim Sensenig, and Victor A. Thonke

Governments along the Middle East have revised investment legislation and eased market entry for foreign investors. However, investors are generally bound to licensing obligations and foreign ownership thresholds, with foreign investment remaining excluded from certain sectors. Specific FDI screening rules may overlap with other or general licensing procedures (e.g., Saudi Arabia), while in some jurisdictions no specific FDI rules exist (e.g., Jordan). The below are high-level considerations for investments in Bahrain, Egypt, Israel, Jordan, Kuwait, Saudi Arabia, the United Arab Emirates and Qatar.

- Licensing approvals for any kind of foreign investment (both greenfield and brownfield) are widespread and vary across and within the various jurisdictions (e.g., in Saudi Arabia, any foreign investor that wishes to do business there needs a foreign investment license)
- Foreign investments may be limited to certain ownership thresholds, in certain industry sectors of the target entity (e.g., investors in the trade sector in Saudi Arabia may opt for a 25 percent minimum Saudi shareholding, to avoid higher capital requirements)

- Some FDI regimes follow an investment-friendly approach, with certain specific sectors only being excluded from foreign investment (e.g., Kuwait), while other jurisdictions tend toward a more restrictive approach, with (majority) investments only allowed in certain sectors enumerated on a “positive list” or certain geographical zones (e.g., the UAE). Furthermore, there are also mixed forms with positive and negative lists of sectors (e.g., Saudi Arabia)
- Sensitive industry sectors for foreign investments commonly include security and defense activities, oil exploration, activities related to places or events of religious relevance (e.g., investments in Makkah (or Mecca), services related to Hajj, or Quran memorization centers) or real estate brokerage
- Several countries have created free economic zones that ease some FDI restrictions as compared to their base economies. These free zones can cater to different sectors (e.g., logistics, industrial, IT). The number of these zones in the region has been growing steadily in recent years, particularly throughout the GCC countries (e.g., Saudi Arabia, UAE, Oman and Kuwait)



**Investors are generally bound to licensing obligations and foreign ownership thresholds, with foreign investment remaining excluded from certain sectors**

- The general trend continues toward an investment-friendly environment in the Middle East, as local governments aim to attract more inbound investments by foreign investors. For example, Egypt recently announced the launch of a “golden license” for certain categories of projects (e.g., strategic projects that contribute to economic development in particular sectors or established in certain remote areas), which allows qualified investors to obtain all required approvals and licenses through a single streamlined process. The golden license projects may be granted additional incentives (e.g., establishment of special customs outlets, allocation of free-of-charge land or refund of up to half of the land value)



# The Netherlands

The Netherlands prepares for its first effective year of new FDI regulation.

By Sarah Beeston, Pim Jansen, and Leonie van der Laag  
Van Doorne N.V.

On May 17, 2022, the Dutch Parliament adopted the Act on Security Screening of Investments, Mergers and Acquisitions (in Dutch: “Wet veiligheidsstoets investeringen, fusies en overnames”) (the Vifo Act). The Vifo Act is expected to come into force in the first quarter of 2023. It applies equally to Dutch and non-Dutch investors and introduces a mandatory and suspensory national security regime which, once it enters into force, will apply to all qualifying investments made after September 8, 2020. The screening mechanism will apply to investments in undertakings active in vital processes and sensitive technology and to “high-tech campuses.” Qualifying investments must be notified to the Investment Review Agency (Bureau Toetsing Investerings or BTI) which will conduct the assessment on behalf of the Minister of Economic Affairs and Climate Policy (the Minister). The Vifo Act does not apply if the sector-specific screening regulations in the energy, telecoms or defense sector apply.

## RECENT UPDATES

- The Vifo Act was adopted on May 17, 2022
- On July 18, the Minister issued two governmental decrees based on the Vifo Act: The Sensitive Technology Decree and the Security Review Decree on Investments, Mergers and Acquisitions (Besluit veiligheidsstoets investeringen, fusies en overnames)
- A legislative proposal for the Energy Act is currently before the Council of State (Raad van State) for its advisory opinion. This draft act amends the notification requirement for investments in the energy sector
- A legislative proposal investment test for the defense industry is under preparation. This proposal introduces a new sector-specific investment review mechanism for the defense sector

## WHO FILES

Under the Vifo Act, either the acquirer or the target should make the notification. If the target is bound by a non-disclosure agreement, the target of the undertaking will have to do this.

Furthermore, the Vifo Act introduces a standstill obligation whereby parties must obtain approval prior to completion of the transaction. The Vifo Act also

provides that a mandatory public offer will not be honored until the Minister has communicated that a review decision has been taken or that it is not required.

The Minister may, at the request of the notifying party, grant exemption from the standstill obligation. The exemption can only be granted if it is in the public interest and there is a risk of economic, physical or social damage to society or negative consequences for financial stability if the exemption is not granted.

Similar to the Vifo Act, the Electricity Act 1998 and the Gas Act 2000 (for the energy sector) prescribe that notification should take place by either the acquirer or the target company. By contrast, the Telecommunications Act 1998 prescribes that the acquiring party should make a notification. Finally, pursuant to the General Security Requirements Defence Contracts 2019 (in Dutch: Algemene Beveiligingseisen Defensie Opdrachten 2019), an undertaking that has an order from the Ministry of Defence must notify changes of control to the director of the Military Intelligence and Security Service (Militaire Inlichtingen- en Veiligheidsdienst).

The sector-specific regulations for the energy, telecoms and defense sectors do not contain a standstill obligation.

## TYPES OF DEALS REVIEWED

The Vifo Act covers undertakings that are “vital providers,” operators of high-tech campuses, or active in sensitive technologies, including dual-use products and military goods.

“Vital providers” include operators of heating networks, Schiphol Airport, the Port of Rotterdam, providers of nuclear energy, air transport, banks and other players in the financial market, renewable energy providers and natural gas operators. These sectors are not covered in their entirety by the Vifo Act. The Act applies to specific functions that are considered vital to a sector, such as the financial market infrastructure.

Sensitive technologies include strategic goods such as dual-use and military goods, where such goods are subject to export control (based on European regulations). Additional regulations which, at the time of writing are in draft form, further specify which technologies are sensitive. Annex 1 to the draft Sensitive Technology Decree (Besluit toepassingsbereik sensitieve technologie) exempts several goods on the EU export control lists from the Vifo Act. By contrast, Annex 2 of the decree expands the list of technologies classified as sensitive to include quantum technology, photonics and semiconductor technology.

In addition, this draft decree further clarifies the provision in the Vifo Act relating to the acquisition of significant influence in a company operating in the field of sensitive technologies. Such acquisition triggers a notification requirement. According to the Explanatory Memorandum, this lower threshold

(of significant influence instead of control) is included because companies that develop and operate sensitive technology have a greater need for venture capital. Particularly for innovative startups, scale-ups and mid-cap companies, this capital requirement means that risk-bearing capital is raised from funders in various financing rounds. Such financing often does not involve the acquisition of control, because the tranches each investor provides are limited in nature due to the risk diversification policy of these investors. For these purposes, significant influence means 10 percent, 20 percent and 25 percent of the voting rights, or the ability to appoint or dismiss one or more directors. Notification will be required each time one of these thresholds is met. For other acquisitions, notification will be required where there is a change of control, assessed in the same way as under the EU Merger Regulation.

The Vifo Act also covers the acquisition of a target company which itself is not active in vital processes or in sensitive technology in the Netherlands, but which has control or significant influence over a Netherlands-based undertaking that does have such activities.

The review mechanisms for investments in the energy sector are currently included in the Electricity Act 1998 (Elektriciteitswet 1998) and the Gas Act 2020 (Gaswet). Both are due to be replaced by the draft Energy Act (Energiewet), which includes a slightly different test. Based on the current regulatory regime, transactions involving LNG installations and electricity generating facilities with a capacity of more than 250 megawatts

must be notified to the Minister. Transactions involving the acquisition of control in undertakings that operate such facilities or installations also require notification. The new Energy Act will lower the threshold by requiring notification of a change in control in relation to an electricity generating facility with a total rated capacity of more than 100 megawatts or a company operating one or more generating plants with a total rated capacity of more than 100 megawatts.

The Telecommunication Sector (Undesirable Control) Act (Wet ongewenste zeggenschap telecommunicatie), which came into force on October 1, 2020, has introduced a screening mechanism in the Telecommunication Act (Telecommunicatiewet). Pursuant to this act, investments in telecommunication companies that have a relevant impact on the Dutch telecoms sector must be notified. The decree on undesirable control in telecommunications specifies when an undertaking has such relevant impact.

Finally, in the defense sector, changes of control falling within the scope of the General Security Requirements for Defence Contracts 2019 (Algemene Beveiligingseisen voor Defensieopdrachten 2019) are subject to a notification requirement. In addition, investments in undertakings that provide telecom services to the General Intelligence and Security Service, the Ministry of Defence, the Military Intelligence and Security Service, the National Coordinator for Counterterrorism and Security or the National Police are notifiable under the Telecommunications Act.



## SCOPE OF THE REVIEW

Following a notification under the Vifo Act, an assessment is made as to whether the investment, merger or acquisition poses a risk to national security. National security refers to security interests that are essential to the democratic legal order, security or other important interests of the Dutch state or social stability. The Vifo Act explicitly notes the following interests:

- Safeguarding the continuity of critical processes
- Maintaining the integrity and exclusivity of knowledge and information of critical or strategic importance to the Netherlands
- Preventing unwanted strategic dependence of the Netherlands on other countries

To assess the potential risk that an investment may pose to national security, particular attention is given to the following factors:

- The transparency of the investor's ownership structure and relationships
- Whether the investor is directly or indirectly subject to restrictive measures on the basis of national or international law, such as Chapter 7 of the Charter of the United Nations
- The security situation in the country or region of residence of the investor
- The investor's criminal record
- The degree of cooperation of the investor in the review procedure
- The nature of any incorrectly submitted information and the motives behind it

For acquisitions involving vital providers, the financial



## **National security refers to security interests that are essential to the democratic legal order, security or other important interests of the Dutch state or social stability**

stability and track record of the acquirer are also included in the assessment. Acquisitions involving sensitive technologies involve an additional assessment of the acquirer's track record and motives for the acquisition.

The notification requirement in the Electricity Act and the Gas Act, and the draft Energy Act aims to screen investments for risks to public safety and security of supply. The assessment of notifiable investments in the energy sector considers the financial reliability of the investor, its governance and management and its transparency. The investor's track record in safety and technical expertise is also relevant. The draft Energy Act provides that the factors relevant for an assessment under the Vifo Act will apply *mutatis mutandis*.

Transactions in the telecoms sector that may lead to a threat to public interest may be prohibited or made subject to conditions by the Minister. The Telecommunications Act provides a list of potential threats to the public interest.

## REVIEW PROCESS TIMELINE

The review procedure under the Vifo Act consists of two phases. The first phase starts with the notification. After notification, the Minister has eight weeks to assess whether the investment could potentially cause a risk to national security. This period can be extended to a maximum of six months. The first phase ends with a notification that no review decision is necessary or that further review is necessary. The failure of the Minister to make a timely decision is deemed to be a decision that no further review is necessary.

The second phase starts upon submission by the notifying party of a request for a review decision. The Minister then has another eight weeks to decide whether the investment gives rise to a risk to national security. This decision period can also be extended up to six months. However, the time used for review in the first phase will be deducted, meaning that the maximum time for both phases before a final decision is given will be six months.

A “stop the clock principle” applies during the review procedure, meaning that if the Minister requests additional information, the decision period is suspended until the required information has been provided. The decision period can also be extended by an additional three months if the Member State is required to share the notification with the European Commission and/or other Member States in accordance with the EU FDI Regulation.

If another, sector-specific national security screening mechanism already applies, no separate notification must be made under the Vifo Act, even if the thresholds of the specific regimes are not met. Other notification regimes that do not concern national security—for example, regimes requiring notification to the Dutch central bank, healthcare authority

or competition authority—do not release the parties from the obligation to notify the transaction under the general national security screening regime.

Notifications based on the Electricity Act or the Gas Act must be submitted no later than four months prior to the intended change in control. Contrary to the Vifo Act, there is no standstill obligation.

If the Telecommunications Act requires notification, it must be made no later than eight weeks before the change in control. The Minister must decide within eight weeks of receiving the notification. If further examination is needed, then this period can be extended by six months. The period can be further extended by three months if the cooperation framework from the European FDI screening regulation applies. If the Minister requests additional information from parties, the clock is stopped. No standstill obligation applies.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Investors (both foreign and Dutch) should make timely notifications to the Minister if required under the Vifo Act or sector-specific regulations. Although the Vifo Act has not yet entered into force and therefore notification is not yet required nor possible, it has retroactive effect from September 8, 2020. Thus, the rules in the Vifo Act also apply to transactions taking place before the act comes into force. The Vifo Act contains a standstill obligation. Investors must therefore wait for the Minister’s approval before proceeding to complete the transaction. Although sector-specific regulations do not contain a standstill obligation, completing a transaction before approval has risks. Indeed, if the Minister prohibits the transaction or attaches conditions to the transaction, the investment may have to be partially or fully reversed.

## LOOKING AHEAD

Although not exhaustive, in future transactions, the following practicalities may be taken into consideration:

- Parties interested in investment in the Netherlands must be aware of the Vifo Act and evaluate whether the transaction falls within its scope or under the scope of other sector-specific legislation
- If applicable, the Vifo Act may put an extra administrative burden on the parties and lead to more deal uncertainty
- Parties should include a condition relating to Vifo (or sector-specific) clearance in their SPA if notification is required or (in the case of doubt) advisable

# Norway

Changes in the geopolitical situation have resulted in increased awareness of security threats caused by strategic acquisitions and access to sensitive technology. The ongoing review of the FDI regulations in Norway is expected to result in more effective mechanisms to identify and deal with security threats in transactions and investors should be prepared to take this into account when planning future investments in Norwegian companies that engage in sensitive activities.

By Eivind J Vesterkjær and Trine Siri Dahl  
Advokatfirmaet Thommessen AS

Foreign direct investment screening in Norway is governed by Chapter 10 of the Norwegian Act on National Security (the Security Act). The screening mechanism is limited to companies that have been brought within the scope of the Security Act by way of an administrative decision pursuant to section 1-3 of the Security Act.

Alongside the notification regime, acquisitions may trigger certain information requirements. For example, companies holding a so-called “supplier clearance” of CONFIDENTIAL or higher shall inform the National Security Authority of changes to its ownership structure, board composition, etc., which may ultimately lead to the withdrawal of the clearance in case of security concerns as a result of the changes.

Outside the scope of application of Chapter 10, section 2-5 of the Security Act contains a general intervention clause that empowers the authorities to intervene against any planned or ongoing activities (including transactions) that may cause a “not insignificant risk” to national security.

As a response to the current political landscape, a review has been initiated to extend the scope of the FDI regulations. The initial proposal from the Ministry of Justice published in connection with a public consultation process in late 2021 contained inter alia provisions making notification mandatory if the target holds a security clearance of CONFIDENTIAL or higher, reducing the ownership stake threshold that

triggers a notification obligation from 33.33 percent to 10 percent ownership or voting rights. It is currently expected that the Ministry will send a formal proposal for amendments to the Act to the Norwegian Parliament in Q2, 2023.

## RECENT UPDATES

As a result of developing national security concerns, the Norwegian Ministry of Justice and Public Security issued a consultation paper in the autumn of 2021 with proposals for significant amendments to the provisions regarding ownership control in the Security Act. The proposed changes included inter alia:

- Expansion of the scope of businesses that are subject to rules on ownership control
- Lowering the threshold for triggering events with recurring filing obligations at several levels to the acquisition of direct or indirect holdings of 10 percent, 1/3, 50 percent, 2/3 and 100 percent of the share capital, participating interests or votes in the company
- Making also the seller and Board of Directors/CEO of the target company subject to the notification obligation (in addition to the buyer)
- Introducing a wide-scoped standstill obligation that covers also the exchange of non-public information
- Introduction of fines for failure to notify

After completion of the consultation process, the Ministry has worked on a legislative bill that has been



**Section 2-5 of the Security Act contains a general intervention clause that empowers the authorities to intervene against any planned or ongoing activities (including transactions) that may cause a “not insignificant risk” to national security**

delayed several times but is now expected to be presented to the Parliament in Q2 2023. During the consultation process many stakeholders raised concerns about the proposed standstill obligation in their responses, and the Ministry is expected to materially adjust or exclude this suggested amendment in its final proposal. While the content of the bill remains to be seen, there is no doubt that it will propose changes in the Security Act that are capable of impacting investments in Norwegian enterprises engaged in sensitive activities and giving rise to novel legal and practical questions that will need to be resolved in acquisition processes. It is expected that the proposed changes (if they are adopted by the Parliament) will be implemented 1 January 2024 at the earliest.

## WHO FILES

If an undertaking is subject to section 1-3 of the Security Act and the triggering thresholds are exceeded, the filing obligation is on the acquiring party. The filing shall be submitted to the relevant ministry responsible for the sector in question, or (if no ministry is in charge) to the National Security Authority. There is no deadline for filing and no automatic standstill, but the authorities have the power to impose a standstill obligation on a case-by-case basis and to unwind a transaction after closing.

A filing shall include the following information:

- The acquirer's name, address, company registration number/ personal ID-number
- The company registration number of the target company
- The acquirer's ownership share after completion of the proposed the acquisition
- The ownership structure of the acquirer (including any foreign ownership interests in the acquirer's business and any foreign ownership interests held by the acquirer) and its ultimate beneficial owner(s). Nationalities shall be reported
- The names of the persons that are members of the acquirer's board of directors and management
- Possible relations between the acquirer and other existing owners of the target company
- The acquirer's ownership interests in other companies that are covered by the Security Act and/or within the concerned sector
- The acquirer's annual turnover and annual accounts for the last five years, to the extent this information is available
- Other circumstances that the acquirer assumes may be of relevance for the assessment of whether the acquisition shall be approved

## TYPES OF DEALS REVIEWED

The provisions on ownership control in Chapter 10 of the Security Act are in principle general in nature and apply irrespective of sector and the nationality of the acquirer.

Chapter 10 of the Security Act only applies if the acquisition or transaction concerns an undertaking that has already been brought within the scope of application of the Security Act by way of a decision by the competent ministry or the National Security Authority pursuant to section 1-3 of the Act. Such decisions may be adopted for undertakings that:

- Handle classified information
- Control information, information systems, objects, or infrastructure of crucial importance for fundamental national functions
- Are engaged in activities of crucial importance for fundamental national functions

There is no publicly available list of companies that have been brought within the scope of the Act by way of a decision pursuant to section 1-3 of the Act. In a transaction process,

information about the existence of such a decision is normally best obtained from the target company (e.g., during the DD process), because it will have been notified of the decision to bring it within the scope of the Act. However, a prospective buyer may also approach the Authority for guidance on a case-by-case basis.

When a company has been brought within the scope of the Security Act, the acquirer of a "qualified ownership interest" in that company has an obligation to notify the relevant ministry so that the acquisition can be reviewed. Under the current Security Act, "qualified ownership interest" is defined as an ownership interest where the acquirer obtains:

- A third of the company's stock capital, or the interests or votes
- A right to become the owner of a third of the stock capital or interests or
- Assumes significant influence over the company through other means (e.g., veto rights)



**There is no deadline for filing and no automatic standstill, but the authorities have the power to impose a standstill obligation on a case-by-case basis and to unwind a transaction after closing**

## SCOPE OF THE REVIEW

In determining whether an acquisition should be approved, made conditional or prohibited, the relevant authority shall determine whether the acquisition “may entail a risk that is not insignificant that interests of national security will be threatened.” The criteria permit broad discretion in the authority’s assessment.

There is limited guidance on the scope of review publicly available, and we are not aware of any decisions of approval or prohibition pursuant to the Security Act except the Bergen Engines case mentioned below. The National Security Authority has, however, on several occasions noted that it will focus on whether the acquirer has ties to countries that Norway does not have a security cooperation with, such as e.g., non-NATO countries.

In March 2021, the Norwegian government for the first time blocked a transaction based on concerns for national security, namely the sale of Bergen Engines, an engine manufacturing company owned by Rolls-Royce, to TMH International. The acquisition was blocked in accordance with section 2-5 of the Security Act (the criteria for intervention correspond to the rules on ownership control in Chapter 10 of the Security Act). A royal decree regarding the Bergen Engines case was published on the website of the Ministry of Justice that shed light on which strategic considerations the authorities might emphasize during foreign investment review:

- Bergen Engines manufactures engines for civil and military applications, and supplies both the civil and military sectors in Norway and several other countries. A sale of Bergen Engines to TMH International would have given TMH International insight into, and allowed the transfer of, the company’s technology, expertise, materials, real estate, customer portfolio and contracts
- The government held that TMH International was partly owned by individuals with ties to the Russian government and that Bergen Engines produced and applied technology that would strengthen Russia’s military capabilities. The acquisition of Bergen Engines by TMH International would therefore have been in conflict with Norwegian security policies
- The government further held that Russia has struggled with accessing such technology since sanctions were imposed in 2014. Allowing the sale of Bergen Engines to TMH International could indirectly have provided technology to Russia and thus violated the current sanctions policy
- The sale of Bergen Engines to TMH International could have led to efforts to circumvent regulations on exports to Russia
- Bergen Engines is located at the entry to a major Norwegian port of strategic importance. Accordingly, the sale of the company to TMH International could potentially have constituted a national security risk also in that respect

## REVIEW PROCESS TIMELINE

Within 60 working days after having received a notification, the responsible authority shall either inform the acquirer that the acquisition is approved, or inform the acquirer that the decision will be made by the King in Council. In case of the latter, there is no definitive timeline for the further review process.

For example, the prohibition decision regarding TMH’s acquisition of Bergen Engines was adopted by the King in Council ca. six weeks after the transaction agreement between Rolls-Royce and TMH was signed, and about 3.5 months after Rolls-Royce had first approached Norwegian authorities regarding the planned sale (and reportedly was given the green light to proceed with a shortlist of buyers that included TMH). This case was handled under the general intervention clause in section 3-5 of the Security Act and not the specific rules on ownership control in Chapter 10 of the Act, but it is likely representative of the ability of Norwegian authorities to analyze complex cases relatively quickly.

If the authority has requested further information from the acquirer within 50 working days from receipt of the notification, the 60-working-day deadline is suspended until the requested information is received by the authority.

There are three possible outcomes of reviews under both the rules on ownership control (Chapter 10) and the general intervention clause (section 2-5): (i) the acquisition is approved; (ii) the acquisition is approved subject to certain conditions or obligations (e.g., sale of part of the business or termination of certain agreements); or (iii) the acquisition is prohibited.

Pursuant to general principles of administrative law, the decision must be suitable to achieve the objective of securing national security and proportionate to that end. The economic consequences of a decision for the businesses involved must be taken into account, and the authorities have an obligation to consider whether the security concerns at stake can be resolved with less-invasive measures than a full prohibition.

As set out above, there are currently no known cases where an acquisition has been blocked pursuant to the provisions on ownership control in Chapter 10 of the Security Act. The Bergen Engines case however demonstrates that national security concerns may lead to the authorities blocking the implementation of a transaction without using the provisions in Chapter 10.

As noted above, we have not identified any decisions of prohibition pursuant to the Security Act pursuant to Chapter 10 of the Security Act, meaning that there is limited transparency on what considerations are made in the review process.

On a general level, the Norwegian government has increased its focus on how the use of economic instruments can constitute a security risk. The COVID-19 pandemic and following negative economic consequences and possible bankruptcies in businesses have further increased the concern that foreign acquirers may be carrying out strategic acquisitions in Norway and accordingly increase their influence in areas of strategic value to Norwegian national security.

Moreover, the Norwegian Police Security Service and the National Intelligence Service have stated in their annual threat assessments that there is a trend that several countries, with which Norway does not have security cooperation, are seeking knowledge relevant to Norwegian military systems and capacities from Norwegian technology environments. It can be expected that this may also affect the review of certain transactions.



**In typical cases, it is advisable to submit the notification of the transaction at least 60 days prior to the planned closing date**

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

If the acquisition in question could trigger national security concerns, investors should carry out a thorough analysis of the feasibility of the transaction and on how deal certainty can best be achieved with the least possible impact on the transaction rationale.

Among the issues that need to be considered is whether the security problem can be isolated to parts of the target business. If so, a divesture of the relevant parts of the target business or termination of sensitive agreements may constitute an adequate remedy in order to secure clearance. Depending on the circumstances, the parties may want to engage in a pre-transaction discussion with the authorities to obtain their view on the proposed transaction and on how any security issues can be resolved.

A practical problem may be that the issues that gives rise to the security problem may constitute



classified information that the seller and the target cannot disclose to the prospective buyer. A workable approach may be that the buyer receives such information in a sufficiently aggregated form (i.e., that the sensitive business constitutes x percent of the total revenues of the target).

While there is currently no standstill obligation in case of mandatory notification requirements, it is normally advisable to include approval as a condition precedent to closing, and to take the filing and review process into account in determining the transaction timeline.

In typical cases, it is advisable to submit the notification of the transaction at least 60 days prior to the planned closing date. Where a transaction could give rise to national security concerns, investors should take into account a potentially longer waiting period prior to closing as an in-depth review following a decision to bring the case before the King in Council (the government) does not have a definitive timeline for review.

## LOOKING AHEAD

- Investors are advised to notify transactions that require an FDI filing in Norway at least 60 days prior to closing, and to factor in a longer review period for all transactions that may trigger national security concerns (also where there is no automatic filing obligation pursuant to Chapter 10 of the Security Act)
- Norwegian authorities have demonstrated that they are capable of reviewing transactions that trigger security concerns swiftly. In the Bergen Engines case, the final decision prohibiting the transaction was taken ca. 3.5 months after the seller first approached Norwegian authorities regarding the planned sale and ca. six weeks after the transaction agreement had been signed
- If the target company has not been brought within the scope of the filing obligation pursuant to Chapter 10 of the Security Act but is active in areas that may be of relevance to national security, both the seller and the prospective buyer should consider whether Norwegian authorities may want to investigate the transaction on the basis of the general intervention clause in section 2-5 of the Act, and any timing obligation of such a scenario. The authorities may be asked for informal guidance in this respect
- Transparency regarding the ownership structure of the prospective buyer is advisable both in connection with informal contacts with the authorities (to ensure that any guidance obtained at that stage is ultimately reliable) and in the filing itself (to ensure an efficient case handling and to reduce the risk of an information request that suspends the initial 60-day case handling deadline)





# Poland

The Polish FDI regime governing the acquisitions of covered entities by non-EEA and non-OECD buyers has been extended until July 2025.

By Jakub Gubański, Maciej Gac, and Iwo Małobęcki

The Polish FDI regime, introduced in 2020, establishes a foreign investment screening mechanism governed by the Polish Competition Authority (UOKiK). It supplements the 2015 investment control regime, which is governed by the relevant ministries, involves a limited number of strategic entities and is applicable regardless of an investor's "nationality."

## RECENT UPDATES

- The main change concerns the extension of the FDI regime until July 2025. The FDI regime was introduced as a response to the COVID-19 outbreak for an initial period of two years. In mid-2022, the Polish Parliament decided to extend the FDI regime for another three years. The provisions of the FDI regime remained unchanged
- The FDI regime is still developmental in Poland, and there are limited precedential decisions available. The UOKiK has issued four clearance decisions so far and has not objected to any of the transactions reviewed under the FDI regime
- Based on the publicly available data, in 2022, no FDI decision had been issued by the UOKiK. In 2021, the UOKiK initiated eight FDI proceedings. Two cases were cleared in standard review and one case was cleared after conducting an in-depth control review. In the remaining cases, the UOKiK issued decisions refusing to initiate a preliminary investigation because the transactions were not subject to the FDI regime. In 2020, four

FDI filings were submitted to the UOKiK. In two of the 2020 cases, the UOKiK refused to initiate the proceedings, as the transactions were not covered by the FDI regime; one case was cleared; and one was continued in 2021 (the UOKiK ultimately refused to initiate the proceedings, as the transaction was not covered by the FDI regime).

## WHO FILES

All non-EEA/non-OECD nationals (natural persons who do not have EEA or OECD citizenship) or non-EEA/non-OECD entities (entities without a registered office in the EEA or OECD at least for the past two years) are obliged to file for clearance when entering into any of the covered transactions (except from the indirect acquisitions when a duty of a post-closing filing is on the acquired entity holding dominance or a qualified holding in the covered entity). The FDI rules include specific provisions against circumventing the EEA/OECD-domicile rule, in particular: (i) subsidiary entities, branches or representative offices of a non-EEA/non-OECD national or non-EEA/non-OECD entity that are also regarded as non-EEA/non-OECD entities; and (ii) even if an acquisition is pursued by an EEA/OECD citizen or an entity having its registered office within the EEA/OECD, the buyer may still be regarded as "foreign" if there is an allegation of circumvention of the law, such as where the buyer does not carry out any business activity other than holding shares or controlling other entities or does not run a sustainable enterprise or employ staff within the EEA/OECD.



**The FDI regime was introduced as a response to the COVID-19 outbreak for an initial period of two years**

## TYPES OF DEALS REVIEWED

Any transaction involving a covered entity that involves direct or indirect:

- Acquisition of control over the covered entity, i.e., any of the following:
  - Holding more than 50 percent of votes at the general/shareholders' meeting or 50 percent or more of the capital
  - Having the right to appoint and/or dismiss the majority of the members of the management board or the supervisory body of the covered entity
  - Having any other right to decide on directions of the covered entity's business, including under an agreement with the covered entity
- Acquisition of a qualifying holding in the covered entity, i.e., a holding representing 20 percent or more (as well as the acquisition of any holding that would bring the buyer above 40 percent) of the: (i) votes at the general/shareholders' meeting; (ii) share capital; and/or (iii) share in distributed profits
- Purchase or lease of the enterprise (or an organized part thereof) of the covered entity through an asset deal

The clearance obligation will also be triggered if any of the above results from: (i) redemption of shares of a covered entity; (ii) a covered entity's purchase of its own shares; or (iii) the merger or spin-off of a covered entity.

#### SCOPE OF THE REVIEW

The UOKiK may issue an objection if the transaction poses at least a potential threat to public order, public security or public health in Poland, or when the transaction might have a negative impact on projects or programs of interest to the European Union. Therefore, political considerations are likely to become the basis for potential objection decisions issued by the UOKiK.

A transaction made without the required notification or in spite of an objection by the UOKiK are null and void.

In the case of an indirect acquisition through transactions not governed by Polish law (e.g., a merger of non-Polish entities resulting in a change of control over a covered entity), even though such transactions will not be unwound, the acquirer will not be allowed to exercise its corporate rights in the covered Polish company.

Additionally, a breach of the clearance obligation would constitute a criminal offense punishable by a fine of up to PLN 50 million and/or imprisonment for up to five years.

Finally, in case of an indirect acquisition, a person required by law or by an agreement to manage the affairs of a subsidiary that has not submitted the required notification will also be subject to a fine of up to PLN 5 million and/or imprisonment for up to five years if such a person was aware of the acquisition being made.

#### REVIEW PROCESS TIMELINE

The FDI review procedure before the UOKiK takes up to 30 business days, but it can be extended for a further 120 calendar days if the UOKiK decides to initiate control proceedings. Deadlines are suspended when the UOKiK is

waiting for requested information and documents (i.e., the clock is stayed if the UOKiK is awaiting further information).

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Merging parties need to take the FDI rules into account each time they contemplate a transaction with a Polish element, i.e., when a Polish company is a direct target of the deal or belongs to the target's group.

Based on our past experience, most transactions require an assessment of whether an FDI filing is required in Poland. It is often a complex process requiring obtaining data from the parties to the transaction (e.g., detailed information on the capital group structures, the ultimate beneficial owner's domicile, and the transaction structure and scope of business of Polish targets). Moreover, because the FDI rules can be interpreted in many ways and consultation with the UOKiK is sometimes necessary, the FDI analysis should be contemplated and started early on in the transaction process.

As in other jurisdictions, it is therefore critical for foreign investors to consider Polish FDI issues in planning and negotiating transactions. In particular, an investor should ensure that it introduces a condition precedent related to obtaining FDI clearance in Poland, where appropriate, prior to closing. It may also be appropriate for merging parties to allocate the potential risks related to FDI proceedings.

In most cases, obtaining quick clearance would require ensuring that an FDI notification is drafted in a clear and informative manner and supplemented with convincing evidence proving that the completion of the transaction would not lead to any concerns. Such a result requires not only an in-depth knowledge of the transaction dynamics, but also efficient cooperation between different teams of advisers and smooth communication with the client.

Following submission of an FDI filing, it is crucial to be proactively involved in the proceedings, establish a good working relationship with the UOKiK and promptly reply to all queries raised by the authority.

#### LOOKING AHEAD

- We can expect closer cooperation between the UOKiK, the European Commission and other national competition authorities on reviewing deals with a foreign element. Most countries have recently introduced FDI regimes, and the European Commission has established a framework for information exchange between the Member States in Regulation 2019/452. This should foster cooperation between the authorities and increase the level of scrutiny in cross-border deals
- Because only a limited number of deals are notified to the UOKiK, the authority may start monitoring the market more closely in order to check whether parties are inappropriately avoiding the filing obligation. The UOKiK is entitled to initiate control proceedings ex officio if it determines that a given transaction requires notification and it can do so within a look-back period of five years from the completion of the transaction
- We expect a revision of the UOKiK's FDI guidelines in the near future. The original guidelines from the UOKiK were issued in 2020 prior to the UOKiK having issued any FDI decisions. Thus, the UOKiK's FDI guidelines leave many questions unanswered, are sometimes unclear, and so the revised guidelines should reflect developments (even if still limited) based on the UOKiK's experience in the intervening years.

# Portugal

Transactions involving foreign natural or legal persons that allow direct or indirect control over strategic assets may be subject to FDI screening.

By João Marques Mendes and Joana Campelo  
PLMJ Advogados, SP, RL

In Portugal, the Council of Ministers has the power to oppose acquisitions of infrastructure or strategic assets by non-EU or non-EEA natural or legal persons. The Council of Ministers may do so in order to guarantee public security, and only in exceptional circumstances and via a reasoned decision. Those transactions that may be opposed are those that are considered to jeopardize national defense and security, or the security of the country's supply in services fundamental to the national interest.

Specifically, according to the Portuguese FDI Law (DL 138/2014), the Portuguese government may oppose investments (i) made by residents outside the EU or the EEA or by legal entities directly or indirectly controlled by residents outside the EU or EEA; (ii) that directly or indirectly allow direct or indirect control (iii) over strategic assets, which are defined as key infrastructures or assets related to defense and national security or to the provision of essential services in the energy, transport or communications sectors. The definition of direct or indirect control under the FDI Law is identical to that definition under EU and Portuguese competition law.

The Portuguese FDI Law does not require mandatory notification of any transaction, but the prospective purchaser may, on a voluntary basis, request an ex ante confirmation that an opposition decision will not be issued. From our experience, confirmation ex ante is rarely requested, and, to date, we are not aware of any transactions blocked under this framework.

## WHO FILES

The Portuguese FDI Law does not require mandatory notification of any transaction. Nonetheless, the prospective purchaser may, on a voluntary basis, request an ex ante confirmation that an opposition decision will not be issued. There is no official form for this request, but it must include the full description of the terms of the envisaged transaction. If the government does not initiate an assessment procedure within 30 business days counted from the date of the request, a non-opposition decision is deemed to have been issued.

If no confirmation is requested ex ante, a review of the transaction can be initiated by the government ex officio within 30 business days from the conclusion of the transaction or from the date it becomes publicly known.

## TYPES OF DEALS REVIEWED

Under the Portuguese FDI Law, the Portuguese government has the power to review any transaction that allows control over strategic assets, which are defined as the key infrastructures and assets related to defense and national security or to the provision of essential services in the energy, transport or communications sectors. There is no financial threshold for investments to be able to be screened under the Portuguese FDI Law.

There is no definition of "strategic assets related to defense and national security or to the provision of essential services in the energy, transport or communications sectors," which creates some uncertainty on the possibility of screening of transactions in these sectors.



**The Portuguese government has the power to review any transaction that allows control over strategic assets**

## SCOPE OF THE REVIEW

The review will focus on the nature of the business to be acquired and the parties involved in the transaction.

In the event a transaction is subject to FDI screening (based on the three requirements referred to above), the criteria that will guide whether the government opposes the transaction include, among other factors, the track record of the buyer and the country in which the buyer is domiciled or to which it is in some way linked. The Portuguese FDI Law gives examples of some situations where it will assume a threat to the defense, national security of security of supply of essential services exists. According to the law, transactions that result, directly or indirectly, in the acquisition of control, directly or indirectly, by a person or persons from countries outside the European Union are likely to jeopardize national defense and security, when:

- There are serious indications, based on objective elements, of the existence of links between the buyer and third countries that do not recognize or respect the fundamental principles

of the democratic rule of law, which represent a risk to the international community as a result of the nature of their alliances or who maintain relations with criminal or terrorist organizations or with persons linked to such organizations, taking into account the official positions of the European Union in these matters

- The buyer has, in the past, used the controlling position held over other assets to create serious difficulties for the regular provision of essential public services in the country in which they were located, as well as neighboring countries, or does not guarantee the main allocation of the assets, as well as their reversal at the end of the corresponding concessions, when they exist, namely taking into account the lack of adequate contractual provisions for this purpose
- The transaction results in a change in the destination of strategic assets

If an opposition decision is issued, all legal acts and transactions relating to the transaction in question shall be deemed null and void, including those relating to economic exploitation or the exercise of rights over the assets or over the entities that control them.

#### **REVIEW PROCESS TIMELINE**

According to the procedure set out in Portuguese law, the process can take approximately 100 business days from the conclusion of the transaction or from the date it becomes publicly known. Specifically, the following procedural steps and timelines shall apply:

- The review of the transaction shall be initiated within 30 business days from the conclusion of the transaction or from the date it becomes publicly known or upon application for an ex ante confirmation
- Investors are notified to present the relevant information and documents about the transaction to the government member responsible for the area in which the strategic asset in question is included, within ten business days (the FDI Law does not provide for a specific deadline, and therefore the subsidiary administrative deadline shall apply)
- The Council of Ministers, upon proposal of the member of the government responsible for the area in which the strategic asset in question is included, may decide to oppose the transaction until up to 60 business days from the complete delivery of the information referred to in the previous number (the absence

of a decision within the same deadline counts as a non-opposition decision)

This procedure can take longer to the extent Regulation (EU) no. 2019/452 leads to the intervention of other Member States or the European Commission.

Any opposition decision is subject to judicial review by the administrative courts (the challenge of the opposition decision does not have a suspensive effect on the same).

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Investors can request an ex ante confirmation of whether a transaction will be subject to screening under the FDI regime. Investors shall consider, in their risk assessment of the likeability of screening, the sectors in which the target develops its activity, the essentiality of services provided by the target, its market share or on the impact of the transaction, among other factors.

#### **LOOKING AHEAD**

We are not aware of any transactions blocked under the FDI legal framework to date.

# Romania

The Romanian regime regarding foreign direct investment has undergone a major change in 2022, when new legislation was enacted, and is aimed at implementing relevant European Union legislation.

By Lucian Bondoc, Raluca Nădejde, and Ionut Lechea  
Bondoc & Associatii

The Romanian regime regarding foreign direct investment (FDI) has undergone a major change in April 2022, when new legislation was enacted, aimed at implementing European Regulation of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (Regulation 2019/452).

Such new legislation is represented by Government Emergency Ordinance no. 46/2022 for the implementation of Regulation 2019/452(GEO 46/2022), which, among others, define the concepts of foreign direct investments, new investments and foreign investor.

Accordingly, “foreign direct investment” is defined as an investment of any kind that fulfills the following conditions:

- Is performed by a foreign investor
- Its purpose is to establish or maintain long-lasting and direct links between the foreign investor and the target company (or a separate division of the target company) to which funds are made available or will be made available for the purpose of carrying out an economic activity in Romania and
- The FDI allows the foreign investor to exert control over the management of the target company

Both direct and indirect changes of control in the ownership of the foreign investor fall under the scope of FDI review if control is acquired by an entity/individual that qualifies as a foreign investor, even if such change in control is outside

of Romania (e.g., a change of the parent company of the foreign investor would trigger FDI review if the new parent company qualifies as a foreign investor, even if the new parent company has not carried any additional FDI in Romania).

“New investments” is defined as an “initial investment in tangible and intangible assets located within the same perimeter, related to the (1) launching of the activity of a new undertaking, (2) expanding the capacity of an existing undertaking, (3) diversifying production of an enterprise through products not previously manufactured or (4) a fundamental change in the general production process of an existing undertaking.”

Setting up a new undertaking represents the creation of a new site for carrying out the activity for which funding is requested, independent from a technological point of view, from other existing units.

Expanding the capacity of an existing undertaking represents the increase of the production capacity at the existing site due to the existence of an unfulfilled demand.

Diversification of the production of an existing undertaking is the obtaining of products or services that were not previously carried out in the establishment in question.

Under GEO 46/2022, a new public body has been established to examine and approve FDI, namely the Commission for Examination of Foreign Direct Investments (CEISD), which in essence replaces CSAT (under the previous regime, transactions falling under FDI scope were notified to the Competition Council and the latter would forward them to CSAT).

## RECENT UPDATES

In 2022, there was significant uncertainty generated by the new FDI regime, in particular due to the lack of implementing rules that were not adopted on time.

## WHO FILES

The principle is that the foreign investor has the obligation to make the FDI filing in Romania. In case of mergers or other types of transactions, the obligation to file is incumbent on the merging parties or the party/parties acquiring sole or joint control.

“Foreign investor” is defined as: (i) a natural person that is not a citizen of an EU Member State; or (ii) a legal entity that does not have its registered office in an EU Member State; or (iii) a legal entity with its registered office in an EU Member State controlled directly or indirectly by a natural person that is not a citizen of an EU Member State or a legal entity that does not have its registered office in an EU Member State; or (iv) a trustee of an entity without legal personality or a person in a similar position, if he/she is not a EU citizen or is not established in a EU Member State, as the case may be, or if such entity was incorporated under the laws of a Non-EU Member State.

Please note that a draft law adopted by the Romanian Parliament and submitted to the Romanian President for promulgation intends to expand the scope of foreign investors to include EU investors—the draft law was sent back to the Romanian Parliament for further amendments by the Romanian President.

## TYPES OF DEALS REVIEWED

Pursuant to GEO 46/2022, the filing is mandatory for a foreign direct investment or new investment made by a foreign investor, that:

- Concerns the fields of activity relevant to national security according to Decision of National Council for Country's Defense no. 73/2012, in conjunction with the criteria set out in art. 4 of Regulation 2019/452  
AND
- Whose value exceeds a threshold of €2 million, calculated at the exchange rate of the National Bank of Romania (NBR) applicable to the last day of the financial year prior to the transaction. By exception, FDIs that do not exceed the threshold of €2 million may also be subject to examination and approval by CEISD, if, by their nature and potential effects, in relation to the criteria set out in Article 4 of Regulation 2019/452, may have an impact on security or public order or pose a risk to them

The fields of activity mentioned above under as being relevant to national security according to the Decision of National Council for Country's Defense no. 73/2012, are: (i) security of individuals and of communities, (ii) security of frontiers, (iii) energy security, (iv) transportation security, (v) vital supply systems security, (vi) critical infrastructure security, (vii) IT&C systems security, (viii) security of financial, fiscal, banking

and insurance activities, (ix) security of weapons, ammunition, explosives and toxic substances production and circulation, (x) industrial security, (xi) protection against disasters, (xii) protection of agriculture and the environment, (xiii) protection of state-owned company privatization or its management.

According to GEO 46/2022, portfolio investments are exempted from examination and approval.

## SCOPE OF THE REVIEW

The purpose of the review is to examine whether a particular foreign direct investment or new investment is likely to affect Romania's national security or public order or projects and programs of interest to the European Union.

## REVIEW PROCESS TIMELINE

As per GEO 46/2022, there is a maximum term of 135 days for the notifying party to be informed of the approval of the transaction by the Romanian Competition Council, which begins as of the moment the filing may be deemed complete (additional time may be added if CEISD requests the opinion of other authorities). In case of transactions that are sent by the CEISD to the Romanian government with the recommendation to be either prohibited or approved conditionally, there is no maximum legal time limit for the Romanian government to issue the decision.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors can protect themselves by ensuring that any transaction carried out in Romania is verified from an FDI perspective (in other words, verifying if the transaction falls under the criteria set out under GEO 46/2022), in addition to other regulatory clearances that may be required, such as the merger clearance by the Romanian Competition Council

Also, in case of transactions which fall under CEISD review, CEISD clearance would need to be a condition precedent to the closing of the transaction because a prohibited transaction would trigger the cancellation of the transaction (noting that, in practice, this has not happened under the old regime).

## LOOKING AHEAD

With respect to the timeline, the Competition Council has provided informal assurances that they will do their best to streamline the process and issue approvals in approximately one month from having a complete notification file, which remains to be tested in practice.

# Russian Federation

The Federal Antimonopoly Service (FAS) tends to impose increased scrutiny in the sphere of foreign investments and has developed a number of amendments to the foreign investments laws that are aimed at eliminating legislative gaps in this sphere.

By Igor Ostapets and Ksenia Tyunik (independent lawyer)

Established by the Russian government in 2008, the Government Commission on Control over Foreign Investments in the Russian Federation (the **Government Commission**) is responsible for the review of foreign direct investment applications. The Government Commission is headed by the Chairman of the Russian government and composed of the heads of certain ministries and other government bodies. Following the appointment of Mikhail Mishustin as the new Chairman of the government and formation of the new government in January 2020, the new Government Commission has been operational since March 2020.

Although the final decision on the application is made by the Government Commission, all the preparatory work (such as reviewing an application's completeness and liaising with relevant government bodies) is done by the Federal Antimonopoly Service (FAS). Among other things, FAS performs a preliminary review of the application and prepares materials for a further assessment by the Government Commission. The Head of FAS is the Executive Secretary and a member of the Government Commission.

Since March 2022, the President of the Russian Federation adopted a number of "counter-sanctions" decrees that introduced additional regulatory requirements for transactions involving companies or persons from the so-called "unfriendly" states (those that imposed sanctions against Russia). Thus, transactions with

shares, participatory interests or immovable property involving a company or a person related to the abovementioned states require (with some exceptions) prior approval of the special sub-commission of the Government Commission formed under the Ministry of Finance.

In addition to this, in August 2022, the President adopted Decree No. 520, which provides that transactions with shares of certain companies operating in the fuel and energy sector, as well as certain banks (both included in the lists approved by the Russian government) are prohibited. Such transactions may be allowed only upon the special permission from the President of the Russian Federation.

## RECENT UPDATES

- Russia's foreign investment laws were amended several times in 2022. In April 2022, two new types of "strategic" activities were introduced—sea or inland waterway transportation of certain cargo (as per the government-approved list) and the development and implementation of an automated information system for the registration of air transportation and related databases and telecommunication networks. As of December 26, 2022, two more new types of "strategic" activities will be introduced, both relating to ensuring the protection of fuel and energy facilities from unlawful interference at such facilities.



## The Government Commission reviews transactions that result in acquisition of control over Strategic Entities

- In October 2022, the type of "strategic" activity on harvesting aquatic bioresources is replaced with the broader definition of "fishing" which, according to FAS's comments, includes not only harvesting but also other processes in the sphere of fishery, such as acceptance, processing, transportation and storage of fish products.
- FAS has developed two sets of amendments to foreign investments laws that were adopted by the Parliament in the first reading in the beginning of November. One set of amendments details specific steps that FAS (and other governing bodies) must perform to invoke the right of the Prime Minister to request a full-scale FDI review for any deal by a foreign investor. The amendments contain the list of Russian entities (and criteria to their activities) where such procedure is mandatory and for the list of additional information that applicants must provide to FAS as part of the merger control process for such transactions in order to enable

FAS to decide if there is a need to initiate this procedure. Another set of amendments is aimed at regulating the procedure of obtaining the “strategic” license by a Russian company being under the control of a foreign investor and thus becoming “strategic,” and outlines the relevant approval steps that are required in such a case.

#### WHO FILES

To obtain an FDI approval, an acquirer must file with the FAS if the proposed acquisition would result in the acquirer’s control over an entity engaged in activities of “strategic importance” to Russian national defense and security (a Strategic Entity). The acquirer is required to obtain the consent of the Government Commission prior to the acquisition of control over a Strategic Entity, or the transaction is declared void.

If an acquirer is a foreign state-owned company, it must submit an application for approval with respect to an acquisition of any Russian company (not necessarily a Strategic Entity”) if it obtains (directly or indirectly) a blocking stake in, or veto rights in relation to, such company. Such applications with respect to Russian companies not engaged in activities of “strategic importance” are generally subject to the “simplified” review (by FAS only) unless FAS invokes the right of the Chairman of the Government Commission to decide that a full-scale FDI review by the Government Commission is required for the transaction.

To apply for consent, the acquirer must submit an application to FAS with attachments, which include corporate charter documents of the acquirer and the target, information on their groups’ structures (including the whole chain of control over both the acquirer and the target), transaction documents and a business plan for the development of the target after closing. A table

disclosing the acquirer’s ultimate controlling entities, beneficiaries and beneficiary owners is also required.

Applications under the abovementioned “counter-sanctions,” decrees may be filed by either party to the transaction but in practice are usually filed by the acquirer. The filing process involves submission of the application to the sub-commission directly or indirectly through the industry-specific Ministry performing the regulation in the sphere of the target’s activities. In practice, filing through the industry-specific Ministry is more efficient as it facilitates the approval process, because the Ministry transmits materials to the sub-commission with a ready opinion on the proposed transaction. To apply for approval, the acquirer must submit an application, along with corporate documents, copies (or drafts) of agreements formalizing transactions and documents disclosing the ultimate controlling entities, beneficiaries, and beneficiary owners of both the acquirer and the seller. In addition to this, the acquirer must provide certain financial information, such as substantiation of the deal value (preferably confirmed by the report of an independent appraiser), as well as the opinion on why the transaction should be approved.

#### TYPES OF DEALS REVIEWED

The Government Commission reviews transactions that result in acquisition of control over Strategic Entities. Foreign investors must also obtain the Government Commission’s consent for certain transactions involving the acquisition of a Strategic Entity’s property.

The list of activities of “strategic importance” comprises 49 activities that, if engaged in by the target, cause the target to be considered a Strategic Entity. The 49 activities encompass areas related to natural resources, defense, media and monopolies. The activities include not only those directly related to the state defense and security (such as

operations with nuclear materials, production of weapons and military machines), but also certain other indirectly related activities (such as TV and radio broadcasting over certain territories, fishing activities and publishing activities).

The criteria for determining control are broad and are lower (25 percent) for a target that is involved in the exploration of “subsoil blocks of federal importance,” such as oil fields with a certain size of reserves, uranium mines, and subsoil blocks subject to exploration within a defense and security zone, or in the fishing activities.

Foreign public investors are prohibited from obtaining control over Strategic Entities or acquiring more than 25 percent of a Strategic Entity’s property, and must obtain consent of the Government Commission for acquisitions of the lower stakes in Strategic Entities, or acquisition of blocking rights with respect to activities of such entities. Such investors, however, may acquire control over (i.e., 25 percent or more of shares in) a strategic entity involved in exploration of “subsoil blocks of federal importance” or engaged in the fishing activities if this does not change the existing control over such entities by the Russian Federation (i.e., its stake in such entities exceeding 50 percent) and provided that such acquisition is specifically approved by the Government Commission.

Certain transactions involving Strategic Entities, or their property, are exempt from the requirement to obtain the Government Commission’s approval, such as transactions in which the acquirer is ultimately controlled by the Russian Federation, constituent entities of the Russian Federation or a Russian citizen who is a Russian tax resident and does not have any other citizenship, as well as certain “intra-group” transactions.

Non-disclosing investors (those refusing to disclose information about their beneficiaries, beneficial



owners and controlling persons to FAS) are subject to a special, stricter regime established for foreign public investors. Pursuant to the rules for disclosing this information approved by the government, a foreign investor planning to enter into a transaction involving a Strategic Entity must make a prior disclosure of its controlling entities, beneficiaries and beneficial owners in order to avoid being treated as a “non-disclosing” investor and to ensure that the stricter regime established for foreign public investors will not apply. The disclosure must be made either in the form of an application for approval, if approval is required, or in the form of an informational letter filed with FAS 30 days before the transaction.

According to FAS, this advance disclosure requirement extends to exempted transactions in which the acquirer is ultimately controlled by the Russian Federation, constituent entities of the Russian Federation or a Russian citizen who is a Russian tax resident, and is a prerequisite for the relevant exemption to be applicable.

Amendments to Russia’s foreign investment laws introduced in 2017 gave the Chairman of the Government Commission (the Prime Minister) the right to decide that prior approval is required with respect to any transaction by any foreign investor with regard to any Russian company (not necessarily the Strategic Entity), if this is needed for the purpose of ensuring national defense and state security. The process is initiated by FAS, which obtains opinions from the Ministry of Defense, the Federal Security Service and other governing bodies whether or not the transaction needs to be sent to the Chairman for his decision. If at least one positive answer is received, FAS sends materials to the Chairman of the Government Commission for review and adoption of the decision. Upon receipt of the positive decision, FAS will notify the

foreign investor about the need to receive approval for a prospective transaction. Any transaction made in breach of this requirement is void.

FAS has developed draft amendments to the foreign investments laws that set out specific steps that FAS (and other governing bodies) must perform to invoke this procedure. The draft has been submitted to the Parliament and has not yet been adopted. Importantly, the amendments include the list of Russian entities (and criteria to their activities) where this procedure will be mandatory. These include targets participating in a national project, operating a city-forming enterprise, enjoying dominant position (in any market), being the sole producer of products/ services that are not under the control of a foreign investor, etc. In practice, FAS invokes this right if the target operates in certain sensitive spheres in the state’s policies and the economy (in particular, operating certain critical technologies, such as genetic-engineering, nanodevices’ technologies, or cryobiology and biomaterial conservation).

Requirements of the abovementioned President’s “counter-sanctions” decrees apply to a wide range of transaction scenarios, including, those where the companies or persons related to “unfriendly” states act as the acquirers, as well as sellers (transacting with Russian residents, or with companies or persons from both “unfriendly” and other states) and cover direct and indirect acquisitions of shares or participation interests in Russian companies and certain transactions with immovable property.

Finally, as mentioned above, Russia’s foreign investment laws establish a requirement for foreign public investors to obtain clearance for acquisition of more than 25 percent of shares in, or blocking rights with respect to, any Russian company, including, if such acquisition is performed as part of the company’s establishment.

Such applications are reviewed by FAS only and serve as a “double check” that the acquired Russian company indeed does not qualify as the Strategic Entity.

#### **SCOPE OF THE REVIEW**

Generally, a review of the FDI application assesses the transaction’s impact on state defense and security.

FAS initially requests opinions of the Ministry of Defense and the Federal Security Service as to whether the transaction poses any threat to Russian defense and security. Additionally, if the target has a license for dealing with information constituting state secrets, FAS requests information from the Interagency Committee for the State Secrecy Protection on the existence of an international treaty allowing a foreign investor to access information constituting state secrets.

Russian law does not provide any additional details on the review’s scope or the criteria on which the transaction under review is assessed.

The review under the “counter-sanctions” decrees is aimed at assessing the financial aspects of the transaction, strategic national interests and security considerations as well as its impact on the Russian market and the economy in general.

#### **REVIEW PROCESS TIMELINE**

The statutory period for reviewing the application is three months from the date of its acceptance for review. The Government Commission can extend the review period for an additional three months. In practice, the Government Commission uses this extension right for a large portion of applications pending review. In practice, the review timing fully depends on the availability of the Commission’s members and the Prime Minister, so it may take longer than the statutory timing.

Amendments to the law adopted in March 2021 introduced a simplified procedure for review

of transactions in which a target operates in certain “civil” sectors (such as the food industry, energy/water supply, machinery) but due to specifics of production has a small strategic asset (not more than 1 percent of total assets of the company) in the form of a water supply facility, a drainage facility or a production quality control laboratory with a “strategic” license and therefore qualifies as the Strategic Entity. For such types of transactions, the approval is generally issued by FAS itself (unless there are negative or no opinions on the deal received from the Ministry of Defense and the Federal Security Service), with subsequent notification of the Government Commission of the decision.

Approvals on applications of the foreign state-owned companies filed under the “simplified” procedure are reviewed by FAS only and therefore are generally issued quite swiftly, unless FAS decides to invoke the abovementioned right of the Prime Minister.

The timing for issuance of approvals by the sub-commission, as well as by the President of the Russian Federation, is not set in the applicable regulation, therefore it is important to apply for such approvals early in the transaction.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Early in a transaction, a foreign investor should analyze whether the target company qualifies as a Strategic Entity and whether the planned transaction triggers a requirement for the Government Commission’s consent. In light of the recent amendments, acquirers

should also analyze whether such consent would be needed in case the acquirer is qualified as a “non-disclosing” investor. Answering these questions will allow the investor to start filing preparations, and then to file its application sufficiently in advance to manage the filing’s impact on the timing of the transaction.

If the planned transaction does not require prior consent but consent would be needed if the acquirer is qualified as a non-disclosing investor, the acquirer must disclose to FAS information on the acquirer’s beneficiaries, beneficial owners and controlling persons in advance, at least 30 days before the planned transaction.

Even if the target company does not qualify as the Strategic Entity, the investor should analyze whether it operates in certain sensitive spheres, including those affected by sanctions/counter-sanctions or possesses any “critical” technologies that may potentially trigger the referral of the transaction by FAS to the Prime Minister and result in a full-scale FDI review of the transaction.

The requirements of the counter-sanctions decrees must also be analyzed in the very beginning of the transaction preparations, to ensure timely submission of the relevant applications to the sub-commission, or for the special permission of the President.

Finally, a foreign public investor that intends to acquire a stake exceeding 25 percent of shares in any Russian company, or blocking rights with respect to such company, must obtain FAS clearance of such acquisitions.

#### **LOOKING AHEAD**

- Timing for obtaining the FDI clearance in Russia tends to be extremely lengthy and often goes beyond the statutory terms specified in the law. There are several reasons for this. Most importantly, FAS tends to request opinions on the planned deal not only from the Ministry of Defense and the Federal Security Service, as provided in the law, but also from other governing authorities, and such authorities often delay their responses. Other reasons include irregular meetings of the Government Commission and high workload of the FAS FDI department, which delays preparation of materials for the Commission. FAS tends to be extremely cautious and obtains positions of the governing bodies on the necessity to send the transaction for review by the Prime Minister (to decide whether the full-scale FDI review is needed) even in non-obvious cases. Another trend is increased activity of FAS on invoking the right of the Prime Minister to decide on the need of the full-scale FDI review for any deal by a foreign investor. Since the beginning of 2022, FAS seems to send most deals not requiring a full-scale FDI review to the Prime Minister as part of such a procedure
- According to FAS’s practice, where a transaction requires both the FDI approval and the approval of the sub-commission under the “counter-sanctions” decrees, the latter approval is secured as part of the FDI review, i.e., a separate application under the decrees is not needed

# Slovakia

On November 29, 2022, Slovakia, for the first time, adopted full-fledged foreign direct investment legislation. This legislation is effective as of March 1, 2023.

By Michal Pališín and Demian Boška  
Aldertree legal s.r.o.

To date, the scope of foreign direct investment screening in Slovakia has been limited. The present screening mechanism is set out under Act No. 45/2011 Coll. on Critical Infrastructure, as amended (the CI Act), and applies only to certain transactions concerning operators of critical infrastructure and/or critical infrastructure assets in the energy (mining, electricity, gas, petroleum) and industry (pharmaceuticals, metallurgy, chemicals) sectors designated as critical infrastructure operators/assets by the Slovak government.

That said, the Slovak government recently enacted the Act on the Screening of Foreign Investments and Changes and Amendments to Certain Laws (the FDI Act). The FDI Act introduces a general FDI screening mechanism in Slovakia and enters into force on March 1, 2023.

## RECENT UPDATES

- On November 29, 2022, Slovakia, for the first time, adopted full-fledged foreign direct investment legislation. Such legislation becomes effective March 1, 2023
- As opposed to the current practice of limiting screening of foreign investments to certain critical infrastructure sectors, the new FDI Act broadens the scope of foreign investments that must undergo mandatory screening. The FDI Act also establishes new screening procedures
- Following the entry into force of the FDI Act, investors will have to carefully consider whether their

investments might fall under the ambit of the FDI Act and in such case, whether they constitute regular foreign investment or critical foreign investment, in which case different processes will apply. Given the novelty of the regime, it may take some time for procedures and practices to be fully settled, and investors should anticipate sufficiently long periods for the completion of the review.

## WHO FILES

With its entry into force on March 1, 2023, the FDI Act shall replace the currently applicable foreign investment screening under the CI Act, which shall consequently cease to apply.

Depending on the target company, the FDI Act distinguishes between a regular foreign investment (RFI) and a critical foreign investment (CFI). Mandatory pre-closing screening/ approval shall only apply to the CFIs that cover transactions above a threshold percentage concerning target companies/ assets in certain specific sectors such as firearms manufacturers and defense technology.

As for RFIs, they do not require mandatory pre-closing screening, but the Slovak government reserves the right to perform any ex post screening on such investments. Foreign investors may apply for voluntary screening in order to assess, in advance, whether a foreign investment might have a negative impact on security and public order in Slovakia or in the EU. By taking advantage of the



## The Slovak government recently enacted the Act on the Screening of Foreign Investments and Changes and Amendments to Certain Laws

voluntary screening, which is less rigorous compared to the mandatory screening, the foreign investor could limit any ex post screening of its investment.

Pursuant to the FDI Act, a foreign investor shall be responsible for the filing. The definition of a foreign investor generally covers a non-EU national or a legal entity whose registered seat is outside the EU. An EU national may also qualify as a foreign investor if he or she acts in concert with a non-EU national or entity, or if a third country finances the foreign investment.

## TYPES OF DEALS REVIEWED

Under the FDI Act, the mandatory pre-closing screening only applies to the CFIs. The definition of a CFI is rather extensive and encompasses investments concerning target companies and/or their assets from specific statutorily enumerated sectors.

At the time of the preparation of this article, the implementing regulation to the FDI Act has not yet been formally adopted and, therefore, there may be changes to the statutorily enumerated sectors

mentioned above. Presently, the draft implementing regulation covers (i) firearms manufacturers; (ii) entities active in military technology or materials research, development or maintenance; (iii) subjects of economic mobilization; (iv) dual-use items manufacturers or entities active in the research, development or maintenance of dual-use items; (v) entities active in the biotechnology sector; (vi) critical infrastructure operators (i.e., designated as such by the Slovak government); (vii) digital service providers; (viii) entities active in production, research, development of national means of cryptographic protection of information or components necessary for their security function, or which have produced such products and still possess them, if the product has been certified by the Slovak National Security Agency; (ix) entities holding broadcasting authorizations if the broadcasting is not of a local or community nature; (x) operators of content-sharing platforms whose turnover exceeds €2 mil.; (xi) publishers of a periodical publication that is not a community periodical, if it conveys communications of a journalistic nature to the general public; (xii) operators of a news web portal that is not a community periodical; and (xiii) press agencies.

On the other hand, RFIs (subject to voluntary screening only) are not confined to any specific sector.

The threshold for triggering the mandatory FDI review of a CFI is the acquisition of a 10 percent qualifying holding (i.e., voting rights or registered capital) or control over the CFI target company. In addition, an increase in the foreign investor's existing participation in the CFI target company that reaches the qualifying

holding of 20 percent, 33 percent and 50 percent also qualifies as a foreign investment that has to undergo mandatory review.

#### **SCOPE OF THE REVIEW**

Under the FDI Act, foreign investments (both the CFIs and RFIs) shall be screened by the Ministry of Economy (Ministry) from the perspective of whether they might have a negative impact on security and public order in Slovakia or in the EU. When making the assessment, the Ministry shall consider the factors stipulated in Article 4 of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing the framework for the screening of foreign direct investments in the Union (such as potential impact on critical infrastructure, supply of critical inputs, access to sensitive information, or freedom and pluralism of the media) as well as other facts related to the target entity and foreign investor, and the circumstances underlying the investment (in particular, previous economic activities of the foreign investor, entities controlling or controlled by the foreign investor, or financing of the investment).

When assessing the negative effect of a foreign investment, careful consideration shall be given to whether it might affect infrastructure necessary for the administration of justice and imprisonment, access to information important in terms of security and public order, including personal data, and other infrastructure, systems or supplies whose disruption or misuse might threaten security and public order.



## **Foreign investors should consider engaging experienced counsel to navigate them through the entire process**

#### **REVIEW PROCESS TIMELINE**

Under the FDI Act, the type of investment (CFI/RFI) will determine the type of screening process (mandatory/voluntary) and consequently, the review process timeline.

For the mandatory screening process, the Ministry has 130 days to complete its screening of the application. If the Ministry does not issue a decision on the approval or conditional approval of the investment, or it does not submit its opinion on the investment's negative impact to the Slovak government within 130 days of the commencement of the mandatory screening, it shall be deemed that the Ministry has approved the foreign investment.

With respect to RFIs, a foreign investor may, but is not required to, file an application for screening. If the Ministry does not commence the mandatory screening within 45 days of its receipt of the application for screening, it shall be deemed that there is no risk to security and public order in Slovakia or in the EU, and the Ministry shall issue confirmation to this effect to the foreign investor.



### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

As the FDI Act has yet to enter into force, there is no sufficient body of settled case-law/practices and it may be expected that it will take some time until the procedures settle. Therefore, foreign investors should consider engaging experienced counsel to navigate them through the entire process.

If it is unclear whether a particular foreign investment falls within the mandatory regime, for the sake of certainty, foreign investors could

consider (i) consulting the Ministry in this respect (although the FDI Act does not currently anticipate such a consultation regime (and unless a formalized pre-notification procedure is established later), an investor could try to file a non-formalized clarification request to this effect) or (ii) filing an application for a voluntary screening. Further, establishing a good and proactive working relationship with the Ministry's case team will enable the investor to better predict the developments in the proceedings.

### **LOOKING AHEAD**

Given the new regime, we would expect the Slovak government to provide additional guidance in the year ahead, to help foreign investors deal with teething issues that may come up with the introduction of a new regime.



# Slovenia

Since May 31, 2020, certain foreign investments into Slovenian companies can be subject to review. Acquisition of real estate related to critical infrastructure may also be subject to review.

By Marko Ketler, Nina Krajnc, and Monika Jejčič  
Ketler & Partners Ltd., member of Karanović

Slovenia's FDI screening mechanism was launched under the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic (the "Act"), which came into force on May 31, 2020. The provisions governing FDI will remain in force until June 30, 2023; however, it is expected that the screening process will become a permanent measure in Slovenia through the introduction of new legislation.

## RECENT UPDATES

There have been no major changes to the Act in 2022. From the launch of the FDI screening mechanism from May 2020 to August 2022, more than 240 FDIs have been notified to the Ministry of Economic Development and Technology of the Republic of Slovenia (Ministry). To our knowledge, there has been no outright rejections by the Ministry so far.

## WHO FILES

The competent authority to review FDIs is the Ministry, which formed a commission primarily responsible for the review of FDI notifications ("Commission"). A key role undertaken by the Commission is to issue a *prima facie* opinion stating whether the Ministry should initiate a review procedure. In some cases, the Commission also decides that the prescribed requirements for mandatory FDI notification have not been met.

Even if the Commission issues an opinion that the initiation of the review procedure is not required

or that the investment does not fall within the scope of Act, should requirements for mandatory FDI notification be met subsequently, the Ministry may nevertheless subsequently initiate a review procedure and potentially annul the proposed transaction.

If a specific FDI meets the prescribed requirements and/or the Commission issues its informal opinion stating that mandatory FDI notification is required, then the foreign investor is obliged to submit a notification to the Ministry. A foreign investor is defined as a company or organization domiciled in or a citizen of an EU Member State, the European Economic Area or Switzerland, or a third country. Fines up to €500,000 are applicable to a foreign investor if the FDI is not notified within the deadline. Notification may also be filed by the target company or foreign investor's subsidiary in Slovenia. There is no filing fee.

## TYPES OF DEALS REVIEWED

Notification of a specific FDI made by a foreign investor (natural person or legal entity) is mandatory, if it fulfils the following requirements:

- In the case of participation in Slovenian business entity, if:
  - It results (directly or indirectly) in at least (direct or indirect) 10 percent participation in the capital or voting rights in a business entity in the territory of the Republic of Slovenia and
  - Is placed in one of the activities listed in the Act (e.g., critical infrastructure, transport, water, aviation, media, data



## More than 240 FDI have been notified to the Ministry of Economic Development and Technology of the Republic of Slovenia

processing, artificial intelligence, medical and pharmaceutical technology, the supply of critical inputs and similar)

- In the case of acquisition of land or real estate by a foreign investor in Slovenia, if:
  - The land or real estate is essential for critical infrastructure or
  - The land and real estate are located near such infrastructure

The notification is required even if the foreign investor indirectly acquires rights in relation to such land or real estate (i.e., by an acquisition of the company that is the owner of such land or real estate).

## SCOPE OF THE REVIEW

The review is limited to whether a specific FDI represents a threat to security or public order in the Republic of Slovenia.

The Ministry shall take into account in particular:

- Whether the foreign investor is directly or indirectly controlled by the government, including

state bodies or armed forces of a third country, including through ownership structure or significant funding

- Whether the foreign investor has already been involved in the activities affecting security or public order in an EU Member State and
- Whether there is a serious risk that the foreign investor engages in illegal or criminal activities

#### REVIEW PROCESS TIMELINE

The Ministry must issue a decision within two months after the notification. However, the Ministry also holds the right to review and potentially rescind the transaction in the five-year period following the execution of a transaction. The presence of two potential review periods creates relative uncertainty for foreign investors.

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

As in other jurisdictions, it is critical for foreign investors to consider Slovenian FDI screening issues when planning and negotiating transactions. In particular, a foreign investor should ensure that it secures a closing condition predicated on obtaining FDI clearance in Slovenia.

In practice, if there are no specific concerns of the Ministry prohibiting the transaction, it is advised that the closing be suspended until receiving an informal opinion from the Commission stating that there is no need for a review by the Ministry.

Otherwise, if concerns exist, it is advised that closing be suspended until a decision by the Ministry is made to limit the risk of any potential negative consequences.

#### LOOKING AHEAD

Some sections of the Act remain ambiguous, and industry watchers are hopeful that there will be further clarifications to the Act in the near future to clear up these sections for the benefit of foreign investors.

Further, the current FDI framework is only temporary and will remain in force until June 30, 2023. A separate legal act, ensuring a permanent legal basis for FDI screening, is expected to be adopted. Most likely, the existing FDI framework will be amended with the adoption of a new permanent legislative framework.



**A foreign investor should ensure that it secures a closing condition predicated on obtaining FDI clearance in Slovenia**



# Spain

The restrictions imposed by the Spanish government on foreign direct investments during the COVID-19 outbreak have remained after the pandemic.

By Juan Manuel de Remedios, Carlos Daroca, and Laura del Olmo

Since the outbreak of COVID-19 in 2020, foreign direct investments (FDIs) have been subject to increasing scrutiny. The policies enacted during the past two years specifically focus on investments that operate in critical sectors or are made by certain purchasers, subject to certain thresholds.

## RECENT UPDATES

- There have not been major changes to the legislation regarding FDIs during 2022. Initially, it was thought that a developing regulation would be enacted during the year to bring more clarity to how the review mechanism would work. However, this has not happened
- The most relevant change is that the temporary restriction imposed on EU and EFTA residents investing in Spain has been extended until the end of 2024. Consequently, investors resident in the EU or EFTA will remain subject to the screening mechanism if they were to invest in listed companies, or in unlisted companies if the value of their investment exceeds €500 million

## WHO FILES

The FDI filing must be filed by the investor, specifically, by the legal entity that will be investing into the Spanish target.

The filing must be made to the electronic office of the Ministry of Industry, Commerce and Tourism. There is no standard form for the

filing, but it should include the following information:

- Identification of the investor and the target
- Shareholding structure of the investor
- Method by which the investment is being made
- Amount of the investment and
- Effective participation of the investor in the target after the transaction, among other information
- There is no filing fee.

## TYPES OF DEALS REVIEWED

A review will be required if the FDI concerns the acquisition of share capital equal to or greater than 10 percent of a Spanish company, or the acquisition of control over the decisions of a Spanish company by a non-EU or non-EFTA resident (or by an EU or EFTA resident if the transaction is in a listed company or over €500 million in a non-listed company), falling within the following domains:

- The company conducts its activity in a strategic sector or in relation to critical infrastructure as expressly provided by law
  - The entity is directly or indirectly controlled by a government
  - The company's activities are related to national defense or
  - The entity is likely to be carrying out illegal or criminal activities that affect public security, public order or public health in Spain
- Notwithstanding the above, investments of less than €1 million are not subject to the investment control mechanism.



**The FDI filing must be filed by the investor, specifically, by the legal entity that will be investing into the Spanish target**

In practice, it is not always clear when a transaction should be reviewed. To remedy this situation, the regulator has provided a questionnaire, through which they advise whether or not the transaction is subject to scrutiny.

## SCOPE OF THE REVIEW

The review by the regulator focuses on several aspects, but specifically these are the most relevant ones:

- The investor: The regulator focuses primarily on the nationality of the investor, its shareholding structure, its ultimate beneficiaries, and what other investments it has made
- The target: The regulator is interested in who the target is controlled by prior to the transaction and what its main activity is, in case the acquisition could affect public order, safety or health in any way
- Means to carry out and amount of the investment: The regulator focuses on how the transaction will be carried out, whether it will result in a change of the target's

activity and what the amount of the investment will be. In practice, it is usually sufficient to include this information in the filing, and it is not usually necessary to provide the sale purchase agreement or any other documentation related to the transaction

- Management of target after the transaction: The regulator is interested in how the company will be managed after the transaction, who will be part of its governing body, if it intends to change its activity, or if it intends to make substantial changes with its employees, among other aspects. In practice, at the time of filing, there is usually not much information on these issues, so the regulator focuses less on them than on the above-mentioned aspects.

#### REVIEW PROCESS TIMELINE

The applicable legislation establishes that the authority must authorize or deny the transactions within a maximum period of six months. Once this period has elapsed without a response from the authority, it will be understood that the authorization has been denied.

In practice, the period within which the authority takes to respond to an authorization request

filing is shorter, approximately two to three months.

For foreign investors who submit the questionnaire seeking a preliminary opinion as to whether the authorization mechanism applies, the authority has no legal deadline to respond to the questionnaire and the investor should assume that the foreign direct investment proposal is rejected if there is no response from the regulator. In practice, the average time taken by the authority to respond to questionnaires is approximately one-and-a-half months.

In any case, the response time, both for the authorization and for the questionnaire, will depend on the volume of requests that the authority has at the time.

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

A good form of protection for investors is to receive specific advice on each transaction, as the application of the mechanism is still quite uncertain given its recent introduction.

It is useful to consider similar transactions that have been made previously, as this may be an indicator of whether or not it will be necessary to seek approval.



### A good form of protection for investors is to receive specific advice on each transaction

It is also useful to provide the necessary information to the authority in advance, as this may avoid additional questions from the authority and speed up the response process.

#### LOOKING AHEAD

Industry watchers expect the government to introduce a new bill to further augment the current regulation at some point. The enactment of a new act will affect the foreign investment regime, for example, many of the interim measures adopted during the pandemic in relation to FDI inflows into Spain, such as restrictions on EU and EFTA residents investing in Spain, may become permanent.



# Sweden

Other than security-related screening, Sweden is currently still without a general FDI screening mechanism.

By Henrik Wireklint, Marcus Halling, and Jennie Storm

Since 2021, the Swedish Security Protection Act (Security Act, Sw. Säkerhetsskyddslagen) requires that any transaction involving a Swedish entity operating security-sensitive activities or assets must be notified and receive approval from one of the reviewing authorities before completion. This being said, Sweden still does not (yet) have a general FDI screening requirement for transactions not coming under the Security Act.

## RECENT UPDATES

- After a proposal for a more general FDI screening framework was presented by the Direct Investment Inquiry (Sw. Granskning av utländska direktinvesteringar) in November 2021, many expected that a general FDI screening framework would be adopted during the course of 2022 and be implemented in 2023. However, no formal proposal has yet been put forward by the Swedish government or adopted by the Swedish parliament. Hence, Sweden remains a country without a general FDI screening mechanism
- The Security Act has been subject to updates during 2022, but such amendments have not resulted in any major changes for the FDI screening process
- In addition to the updated legislation, several of the 13 reviewing authorities under the Security Act have updated their internal instructions (Sw. föreskrifter) to ensure that their



**It is the seller that is responsible for the assessment of the applicability under, as well as compliance with, the obligations of the Security Act**

procedures correspond with the updated Security Act. For example, it is now specified in the instructions issued by the Swedish Security Police that the application for a consultation in connection with a transaction shall include a description of the intended transaction, a security assessment and information about the acquirer and its ownership structure

## WHO FILES

The notification under the Security Act must be submitted by the seller. The notification shall be submitted to the relevant reviewing authority, which differs depending on the target company's activities or, in case of a public entity, the geographic location of its activities. Moreover, it is the seller that is responsible for the assessment of the applicability under, as well as compliance with, the obligations of the Security Act.

The seller should first conduct a security assessment to identify the specific activities, assets or information that the investor may get access to following the transaction. Based on the security assessment, the seller shall determine if the

transaction is appropriate from a security protection point of view. The assessment of appropriateness shall be documented. If the assessment of appropriateness leads to a conclusion that the transaction is appropriate, the seller shall consult with the relevant authority by submitting a notification including the underlying assessments and general information about the parties and the transaction. The transaction cannot be completed until such consultation has been completed.

## TYPES OF DEALS REVIEWED

A transaction must be notified if it involves a Swedish entity that carries out security-sensitive activities, has assets that are considered security-sensitive or has access to security-sensitive information, also known as classified information (security-sensitive activities). It falls upon the target company and/or its seller to assess whether the operations of the entity fall under the concept of security-sensitive activities. If the outcome of the assessment is that the entity's operations fall under the notification obligation, the seller must follow the notification procedure set out in the Security Act.

The obligation by the seller to notify applies to both Swedish and foreign (EEA and non-EEA) investors. Moreover, there are no specific thresholds with respect to acquired shareholding or control. The Security Act refers to the transfer of the whole or a part of the target entity. Only the transfer of shares in public limited companies is explicitly exempted.

The concept of security-sensitive activities, assets or information is broadly defined by the Security Act as activities that are important to Sweden's security or are covered by international protective security commitments binding for Sweden. Some further guidance can be found in the preparatory works to the Security Act, which mention sectors such as defense, law enforcement, energy and water supplies, vital infrastructure, telecommunications and transport that would be considered security-sensitive.



**In order to trigger the need for security protection, the effects on national security must be material and measurable**

#### **SCOPE OF THE REVIEW**

If the assessment of appropriateness leads to the conclusion that the transaction is not appropriate from a protective security point of view, the transaction may not be completed.

The reviewing authorities have the powers to block a transaction or approve it subject to commitments. Moreover, if the seller fails to notify a transaction that falls under the scope of the Security Act, a consultation procedure may be initiated *ex officio* and the transaction can be prohibited and held to be null and void, even post-closing.

According to limited and non-binding guidance issued by the Swedish Security Police, a transaction is considered inappropriate if the acquirer's access to the target's assets or operations may cause risks to national security. The target's operations or assets may also be of such a nature or such a significance for national security that a transfer of these to the acquirer is in itself inappropriate. Moreover, a transaction may be inappropriate if the acquirer represents foreign interests. The test is linked to a central question: What would the effects of a hostile action, such as an attack, espionage or an interruption of the target's business, products or services, have on Sweden's national security?

In order to trigger the need for security protection, the effects on national security must be material and measurable. For example, given that Sweden's population is largely geographically diverse and mainly concentrated in the Stockholm region, security concerns in relation to certain activities located in Stockholm will likely have a greater impact on national security compared to similar activities located in scarcely populated areas.

#### **REVIEW PROCESS TIMELINE**

There is no official timing for the review process. However, the reviewing authorities have an obligation to comply with general Swedish administrative rules, which require that the procedure is handled swiftly. A decision should normally be issued within one to two months, but there is no guarantee that this will be the case, and no direct recourse is available if a process is delayed. The Swedish government has stated that it is looking into this issue, meaning that this may be changed in the future.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

Although the Security Act has been in force since the 1990s, it has traditionally been a concern for a limited group of companies and government entities. The recent

amendments, requiring certain investments to be notified, have thrown protective security issues into the spotlight of Swedish transactions. As the applicability of the Security Act is based on a self-assessment, target companies are now expected to be aware of the Security Act and whether it applies to their operations.

In view of the novelty of the notification obligation, there is limited guidance on the sectors and industries covered by the Security Act as well as the review process. A case-by-case assessment of the target is therefore recommended in every deal.

An investor who aims to invest in any of the highlighted industries (defense, law enforcement, energy and water supplies, vital infrastructure, telecommunications and transport) should anticipate an assessment of the target company's services or products, assets, information accessed or stored and customers in order to draw a conclusion on the applicability of the Security Act. As pointed out above, the responsibility for the assessment of the applicability of the Security Act as well as the notification lies on the seller and prior clearance should be a condition of any prospective deal.

## LOOKING AHEAD

It is likely that a proposal for a general FDI screening framework will be put forward by the Swedish government during the course of 2023. If such proposal follows the proposal from the Direct Investment Inquiry, it will have a wide scope and enable the Swedish Inspectorate of Strategic Products (Sw. Inspektionen för Strategiska Produkter) to review and block foreign investments by non-EU, EU and Swedish investors in activities "worthy of protection." Such activities include security-sensitive businesses and functions that are fundamental to the society (similar to today's rules), and also dual-use products, critical metal and minerals, and the development of new technologies. Compared to the current screening, the new regulation could also apply a higher threshold for when transactions may be prohibited, and provide a more structured notification procedure.

According to the proposal, the current security screening regime regulated in the Security Act and the proposed FDI regime would apply in parallel, with no framework superseding the other. In practice, a deal involving security-sensitive activities could thus be subject to two parallel notifications. It remains to be seen if this burdensome mechanism is maintained in any forthcoming proposal from the Swedish government.



# Switzerland

Historically, Switzerland has been very liberal regarding foreign investments. However, there has recently been increased political pressure to create a more structured legal regime for foreign investment.

By Raphaël Schindelholz, Marie Flegbo-Berney, and Stéphane Lagonico  
Bonnard Lawson

Unlike many other European jurisdictions, Switzerland has traditionally been a very attractive jurisdiction for foreign investments, with few or no restrictive conditions. However, that could change under a new FDI regulation, the idea of which was first mooted by the Swiss Parliament in March 2020, and slated to take effect sometime in 2024.

## RECENT UPDATES

- Historically, there has been no general foreign investment control in Switzerland
- However, and while the Swiss Federal Council has been opposed to legislation on foreign investment in Switzerland, Parliament passed a motion to that effect in March 2020. In this context and at the time, the Federal Council stated that the objective in introducing broader investment controls would be to ensure that Switzerland remains open and attractive to foreign investors. The consultation process on the new FDI regulation was completed on September 9, 2022, and the preliminary draft of the bill revealed the stated purpose was to prevent a threat or endangerment to public order or security by the acquisition of domestic enterprises by foreign investors
- This preliminary draft has led to a great deal of criticism, being both too broad (the circle of companies covered goes beyond the strategic and security areas) and imprecise (the criteria are not detailed, which leaves far too

much room for maneuver to the federal administration, i.e., the Secretariat of State for Economic Affairs). That being said, given recent events in Europe, there has been new momentum behind this legislation, particularly on the importance of securing supply chains and energy

## WHO FILES

There are currently no general foreign investment controls in Switzerland; foreign investment control only applies to certain industries and sectors, in particular banking/securities and real estate, where prior government approval is required. A number of additional business activities require a license from the authorities and, in the following fields: aviation; telecommunications; nuclear energy; and radio/television, the licensing conditions include specific requirements regarding foreign investors.

In the cases mentioned above, the reasons for the longstanding limitation of access to foreign investors in the legislation are linked to the very specific context of these sectors, as opposed to a desire to control foreign investment from an economic perspective.

However, the Swiss Parliament has mooted the idea of a new bill, which may lead to greater controls on FDI into Switzerland. This new bill contains two differing axes. First, there is a mandatory authorization regime that will apply to any acquisition by a foreign state or a foreign company under state influence, regardless of the target industries or activities (but subject



**Foreign investment control only applies to certain industries and sectors, in particular banking/securities and real estate, where prior government approval is required**

to a general exemption if the target company has had fewer than 50 full-time employees and annual sales of less than CHF 10 million on average worldwide in the past two financial years). Second, for private (i.e., neither state nor state-controlled) foreign investors, acquisitions in certain restricted sectors would be subject to an authorization regime regardless of the turnover of the target company.

Under this new bill, applications, where required, should be submitted by the foreign investor. The State Secretariat for Economic Affairs (SECO)- Federal Department of Economic Affairs, Education and Research will be the competent authority to consider applications submitted by or on behalf of foreign investors.

## TYPES OF DEALS REVIEWED

As the preliminary draft bill currently stands, the chosen approach of the future legislation is based on two different axes:

- A mandatory authorization regime will apply to any acquisition by a foreign state or a foreign company under state influence,

regardless of the target industries or activities (but subject to a general exemption if the target company has had fewer than 50 full-time employees and annual sales of less than CHF 10 million on average worldwide in the past two financial years)

- For private (i.e., neither state nor state-controlled) foreign investors, acquisitions in the following areas are also subject to an authorization regime regardless of the turnover of the target company :
  - Companies that provide defense equipment or services essential to the operational capability of the Swiss military
  - Companies that produce dual-use goods
  - Companies active in the fields of energy and water supply and
  - Companies that provide central IT security systems or security services for the national authorities

The same will apply to acquisition in the following areas if the target company had an average turnover of at least CHF 100 million in the two years preceding the planned acquisition:

- General hospitals
- Companies active in the research, development, production and distribution of pharmaceuticals, medical devices, vaccines and personal medical protection equipment
- Companies in the field of freight and passenger transportation and logistics, such as operators/owners of airports, railroad infrastructures or food distribution centers
- Operator/owners of national telecommunications networks and

- Operators of systemically important financial market infrastructures and systemically important banks

However, the bill reserves the right for the authority to subject any other sector to authorization, for a period of 12 months, if it considers that the guarantee of public order or security so requires. Some critics will see this as a strong legal uncertainty, even if its application is reserved for “exceptional circumstances.”

No thresholds are disclosed regarding the target company’s turnover or regarding the percentage of stock/participation rights triggering a compulsory notification. The definition of an acquisition will be very broad, inspired by the notion of control in antitrust law. The explanatory report of the Federal Council explains that the term “acquisition of control” includes all possible means and forms of control, direct and indirect. The foreign investor(s) exercising control must be able to decide on important questions of management and business policy of the controlled

company, but the extent to which the possibility of control is actually exploited is not relevant; it may, for example, result from the acquisition of an equity interest or the conclusion of a contract. The determining level of participation is thus variable: From 50 percent of the voting rights in a private company with only a few shareholders, it can be lowered to 20 percent or 30 percent when the company is open to the public.

The notion of acquisition also covers (i) the purchase of important assets (such as plant, machinery or patents) in order to prevent a company from selling its strategic assets—this being comparable to a loss of control—and (ii) the merger of at least one foreign company with at least one Swiss company that were previously independent of each other.

An acquisition only occurs if all or part of an existing Swiss company is taken over—the creation of an entirely new company is not subject to control by the authority.



**The definition of an acquisition will be very broad, inspired by the notion of control in antitrust law**



## SCOPE OF THE REVIEW

In principle, the acquisition will be approved if there is no reason to believe that it threatens or endangers public order or safety.

The decision will be based on the following key elements, among other things:

- Investor characteristics (activities having a negative effect on the public order or security of Switzerland or other states; resorted to espionage; sanctioned by an embargo)
- The services, products or infrastructure of the Swiss company can be replaced within a reasonable period of time
- The acquisition provides access to key data protection information and
- The acquisition leads to significant distortions of competition

## REVIEW PROCESS TIMELINE

The review is to be carried out in two stages:

- An expedited (within a month) review of the need for authorization. If none of the criteria are met, the acquisition may be carried out without an in-depth approval procedure
  - If deemed necessary, an in-depth approval procedure, the duration of which is limited to three months. SECO will be responsible for coordination with other offices. If one of the agencies involved disagrees or if they unanimously deem the acquisition to be of significant political importance, the Federal Council will be the ultimate decision-making body
- If SECO exceeds these processing deadlines, the authorization will be deemed to be granted.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

The new bill is still under consideration by the Swiss Parliament, and it is still unclear what the new FDI regime will eventually look like. Foreign investors should continue to stay plugged into this topic, and seek local counsel assistance if they expect to encounter any potential FDI issues.

## LOOKING AHEAD

We are awaiting the revised version of the bill that will be submitted to Parliament for its deliberations. The legislation is not likely to come into force until 2024. As such, we expect to get greater clarity on how the bill will operate in the year or two ahead.



# Türkiye

Making Türkiye an attractive investment destination continues to be a priority for the government.

By Sezin Elçin Cengiz and Esmâ Aktaş

The Turkish foreign direct investment (FDI) regime is mainly regulated under the Turkish FDI Law published in 2003 and the Turkish FDI Regulation. Turkish FDI Law provides that foreign and Turkish investors should be treated equally. Moreover, the Turkish government has started investment incentive programs to maintain domestic economic stability. To that end, in 2021, Türkiye's FDI Strategy (2021 – 2023) Report was published and the relevant report aims to increase Türkiye's FDI market share in global FDI inflows to 1.5 percent by 2023.

## RECENT UPDATES

- To encourage FDI in Türkiye, the Investment Office of the Presidency of the Republic of Türkiye developed Türkiye's FDI Strategy (2021 – 2023) Report in cooperation with relevant public and private industry organizations
- The government's strategy targets bringing in value-added investments in strategic areas in the Turkish economy and increasing Türkiye's market share in global FDI inflows
- According to the Ministry of Industry and Technology, as of mid-2022, the number of companies with international capital in Türkiye hit 78,257, up from 5,600 in 2002
- Moreover, according to the Central Bank of Republic of Türkiye, the FDI in Türkiye increased to US\$949 million as of November 2022

## WHO FILES

The FDI regime is based on a post-closing notification procedure, rather than a prior approval/review procedure. There is no suspension requirement. In this context, foreign-capitalized companies, or companies that become foreign-capitalized as a result of the transaction, are responsible for filing the notifications. FDI companies are obliged to make certain notifications to the Ministry's General Directorate of Incentive Practices and Foreign Capital through an online system named E-TUYS. Moreover, foreign-capitalized companies may also designate the authorized signatories to submit any required notification via E-TUYS.

## TYPES OF DEALS REVIEWED

Under the Turkish FDI regime, FDI is defined as importing cash capital, company securities (excluding state securities), machinery and equipment, and industrial and intellectual property rights to Türkiye from abroad, or setting up a new company or branch, or joining the shareholding of a company by way of acquiring shares outside securities exchanges, or at least 10 percent shareholding or voting rights at the same amount from securities exchanged through economic assets by foreign investors.

## SCOPE OF THE REVIEW

FDI companies submit any required notification to the Ministry of Industry and Technology's General Directorate of Incentive Practices and Foreign Capital through the



**Foreign-capitalized companies, or companies that become foreign-capitalized as a result of the transaction, are responsible for filing the notifications**

E-TUYS online system; however, these notifications do not require an approval from the relevant ministry. In other words, mere notification is sufficient. To that end, pursuant to Article 6 of the FDI Regulation, approval is only required for companies establishing a liaison office in Türkiye.

Changes to the capital and shareholding structure of FDI companies must be notified within one month. FDI companies must also submit annual notifications by filling out a standard form requiring general information pertaining to the FDI company, including its trading name, address, tax identification number, and brief information regarding its subsidiaries and shareholding structure.

Separately, certain sector-specific legislations also include provisions related to FDI, and these legislations may require further approvals from relevant authorities such as the Ministry of Environment, Urbanization and Climate Change, Energy Market Regulation Authority,

Ministry of Treasury and Finance, and Banking Regulation and Supervision Agency for investments into these regulated sectors.

The FDI rules in Türkiye apply to transactions that will result in a change in the direct shareholding of a Turkish company. If the transaction will not result in a direct change in the shareholding structure of the Turkish subsidiary, the transaction will not be subject to any filing/notification obligations within the scope of the FDI rules in Türkiye. If the investment is considered a merger and/or acquisition or an establishment of joint venture under the Turkish merger control rules, this transaction is also subject to a mandatory filing with the Turkish Competition Authority (TCA) as well.

#### REVIEW PROCESS TIMELINE

There is generally no time limit stipulated for review processes under the Turkish FDI regime. The duration of the review process would depend on the specific factual matrix in question. There is no general requirement for pre-filing or initial review. For liaison offices, under Article 6 of the FDI Regulation, the application is reviewed within 15 business days after submission of all requested information and documents.

In terms of the TCA's review process for merger notifications, if the Competition Board does not respond within 30 calendar days upon a complete filing, it is considered to be a tacit approval. However, in practice, the Board almost always responds within the 30 calendar-day period by sending a written request for information. Any written request by the TCA for missing information will restart the timelines. Cases that do not raise significant competition concerns are likely to be reviewed within four to six weeks.

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

The Turkish FDI regime is based on the concept of freedom to invest. Article 3 of the FDI Law provides that foreign investors can invest in Türkiye directly and they must be treated equally as local investors. Having said that, certain sectors have specific regimes because of additional concerns in relation to public security and public interest. To that end, the foreign investors should take into account whether the envisaged transaction triggers additional FDI requirements and filings under sector-specific legislation.

For cases involving potential mergers, acquisitions or joint ventures, it is also important to conduct an assessment as to whether the envisaged transaction is subject to the mandatory notification to the TCA as well. Foreign investors should bear in mind that failure to comply with the notification requirement might lead to an administrative monetary fine amounting to 0.1 percent of the turnover generated during the financial year preceding the decision date.

#### LOOKING AHEAD

- Under Türkiye's FDI Strategy (2021 – 2023) Report, the Turkish government has aimed to increase its share in the global FDI market to 1.5 percent by 2023, by increasing Türkiye's performance in terms of the quality FDI profiles such as R&D, design and innovation center investments, technology-intensive production investments and export-oriented production investments, and developing FDI-related regulatory framework and support and incentive mechanisms
- Considering that the FDI Law was introduced in 2003, we expect that the Ministry might introduce further developments to the Turkish FDI legal framework and procedure in the near future, to bring the law into closer alignment with European Commission practice
- Based on the findings of the FDI Strategy Report, we can expect the introduction of new regulations on environment and sustainability matters such as the European Green Deal



**The FDI rules in Türkiye apply to transactions that will result in a change in the direct shareholding of a Turkish company**

# United Arab Emirates

Foreign direct investment is permissible in the UAE, subject to applicable licensing and ownership conditions.

By Stefan Mrozinski

Recent legislative changes demonstrate significant progress in liberalizing the extent to which foreign investors can invest in companies onshore in the UAE (defined below); however, foreign direct investment continues to be primarily targeted toward the UAE's financial and non-financial free zones. With respect to onshore companies in the UAE, prior to any acquisition, an investor should consider the nature of the intended business activities and the extent to which foreign ownership of businesses carrying out such activities is permitted.

- For the purposes of corporate law, the UAE comprises two jurisdictions:
  - Offshore UAE – comprising:
    - (i) the two financial free zones (being the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM)); and
    - (ii) various non-financial free zones (of which there are more than three dozen)
  - Onshore UAE – being the geographical space that falls within the UAE's borders but outside of offshore UAE
- Foreign investment remains primarily targeted toward offshore companies in the UAE, as the financial and non-financial free zones permit 100 percent foreign ownership. For FDI into offshore companies in the UAE, the applicable laws and regulations in the relevant offshore jurisdiction will need to be considered

- Until recently, there were significant restrictions with respect to foreign ownership in onshore companies in the UAE. Such restrictions meant that a foreign investor could hold a maximum of 49 percent of the share capital of an onshore limited liability company in the UAE, with a UAE national or company holding (at a minimum) 51 percent of the company's shares
- Recent legislative amendments have relaxed these restrictions regarding certain business activities. Thus, where foreign ownership in an onshore company in the UAE is being considered, the following three possibilities are now available:
  - Positive List activities – 100% foreign ownership is permitted in businesses that conduct activities set out on lists of approved commercial activities (Positive Lists) published by the UAE's Departments of Economic Development (DED). The DEDs act alongside the UAE's Ministry of Economy, as the primary regulatory bodies governing the establishment, licensing and operation of onshore companies in the UAE, including for companies where foreign ownership is intended
  - Strategic Impact Activities
    - UAE Cabinet Decision No.55/2021 sets out a list of strategic impact activities (the Strategic Impact List) that are of an increased commercially sensitive nature and that attract higher levels of regulatory supervision, such as activities of a military

nature, financial services activities or telecommunications activities (among others). Any investor, including foreign investors, intending to invest into a company carrying out an activity set out in the Strategic Impact List must notify to the relevant UAE regulatory authority to understand whether the regulatory authority will permit it to acquire the shares in/incorporate the relevant company

- 49/51% – Where a company's activity falls neither on a Positive List, nor on the Strategic Impact List, the previous foreign ownership restrictions (i.e., 49 percent foreign ownership: 51 percent Emirati ownership) is understood to apply, although this is not expressly stated in applicable UAE law
- With respect to the transfer or acquisition of any shares in a UAE company, an extensive KYC check will be undertaken on the proposed investor and its ultimate beneficial ownership, including every entity in the chain
- Breaches of the laws governing foreign ownership in onshore UAE may result in the imposition of fines or imprisonment. Moreover, the Ministry of Economy or competent authority, as the case may be, may request to dissolve a company if incorporated or if it performs an activity in violation of the provisions governing foreign ownership. In practice, the UAE is a jurisdiction where cooperation from relevant authorities is required on an ongoing basis in order to operate a business



# United Kingdom

The UK's National Security & Investment Act has now been in place for a year and has already made its mark, prohibiting deals on national security grounds and also requiring remedies in cases that are not subject to the mandatory notification requirement. We expect a continued tough approach over the next year as global geo-political tensions bring national security concerns to the fore.

By Marc Israel, Kate Kelliher, and Luc Rosenberg

The National Security and Investment Act 2021 (NSIA) became operational on January 4, 2022 and has since become a regular feature of transactions. Certain transactions in 17 sectors require notification, but the regime can apply to any transaction, so voluntary filings are also made if an acquirer would like absolute certainty that a transaction will not be retrospectively reviewed. The regime is administered by the Investment Security Unit, which has been recently relocated to sit within the responsibility of the Cabinet Office, with the Chancellor of the Duchy of Lancaster and Secretary of State for the Cabinet Office (the Secretary of State) exercising final decision-making powers.

## RECENT UPDATES

Qualifying transactions require notification if the target carries on specified activities in any one of 17 “sensitive sectors.”

Unusually, the NSIA is not a true “foreign” direct investment screening mechanism, as it applies equally to UK and foreign investors alike. Indeed, the first conditional decision issued under the NSIA in July 2022, *Epiris/Sapura*, imposed conditions on UK-based investor Epiris in the context of its acquisition of the digital communications provider that supplies radio solutions to UK emergency services.

## WHO FILES

Mandatory notifications are filed by the investor. Voluntary notifications, however, can be filed by any party, i.e., the investor, the seller or the target itself.

## TYPES OF DEALS REVIEWED

Very little information about NSIA notifications is published. The very fact that a filing has been made is typically not made public, and only if a transaction is blocked, or subject to conditions will a final order (with minimal detail) be published. Transactions that are cleared are not publicized, and the total number of notifications will only be made public in the annual report covering the NSIA.

During 2022, 14 transactions were the subject of “final orders” either imposing conditions on the transactions or prohibiting the transaction outright.

Prohibitions were issued in five instances. Notably, of the five, four of these prohibitions concerned investors from China/Hong Kong. Two of these prohibitions ordered the unwinding of transactions that had already been concluded before the mandatory filing requirements under the NSIA came into force. This power is a feature of the NSIA, which allows the UK government to “call in” any transaction concluded from November 12, 2020. This retroactive power to call in a transaction for review ordinarily applies for up to five years from the date of the transaction, although this can be reduced to six months if the Secretary of State becomes aware of the transaction (e.g., as a result of a voluntary notification).

Conditions were imposed on nine transactions. In terms of the sensitive sectors that have been subject to conditional decisions—energy; defense/military and dual-use; satellite and space technology; quantum technology and communications—all feature.



**Qualifying transactions require notification if the target carries on specified activities in any one of 17 “sensitive sectors”**

Conditions vary by sector and have included, for example:

- Requirements to implement enhanced security controls to protect sensitive information and technology from unauthorized access
- Requirements that certain key personnel or board members are pre-approved by UK government authorities and
- Restrictions on the sharing of certain target information, including with the investor
- Again, Chinese investors feature prominently, with at least four of the conditional decisions imposed on Chinese investors. However, conditions have also been imposed in transactions with UAE, UK and US investors.

## SCOPE OF THE REVIEW

The scope of the review under the NSIA is three-pronged, with the ISU assessing:

- Control risk: i.e., the level of control that will be asserted by the prospective investor. Less control merits less concern from a national security perspective, particularly where an investor is seeking to take a non-controlling

stake. A mandatory filing can be triggered with a 25 percent equity or voting stake, so the level of the investment will affect the determination of the control risk

- Target risk: This refers to the extent to which the target is being used, or could be used, in a way that raises a risk to UK national security. This may involve, for example, considerations such as proximity to sensitive sites as well as the specific nature of the target’s activities. Ultimately, however, any target falling within the defined sensitive sectors will raise target risk considerations. Where targets fall within multiple sensitive sectors, this risk may be considered enhanced
- Acquirer risk: This entails a review of the acquirer including the ultimate controller. Specifically, the acquirer risk assessment will

consider whether the acquirer “has characteristics that suggest there is, or may be, a risk to national security from the acquirer having control of the target.” These characteristics include associations with states or organizations that may be considered hostile to the UK, although this concept is undefined. Helpfully, however, previous guidance has made clear that a history of passive or long-term investments may indicate low or no acquirer risk.

**REVIEW PROCESS TIMELINE**

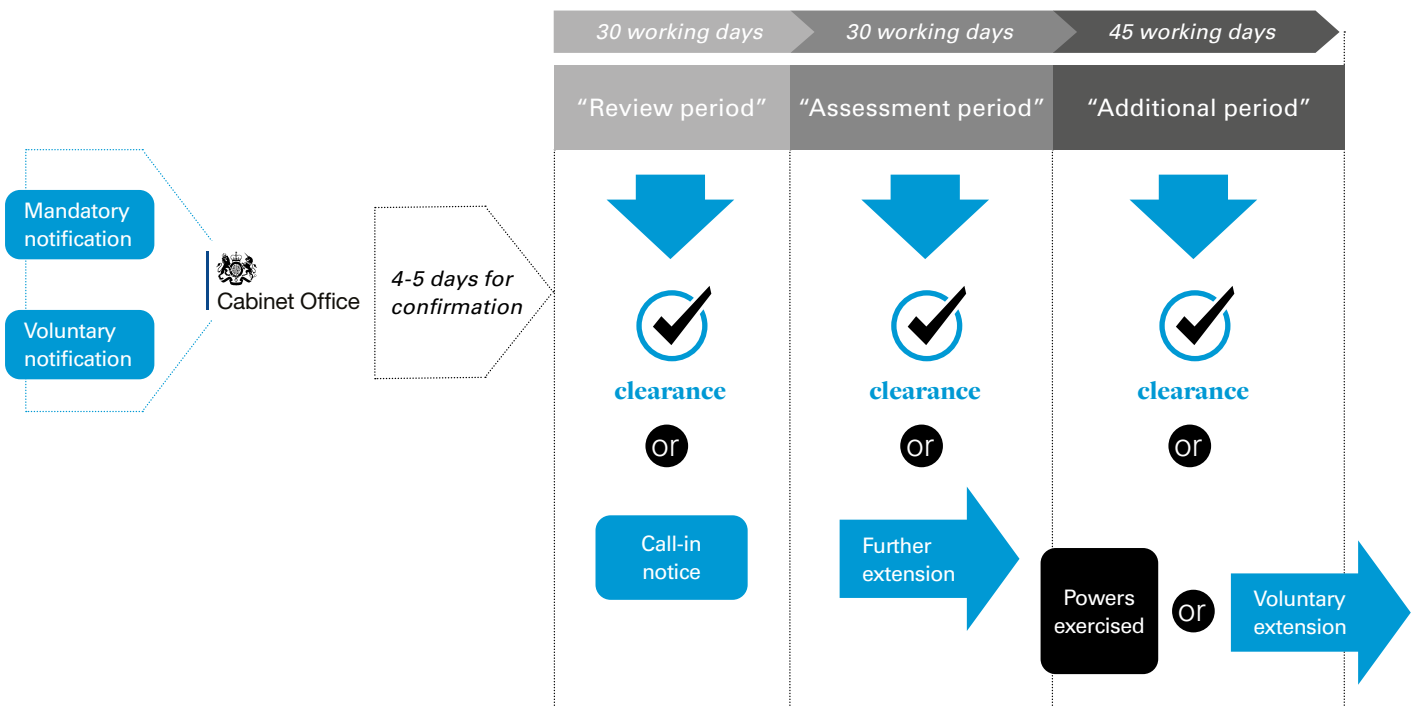
The timeline under the NSIA runs from the date that the notifying party receives confirmation that the notification is accepted as complete. Typically this takes three to four working days (WD) from the submission of the notification.

Once this confirmation is received, the review process is divided into two parts:

- A 30-WD “review period” that applies to all notified transactions and
- A 30-WD “assessment period,” which applies to any transactions that are subject to a “call-in notice” indicating that they will be subject to more detailed scrutiny. This can be extended by another 45 WD if required. Any further extensions beyond this time period require the investor’s written consent

These timelines are illustrated below. In graphic below, should read: Call-in notice, Review period, Assessment period, Additional period, Mandatory notification, Voluntary notification

**The total timescale for review; information or attendance notices issued during the assessment period stop the clock**





## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

It is, of course, crucial to understand whether or not a transaction requires a mandatory notification. As this analysis is all target-focused, engaging due diligence of prospective targets early on for these purposes is very important.

Thus far, the focus in terms of probing transactions, and imposing conditions, has been on information ring-fencing and securing continuity of supply to critical services in the UK. Therefore, it is important to have a clear narrative in place around the control, information-sharing and intentions that an investor has for a sensitive target in the UK.

In terms of transaction certainty, investors may want to consider judicious use of the voluntary notification option. For example, while mandatory notifications are only required with respect to share sales—asset deals that would otherwise trigger if structured as a share deal—would be a good candidate for voluntary pre-clearance. This also eliminates the prospect of a retrospective call-in after the transaction has closed.

For transactions that are subject to call-in review, it is notable that often there will be limited, if any, engagement with the ISU. The ISU has the power to issue information notices (and attendance notices) but will not necessarily do so. Nonetheless, an investor always has the option to submit further information for the Secretary of State's attention that must be taken into account in his/her decision under the provisions of the NSIA, and selective use of this option can help to allay potential concerns.

It is also important to keep in mind, however, that the vast majority of transactions will be cleared without a "call-in" review.

## LOOKING AHEAD

The chief decision-maker under the NSIA is the Secretary of State. Since the regime has come into force, there have been four decision-makers, with the latest, Oliver Dowden MP, assuming responsibility for the NSIA on February 7, 2023. Doubtless, there is some learning to be expected from Mr. Dowden's decision-making, therefore, in terms of the projects and types of investors that he prioritizes for review.

Indeed, the difference in approach between the men who have occupied this position since the regime took effect in January 2022 is ably demonstrated by the November prohibition decision on Nexperia's concluded acquisition of 86 percent of Newport Wafer Fab, the Britain-based semi-conductor company. Kwasi Kwarteng, the first NSIA Secretary of State, was originally told not to call in the transaction at all, according to a letter written by Tom Tugendhat, MP to then-Prime Minister Boris Johnson, in July 2021 urging intervention. This position was reversed, however, with the deal being exposed to further scrutiny under the NSIA call-in process before eventually being prohibited, mandating an unwinding of the completed transactions, under a decision taken by the previous office-holder, Grant Shapps MP, on November 16, 2022.

In terms of sectoral focus and decision-making practice, the NSIA mandates the publication of an annual report, covering the period from April 1 to March 31 each year. Per those requirements, we can expect an annual report in spring of 2023, which should provide further insight into the sectors that are featuring most prominently in notifications, the percentage of deals being cleared without detailed "call-in" review, and the average timescales attaching to each step in the NSIA process.



# Australia

Australia requires a wide variety of investments by foreign investors to be reviewed and approved before completion of the investment.

By Stephen Carlton, John Tivey, Nirangjan Nagarajah, Sidney Tang, Fiona Blanch, Belinda Harvey, and Stefanie Benson

The decision to approve or deny a foreign investment application is ultimately made by the Treasurer of Australia, based on an assessment of whether the investment would be contrary to the national interest and national security.

When making its decision, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**), which examines foreign investment proposals, consults with other relevant Australian government agencies as required, and advises on the national interest and national security implications. Australia's foreign investment policy framework comprises the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the "**Act**") and its related regulations, the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its related regulations ("**Fees Regime**"), Australia's Foreign Investment Policy (the "**Policy**") and a number of guidance notes.

## RECENT UPDATES

- New government: A new federal government was elected in May 2022, with a new Treasurer appointed thereafter. While this immediately impacted penalties and the fees payable for assessing an application to FIRB (see below), it is unclear whether any substantive reforms on top of those in 2021 (also see below) will be implemented by the new government with respect to the FDI regime generally
- Fees: The new Treasurer announced in July 2022 that fees for making foreign investment

decisions would double from July 29, 2022, with a maximum cap set at AUD1,045,000

- Compliance: The Australian government has again increased its focus on compliance activities, enforcement and audits, particularly with respect to tax and data conditions imposed on FIRB approvals, with contraventions that relate solely to residential land doubling as of January 1, 2023
- Reforms: As of January 2021, with the implementation of an updated foreign investment regime, the government's focus has firmly been on national security and compliance. The reform package included:
  - A new "national security test" created for foreign investors proposing to acquire a direct interest in a "national security business" or "national security land." The Treasurer now also has the power to impose conditions or block any investment on national security grounds, regardless of value
  - A new voluntary notification regime with respect to "reviewable national security actions," i.e., acquisitions involving a foreign person proposing to acquire a direct interest in any entity or Australian business, or any interest in Australian land
  - A new "call-in" power that allows the Treasurer to screen any investment that would not ordinarily require mandatory notification (i.e., a voluntary "reviewable national security action" noted above, which was not voluntarily filed at the time of acquisition), on

national security grounds for a period of ten years following completion of the acquisition.

- In cases where the Treasurer determines the acquisition was contrary to national security, the Treasurer may make a number of orders, including in extreme cases, disposal orders
- Updated sectoral guidance in FIRB Guidance Note 8 on national security, to include additional commentary for sectors such as health, critical minerals and technology, public infrastructure, energy, gas, electricity, transport and data
  - Removal of the 40 percent threshold for the foreign government investor test: Private equity investors are no longer treated as foreign government investors purely by virtue of passive upstream investors who are foreign government entities holding, in aggregate, >40 percent of the interests in that private equity investor (e.g., fund)
  - Expansion of the exemption certificate regime with ability for the Treasurer to grant investor-specific exemption certificates



**The Australian government has again increased its focus on compliance activities, enforcement and audits**

- Stronger and more flexible enforcement options, including powers to impose or vary conditions to approvals, or, as a last resort, require divestment of previously approved investments where national security risks emerge (compliance with approval conditions is receiving more attention as the government has received criticism for failing to allocate sufficient resources to this area)
- Increased monitoring and investigative powers and materially higher civil and criminal penalties
- Introduction of the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Cth) and a new way of calculating submission fees for FIRB applications
- Data: FIRB has increasingly emphasized that, as part of its national interest assessment, it will have particular regard to the protection of sensitive Australian data and foreign access to or interference with such data. For example, this has been a particular focus with respect to proposed investments in Australian healthcare groups in the context of “patient data” and data centers
- Conditions: Generally, the Treasurer approves the vast majority of applications. However, FIRB has been increasingly willing to use conditions and undertakings as a mechanism to increase the government’s oversight of more complex or sensitive investments. Undertakings required from FIRB may include matters relating to governance, location of senior management, listing requirements, market competition and pricing of goods and services (e.g., that all off-take arrangements must be on arm’s-length terms) and other industry-specific matters. FIRB has also issued a set of standard tax conditions that apply to those foreign investments that pose

a risk to Australia’s revenue and make clear the requirements and expectations for investors—and in 2022, we are seeing an increase in tax conditions being imposed on foreign investors (in particular private equity investors) to address the potential for “treaty shopping,” as a result of the ATO’s view on income versus capital

- Powers: The Treasurer has wide divestiture powers; criminal prosecution and civil penalties (including the issuance of infringement notices) can also apply for serious breaches of Australia’s foreign investment laws and for those facilitating such breaches, such as professional advisors. The standard practice is to seek approval where there is any doubt as to whether approval is required

#### WHO FILES

A foreign person or entity making an acquisition that requires approval under the Act must apply to FIRB for a notification that the Treasurer has “no objection” to the acquisition, before completion of the acquisition. In these circumstances, any agreement to make the acquisition must be conditional upon, and subject to, receipt of FIRB approval by the acquirer.

An application includes a filing fee that varies according to the type of deal and the deal value. As of January 1, 2021, amendments to the Fees Regime changed the way that fees are calculated for applications and, as of July 29, 2022, the fees applicable for an application to FIRB doubled, with the maximum fee payable now capped at AUD1,045,000.

An application to FIRB can be mandatory (as explained below), or voluntary, subject to the type of the transaction and the sectors involved (a voluntary filing may preclude post-acquisition orders being made by the Treasurer on the basis of “national security” concerns— as further explained below).

#### TYPES OF DEALS REVIEWED

FIRB approval is required for a range of acquisitions by foreign persons, including:

- A “substantial interest” in an Australian entity: An acquisition of a direct or indirect interest of 20 percent or more in an Australian entity valued at more than AUD310 million (approximately US\$216 million as of January 15, 2023)
- A “direct interest” in a national security business: An acquisition of a direct interest of 10 percent or more in an Australian national security business (for example, a business that holds critical gas, water or port assets, a telecommunications carrier, or is involved in the supply chain for military and defense goods and services). There is no monetary threshold for these acquisitions
- An interest in national security land (for example, a defense premises or land in which the Australian intelligence community has an interest). There is no monetary threshold for these acquisitions
- Australian land and land-rich entities: Various acquisitions of interests in Australian land are regulated with varying monetary thresholds, including with respect to residential land, vacant commercial land, developed commercial land and an entity where the value of its interests in Australian land exceeds 50 percent of the value of its total assets



**The Treasurer may prohibit an investment if he or she believes it would be contrary to the national interest or national security**

□ Agricultural land and agribusinesses: Acquisitions of interests in agricultural land and agribusinesses are regulated separately in the Act. In addition, a register of foreign ownership of agricultural land is maintained by the Australian taxation authority

Certain types of investors receive differing treatment for their deals:

- Free trade agreement investors: Consistent with Australia's free trade agreement (FTA) commitments, higher monetary thresholds apply to certain acquisitions made by investors from Chile, China, Japan, New Zealand, Singapore, the US and countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is in force. For example, an acquisition of an Australian entity by an FTA country investor will only require FIRB approval if the entity is valued at more than AUD1.3 billion (approximately US\$907 million as of January 15, 2023), unless the investment relates to a "national security business" or a "sensitive business," such as media, telecommunications, transport, defense and military-related industries (to which a lower or zero threshold may apply), or the investor is a foreign government investor
- Foreign government investors: Stricter rules apply to foreign government investors, which can include domestic or offshore entities where a foreign government and its associates hold a direct or upstream interest of 20 percent or more, or foreign governments of more than one foreign country and their associates hold an aggregate interest of 40 percent or more. In general, unless an exemption applies (e.g., the de minimus exemption for

offshore acquisitions), a foreign government investor must obtain FIRB approval before (i) acquiring a "direct interest" (generally defined as at least 10 percent holding or the ability to influence, participate in or control) in any Australian asset or entity; (ii) starting a new business; or (iii) acquiring mining, production or exploration interests

#### SCOPE OF THE REVIEW

The Treasurer may prohibit an investment if he or she believes it would be contrary to the national interest or national security.

In making this decision, while the concept of "national interest" is not defined in the legislation, the Treasurer will broadly consider:

- The impact on national security (being the extent to which investments affect Australia's ability to protect its strategic and security interests)
- The impact on competition (being whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia)
- The effects of other Australian government laws and policies (including tax and revenue laws and the impact of the investment on Australian tax revenues)
- The impact of the investment on the Australian economy and the community
- The character of the investor (including to the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision, as well as the corporate governance practices of the investor)

The "national security test" requires the Treasurer to assess a given investment from a national security perspective, and whether such

investment will affect Australia's ability to protect its strategic and security interests. In making this assessment, the Treasurer relies on advice from the relevant national security agencies for assessments as to whether an investment raises national security issues (e.g., through foreign intrusion or espionage). This test is generally applied in circumstances where an investment involves a "national security business," "national security land" or falls within one of the sectors of interest for the Treasurer, as set out in Guidance Note 8 on National Security.

#### REVIEW PROCESS TIMELINE

Under the Act, the Treasurer has 30 days to consider an application and make a decision. However, in practice, the assessment process is in many cases extended and takes longer, typically eight to 12 weeks from the time of application to the receipt of a "no objections" notification. As mentioned above, the holiday period usually impacts these timeframes for decisions.

The timeframe for making a decision will not start until the correct application fee has been paid in full. If the Treasurer requests further information from the investor, the review period will be on hold until the request has been satisfied.

Typically, if FIRB requires further time, it will request that the applicant voluntarily extend the approval deadline. As the Treasurer is also entitled to unilaterally impose a 90-day extension under statute, applicants are generally incentivized to "voluntarily" request the proposed deadline extensions and, in reality, the review process will take approximately eight to 12 weeks.

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign persons should file an application in advance of any

transaction, and any transaction requiring mandatory FIRB approval must be conditioned on receipt of FIRB approval. Such a transaction should not proceed to completion until the Treasurer advises on the outcome of his or her review. For applications involving a sensitive or national security business or sector (e.g., a transaction involving businesses engaged with the Australian defense force, public infrastructure, power, ports, water, telecommunications, banking or media sectors), foreign investors should consider the government's invitation in the Policy to engage with FIRB before filing an application for a significant investment. Leading into the holiday period in December and January, and the impact of an Australian federal election (the next federal election is not anticipated until 2025), it is expected that decision timeframes for FIRB applications will be protracted. Foreign investors should be particularly cognizant of the need to engage with FIRB and Australian legal advisers early in a deal timeline.

These discussions may help foreign investors understand the complexity of their application, any national interest concerns the government may hold about a particular proposal, and the conditions the Treasurer may impose on approvals.

These discussions can also help with structuring a transaction in order to reduce the likelihood of rejection. Such discussions should be held at an early stage in order to provide enough time to satisfy all FIRB queries. Where there is a competitive bid process for the acquisition, a foreign investor that does not actively engage with FIRB early in the bidding process may be placed at a competitive disadvantage

to other bidders who do. Foreign investors should be prepared to discuss in detail any conditions and undertakings that may be requested by FIRB, especially for acquisitions that are likely to attract greater political or media scrutiny.

Investors should be aware of the sensitivity in relation to the investment structures used by foreign investors, profit shifting and payment of Australian tax. Early on, foreign investors should work with their tax advisors to ensure

their investment structures do not fall outside the spectrum of what is acceptable to the Australian Tax Office (ATO), as the ATO is consulted in all approval processes. In particular, see below under the bullet point "Conditions" for commentary on tax conditions that may be attached to a FIRB approval. Investors should also work with their advisors to determine a level of transparency in upstream ownership, to avoid further enquiry from FIRB and possible future delays.

## LOOKING AHEAD

- Exemptions under the Act now include an additional limb that carves out acquisitions in sensitive sectors and/or of national security concern. Exemptions that previously applied to certain transactions (for example, the de minimus exemption for offshore transactions) will now also need to be assessed against the new national security framework under the Act
- An assessment as to whether an entity is a "national security business" or holds an interest in "national security land" will require extensive due diligence, which generally extends beyond searching publicly available information. Given that national security actions attract mandatory filings and are now carved out from most exemptions under the Act, it is important to fully diligence the target and its business from this perspective
- FIRB will require the identities of any upstream investor (and their upstream investors) that will hold more than a 5 percent interest in the target (on a look-through basis) following the acquisition. We recommend including this information upfront in the application to avoid a protracted consultation process with FIRB
- While the "statutory deadline" for FIRB applications is 30 days under the Act, this is generally not the decision period for a given application. Whether mandatory or voluntary, the decision period for an application will depend on a number of factors:
  - The identity of the investors, their country of origin and whether there is any upstream foreign government ownership
  - Whether the transaction involves a national security action
  - The number of consult partners FIRB engages with while assessing the application—these can include the ATO, the competition regulator and the Department of Defence
  - The complexity of the application and
  - Australia's political landscape (i.e., its relations with the investor's country of origin and whether there is an impending election/holiday period in Australia)

# China

China has further developed its national security regulatory regime by promulgating measures on cybersecurity review and security assessment of cross-border data transfer.

By Vivian Tsoi, Z. Alex Zhang, James Hsiao, and Chunlei Pang

In China, the Foreign Investment Law (FIL) and its implementation regulations create the framework for the foreign investment security review (FISR) system. The Measures for Security Review of Foreign Investments (the “FISR Measures”) further develop the scope of FISR—nonetheless, the FISR Measures describe the targeted sectors in broad strokes, leaving substantial room for further interpretation and clarification.

## RECENT UPDATES

In 2022, China continued to strengthen its national security regulatory regime by detailing additional cybersecurity and data security clarifications to its FISR system.

- In December 2021, 13 regulatory authorities at the ministry level led by the Cyberspace Administration of China (CAC) jointly promulgated the new Measures for Cybersecurity Review (the “Cybersecurity Review Measures”), which took effect on February 15, 2022. The Cybersecurity Review Measures include the following key elements:
  - Expanded the scope of regulated entities from critical information infrastructure operators to all network operators
  - Added China Securities Regulatory Commission as one of the reviewing authorities for cybersecurity review and
  - Specified that network operators that control personal information of more than

one million users must file cybersecurity review before applying for listing overseas

- In 2022, the CAC promulgated the Measures for Security Assessment of Cross-Border Data Transfer in July, which took effect on September 1, 2022, and the Guide to the Application for Security Assessment of Cross-Border Data Transfer (First Edition) in August. The regulatory measures and guide detailed the circumstances under which a security assessment is required for cross-border data transfer and how to conduct such a security assessment.

## WHO FILES

According to the FISR Measures, if a transaction falls within the scope of FISR, either the foreign investor or the Chinese party (each a “Filing Party”) must file an application with the office of the working mechanism (the “FISR Office”) before the commencement of the transaction in order to meet the regulatory filing requirements. If the Filing Parties fail to file an FISR application and commence a transaction, and the FISR Office determines that it falls within the scope of FISR, the FISR Office has the authority to require the Filing Parties to suspend the transaction and submit an FISR application.

In practice, various regulatory authorities will closely cooperate with each other in monitoring foreign investment activities in China. For example, if an antitrust filing is required for a transaction and such transaction is likely to fall within the scope of FISR, the



**In practice, various regulatory authorities will closely cooperate with each other in monitoring foreign investment activities in China**

antitrust regulatory authority may share the relevant information of such transaction with the FISR Office for further review and clearance before processing the antitrust filing. Based on the review of the relevant information, the FISR Office may notify one of the parties to a transaction to submit an FISR application.

## TYPES OF DEALS REVIEWED

Under the FISR Measures, the FISR Office has the authority to review a broad range of direct and indirect investment activities conducted by foreign investors, including:

- **Greenfield Investments.** Investments to initiate a new project or establish a new enterprise in China, either independently or jointly with other investors
- **Acquisition of Equity Interest or Assets.** Investments involving the acquisition of equity interest or assets of an enterprise in China. This category covers transactions between two foreign parties involving the indirect acquisition of equity interest or assets of a

Chinese enterprise, such as share transfer at the shareholder level outside China

- **Investments with Other Structures.** Investments in China through other structures. This category is broadly defined in order to give the regulator great flexibility in interpretation, and it is our view that foreign investments via a variable interest vehicle and public offering of Chinese enterprises through merging with special purpose acquisition companies (i.e., De-SPAC transactions) will likely fall into this category

Given the broad definition of foreign investments, we recommend that foreign investors evaluate carefully before the commencement of a transaction to avoid FISR compliance risks.

#### SCOPE OF THE REVIEW

A foreign investment transaction is subject to FISR if:

- It involves sectors related to national defense and security, such as arms and arms-related industries or in geographic locations in close proximity to military facilities or defense-related industries facilities OR
- It (i) involves sectors significant for national security, such as critical agricultural products, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, information technology and internet products and services, financial services, and key technologies; and (ii) will result in foreign investors obtaining “actual control” of the target enterprise

Foreign investors will be deemed to have “actual control” over a target enterprise if: (i) foreign investors hold

more than 50 percent of the equity interest in such enterprise; (ii) even if foreign investors hold less than 50 percent of the equity interest in such enterprise, such foreign investors can exert significant influence at the shareholder or board level by virtue of voting rights; or (iii) other circumstances under which foreign investors can exert significant influence over the operational decision making, personnel, finance and technology of the target enterprise.

In addition, although not explicitly stipulated under relevant laws and regulations, the FISR Office may consider the following factors in reviewing the FISR applications in practice:

- Whether the foreign investor is, directly or indirectly, connected to any foreign government or any political parties of a foreign country
- Whether the Chinese enterprise involved has customers that are state-owned enterprises or entities in military, defense, financial, transportation or public utilities sectors
- Whether the products or services provided by the Chinese enterprise involved are otherwise readily available in the Chinese market and
- Whether the Chinese enterprise involved has access to the important data of its customers or collects any personal data within China

#### REVIEW PROCESS TIMELINE

The FISR Measures provide the typical timeline and process for the FISR review of a transaction:

- **Preliminary Review.** Upon the receipt of an application, the FISR Office will make a preliminary decision on whether a transaction

is subject to general review within fifteen (15) working days

- **General Review.** If the FISR Office decides that a transaction should be subject to general review at the conclusion of the preliminary review, it will conduct and complete the general review within thirty (30) working days of the date it made its preliminary review decision
- **Special Review.** If the FISR Office determines that a transaction should be subject to special review at the conclusion of the general review, the FISR Office will conduct and complete the special review within sixty (60) working days. Under special circumstances, the FISR Office may extend the special review at its own discretion and will inform the applications with a written notification. The FISR Office will issue its final decision to applicants after the completion of the special review

During the FISR Office’s review, parties to a transaction are prohibited from proceeding with a transaction. In other words, the FISR must be completed prior to the closing of a transaction.



**Foreign investors may consider scheduling pre-application consultations with officials**



## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

- Foreign investors should continue to be mindful of the legislative and enforcement developments on China's national security regulatory regime, and pay special attention to transactions that might fall within the industries that are more likely to trigger national security concerns
- Foreign investors should be cautious when completing acquisitions before obtaining FISR approval, as they might be forced to divest the acquired equity interest or assets in China if the transaction ultimately fails the FISR approval process
- Due to enforcement uncertainties and the broad scope of captured industries, foreign investors interested in sensitive industries may wish to conduct a comprehensive pre-transaction analysis before proceeding with the transaction to avoid compliance risks
- Foreign investors may consider scheduling pre-application consultations with officials from the FISR Office to determine FISR risk before commencing the formal application process to reduce transaction uncertainties

## LOOKING AHEAD

In recent years, China has been making a sustained effort to strengthen its national security regulatory regime, including from a data security perspective. In particular, the regulatory measures and guide on cross-border data transfer promulgated in 2022 has provided detailed guidance for business operators. Given that China is still in the process of completing its data security legal framework, we expect that additional regulatory rules will be rolled out to enhance data security protections.

Although China has promulgated a set of laws and regulations to establish its national security regulatory regime, the broad language of the FIL and the FISR Measures leaves ample room for regulators to apply their interpretation and clarification on the operation of China's FISR system. Finally, given the current and rapidly changing geopolitical situation, China will likely continue its efforts to promulgate additional rules to strengthen FISR implementation.



GALLERY OF MODERN ART  
MUMBAI

# India

India continues to be an attractive destination for foreign investment, ranking as the world's seventh-largest recipient of FDI in 2021.

By James Hsiao, Sayak Maity, and Royston Tan

**F**DI is regulated primarily by India's Department of Promotion of Industry and International Trade (DPIIT), under its Foreign Exchange Management Act regime (FEMA Regime). India remains one of the most popular FDI destinations in the world, ranking as the seventh-largest recipient of FDI in 2021 according to the World Investment Record 2021. Attracting FDI inflows continue to be a priority for the Indian government, as it continues to shape the FDI legal landscape to make India an investor-friendly jurisdiction.

## RECENT UPDATES

- India continued to be a major destination of foreign direct investment, having received its highest-ever FDI inflow of US\$83.57 billion for the financial year 2021 to 2022
- There were no major changes to India's FDI legislation, although the DPIIT made minor amendments to the current laws and regulations governing FDIs in India. For example:
  - Pursuant to an amendment to the Foreign Exchange Management (Non-Debt Instruments) Rules of 2019 (the NDI Rules), foreign persons can now invest up to 20 percent in the Life Insurance Corporation of India, India's largest public sector insurance company
  - Pursuant to another amendment to the NDI Rules, prior government approval is required for the issuance of share-based employee benefits by Indian companies

(i) to citizens of Bangladesh or Pakistan, and (ii) in sectors that mandate government approval. The issuance of share-based employee benefits must also comply with applicable rules and regulations, including applicable sectoral caps.

## WHO FILES

There are two routes governing FDI into India: (i) the automatic route and (ii) the government approval route. Whether an investor proceeds via one route or the other would depend largely on the sector in which the investee entity falls as well as the quantum value of the investment.

Under the automatic route, FDI is allowed without the need to obtain any approval or license from the government. The amount of investment permitted would depend on the sector in which the investee operates. For example, some sectors, such as the manufacturing, telecom and financial services sectors, allow foreign investors to invest up to 100 percent of an Indian entity.

Certain other sectors fall under the government approval route, and require the prior approval of the government, the Reserve Bank of India, or both. Key sectors that require government approval include the multi-brand retail trading sector (where FDI of up to 51 percent is permissible assuming certain regulatory conditions are met) and the brownfield pharmaceutical sector (where any FDI above 74 percent must obtain government approval).



**Some sectors, such as lottery businesses and the manufacture of tobacco or tobacco substitutes, are prohibited sectors where FDI is not permitted**

Some sectors, such as lottery businesses and the manufacture of tobacco or tobacco substitutes, are prohibited sectors where FDI is not permitted.

No application is required for transactions that fall within the automatic route. For transactions that fall under the government approval route, the foreign investor will have to file its FDI proposal under the Foreign Investment Facilitation Portal (FPIP) managed by the DPIIT. The proposal will then be sent by the DPIIT to relevant stakeholders, such as the RBI and the Ministry of External Affairs.

## TYPES OF DEALS REVIEWED

The FEMA Regime governs the following types of transactions, among other things:

- Equity investment into an Indian company by a foreign investor, including the acquisition of equity shares, fully paid and mandatorily convertible preference shares or debentures, and share warrants
- Investment into capital contributions of Indian LLPs

- Investment into convertible notes, provided that the convertible notes meet certain conditions. For example, the convertible notes can be issued only by start-up companies for an amount of 2.5 million Indian rupees (approximately US\$30,000) or more in a single tranche, and issuance and transfer of these notes must adhere to pricing guidelines and sectoral conditions as prescribed under the FEMA Regime

### SCOPE OF REVIEW

If a transaction falls under the government approval route, then the foreign investor must submit an FDI proposal to the DPIIT using the FPIIP platform.

Documents that an FDI proposal must annex include the following: (i) charter documents of the foreign investor and investee entity; (ii) audited financial statements and tax returns of both the foreign investor and investee entity; (iii) diagrammatic representation of the flow of funds from the foreign investor to the investee entity; and (iv) a summary of the FDI proposal by the foreign investor.

Foreign investment into certain sectors may require prior security clearance from the Ministry of Home Affairs. These sectors include broadcasting, telecommunication, private security agencies and civil aviation. For these sectors, the FDI proposal will also be sent to the Ministry of Home Affairs for its review.

The Indian government has broad discretion whether to grant or reject a proposal. The DPIIT and competent authorities would consider, among other things, the reputation of the foreign investor, its history of owning and operating similar investments,

national security and the overall impact of the proposed investment on the national interest.

### REVIEW PROCESS TIMELINE

The DPIIT's standard operating procedure on FDI applications provides an indicative timeline of eight to twelve weeks from the date of application to the date of approval. However, it is not unheard of for investors to require up to six to nine months for the entire application to be disposed of, including time spent providing clarifications or supplementary documents in response to questions from the DPIIT or any other competent authority.

### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

The FEMA Regime contains extensive guidelines for FDI into India, and guidelines and restrictions may differ depending on the sector and mode of investment. Separate from the FEMA Regime, there may also be other considerations that a foreign investor may need to consider before investing into an Indian entity, including special benefits or incentives for setting up businesses in special economic zones and other sectoral regulations for businesses in regulated industries.

Investors should engage counsel who are familiar with the particular federal, state and sectoral landscape that they wish to invest in, and be acquainted early on with the particular restrictions or rules that may govern their investments. This would allow investors to prepare more comprehensive and compliant FDI proposals and increase the chances of it obtaining the relevant approvals and licenses early.

## LOOKING AHEAD

The Indian economy has grown strongly over the past two decades, buoyed in part by the large influx of FDI. Despite decelerating global demand and challenging global economic conditions, the OECD has forecasted that India's GDP will continue to grow at a rate of 5.7 percent for the financial year 2023 – 2024, and expects India to be the second fastest-growing economy in the G20 in 2023 – 2024.

The Indian government will likely continue to take steps to make India an attractive investment destination. Having loosened FDI requirements in recent years, it will come as no surprise if the government were to further liberalize FDI requirements in India, and make it easier to invest into certain strategic sectors such as chemicals, healthcare and insurance.



**Investors should engage counsel who are familiar with the particular federal, state and sectoral landscape that they wish to invest in**

# Japan

The Japanese government continues to review filings and refine its approach under the FDI regime following the 2019 amendments.

By Jun Usami, Nels Hansen, Shino Asayama, and Mizuki Hyuga

Japan's Ministry of Finance (MOF), together with ministries responsible for specific industry sectors, reviews foreign direct investments (FDI) under the Foreign Exchange and Foreign Trade Act (FEFTA).

2019's FEFTA amendments expanded the scope of FDI review, lowered the filing threshold (by expanding the filings required), and introduced exemptions (which in practice reduce the filings required).

## RECENT UPDATES

- The MOF updated its list of public companies that preliminarily classifies those companies' businesses as among those operating in "non-core sectors," "core sectors," or "undesignated sectors." The list is to be reviewed and updated periodically, with the most recent update in November of 2021. However, as before, filers cannot rely on this list and must perform their own analysis
- Business sectors relating to critical minerals, including rare earth, were added to "core sectors." Those business sectors include (i) metal mining; manufacturing, repair/maintenance of software for devices or products used for metal mining; and component analysis services for minerals; and (ii) the construction services business for improving or maintaining port facilities on designated remote islands to ensure the smooth operation of mineral exploration vessels
- FEFTA was amended to deem certain transactions relating

to crypto-assets "capital transactions" subject to prior approval to enhance the effectiveness of economic sanctions against Russia

## WHO FILES

Depending on the type of business in which the target entity is engaged, FEFTA requires a "foreign investor" to submit a prior notification and/or a post-transaction filing through the Bank of Japan to the MOF and relevant ministries. Foreign investors include:

- Individuals who do not reside in Japan, termed "non-residents"
- Entities or other groups established under laws or regulations of, or having their principal offices in, foreign countries
- Entities in which an individual or entity described above holds 50 percent or more of the total voting rights
- Partnerships operating in the investment business of which 50 percent or more of the total capital has been contributed by foreign entities, foreign groups or non-residents, or the majority of general partners are non-residents
- Entities in which the majority of directors or representative directors are non-residents

## TYPES OF DEALS REVIEWED

The MOF and Japan's ministries with jurisdiction over the target entity's business review two types of transactions: designated acquisitions and inward direct investments.

- A designated acquisition is a transaction where a foreign investor acquires any

shares (even one share) of a non-listed company from another foreign investor.

- An inward direct investment is defined to include transactions, among other things, where a foreign investor:
  - Acquires one percent (1 percent) or more of a listed target entity's outstanding shares or total voting rights
  - Acquires any shares (even one share) of an unlisted target entity from a resident shareholder
  - Consents to material changes to the business purposes of an unlisted target company, regardless of ownership percentage, or a listed target company where the foreign investor owns one-third or more of the target company's total voting rights
  - Consents to shareholder meeting proposals to nominate that foreign investor or certain related parties to the board or certain other extraordinary transactions such as a sale of the company, regardless of ownership percentage for an unlisted target company and when holding 1 percent or more of the voting rights for a listed target company



**Business sectors relating to critical minerals, including rare earth, were added to "core sectors"**

- Obtains proxy voting authority at an unlisted company, or such authority equivalent to 10 percent or more of the total voting rights of a listed company
- Acquires the right to exercise 1 percent or more of a listed company's voting rights
- Obtains the agreement of other foreign investors to jointly exercise their respective beneficially owned voting rights, where the aggregate beneficially owned voting rights across all relevant foreign investors account for 10 percent or more of the total voting rights of a listed company
- Lends to a Japanese company more than ¥100 million, where the company's debt to the foreign investor accounts for more than 50 percent of the company's debt
- Purchases corporate bonds which meets certain criteria, including that they amount to more than ¥100 million and account for more than 50 percent of the company's debt

#### SCOPE OF THE REVIEW

Foreign investors are required to make a prior notification and/or a post-transaction filing through the Bank of Japan to the MOF and relevant ministries with respect to certain inward direct investments.

Prior notification filings may be required depending on whether the target entity is engaged in designated industries or the characteristics of the foreign investor (including nationality, location (including region)) and whether the investor qualifies for exemptive relief).

A foreign investor who has obtained a prior notification filing approval for any inward direct investments is required to make a post-transaction filing within 45 days of the completion of the transaction.

A foreign investor is required to submit a prior notification filing with regard to a designated acquisition if the target company is engaged in designated industries. Post-transaction filings are not required for a designated acquisition unless the foreign investor claimed an exemption from prior notification filings for its stock acquisition.

#### REVIEW PROCESS TIMELINE

Foreign investors must make their prior notification filings within the six-month period prior to the completion of the transaction. In other words, approvals are valid for six months **from the date on which the filings were officially received by the BOJ.**

By default, transactions subject to a prior notification filing cannot be closed until the expiration of a 30- calendar-day waiting period from the date on which MOF and the ministry having jurisdiction

over the transaction received the filing. However, the waiting period may be shortened to two weeks. Nevertheless, the MOF and the relevant ministries can extend the waiting period up to five months if necessary for the review.

If the MOF and the relevant ministry find the transaction under review problematic in terms of national security, they may recommend that the foreign investor change the content of the transaction or discontinue the transaction after consultation with the Council on Customs, Tariff, Foreign Exchange and other Transactions. The foreign investor must notify the MOF and the relevant ministry of whether it will accept the recommendation within ten days after receiving such recommendation. If the foreign investor does not provide notice or refuses to accept the recommendation, the MOF and the relevant ministries may order a modification of the content of the transaction or its termination before the expiration date of the waiting period.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

### Exemption scheme for prior notifications

The 2020 FEFTA Amendment introduced exemptions from the prior notification filings otherwise required for stock purchases. Foreign investors are categorized into three types under the exemptions from the prior notification filings: foreign financial institutions; general investors; and non-qualified foreign investors. The coverage of the exemption differs depending on the type of foreign investor involved. All of the exemptions are subject to the requirement that the foreign investor comply with the following three exemption conditions:

- The foreign investor and its closely related persons will not serve on the board of the target company as directors or audit & supervisory board members
- The foreign investor will not make proposals at shareholders' meetings to dispose of material businesses in designated industries
- The foreign investor will not access sensitive confidential technologies that are related to the target company's business in designated industries

### Decision on whether to make a prior notification filing

In principle, the applicability of a designated industry is determined based on the issuer's actual business. In practice, however, a filer makes the classification judgment based on publicly available information, such as company websites and commercial registries, as well as input from the issuer, if possible.

To help such assessment, foreign investors may refer to the MOF list of public companies discussed above, designating businesses as being involved in "non-core sectors," "core sectors" or "undesignated sectors."

### Practical tip

For investors who wish to make flexible and speedy investments in response to market trends, such as investment funds, it is worth considering making a prior notification filing a bit more frequently than every six months for possible investments in a target company.

Sometimes, after making a prior notification, filers receive questions regarding their own business, intended transactions with the issuer, etc. from the ministries, and may be asked to make covenants in a filing relating to possible transactions. There is, however, room to negotiate the language of the proposed covenants, and filers can suggest changes to the ministries.

## LOOKING AHEAD

According to a public release from the MOF in June 2022, the number of pre-filings in FY 2021 (April 2020 to March 2021) was 2,859. The number of pre-filings has been increasing over the past few years: 1,946 in FY 2019 and 2,171 in FY 2020, and this trend is expected to continue going forward. We have occasionally encountered significant delays in reviews by the government and, somewhat frequently, we have encountered requests for a filer to withdraw a filing so that the government can unofficially extend the review period. We expect those requests will increase as the number of filings increases. Filers should consider filing as early as possible, as filers are able to make a FEFTA filing anytime within the six-month period prior to the planned transaction.





# Korea

Korea is increasing the level of scrutiny of foreign investments due to growing concerns over the transfer of sensitive technologies.

By Hyeonmin Kim and June Kyu Shin  
Kim & Chang

All foreign direct investments are subject to either the Foreign Investment Promotion Law (FIPL) or Foreign Exchange Transaction Law (FETL). If a foreign direct investment meets certain conditions and is made pursuant to the FIPL, then such investment is not subject to restrictions under the FETL. The Ministry of Trade, Industry and Energy (MOTIE) is the main government department responsible for the administration of foreign direct investments (FDI).

The Act on Prevention of Divulgence and Protection of Industrial Technology (ITPA) governs the transfer of National Core Technologies (NCT) to foreign companies as well as foreign acquisitions of domestic companies that hold National Core Technologies. MOTIE is the main government department responsible for administration of foreign acquisition of NCT.

Further, MOTIE enacted and put into effect the Regulations on Operation of Security Review Procedures for Foreign Investment, which additionally provide that when a foreign investor files a report for foreign investment or application for approval, the investor must indicate whether it is acquiring de facto control of the company and whether the transaction results in one of the cases below.

- There are concerns that production of defense materials may be hindered
- It is highly likely that goods will be subject to export approvals or licenses, or technologies will be diverted for military purposes

- There are concerns regarding public disclosure of state secrets
  - There are concerns that international efforts by the United Nations or other organizations to maintain international peace and security may be severely and substantially hindered or
  - It is highly likely that National Core Technology will be divulged
- If the foreign investment is subject to security review on the face of the report/application, then the certificate of report on foreign investment will be withheld and foreign investment security review must commence.

## RECENT UPDATES

MOTIE enacted and put into effect the Regulations on Operation of Security Review Procedures for Foreign Investment, which additionally provide that when a foreign investor files a report for foreign investment or application for approval, the investor must indicate whether it is acquiring de facto control of the company and whether the transaction results in one of the cases below.

- There are concerns that production of defense materials may be hindered
- It is highly likely that goods will be subject to export approvals or licenses, or technologies will be diverted for military purposes
- There are concerns regarding public disclosure of state secrets
- There are concerns that international efforts by the United Nations or other organizations to maintain international peace and security may be severely and substantially hindered or

- It is highly likely that national core technology will be divulged
- If the foreign investment is subject to security review on the face of the report/application, then the certificate of report on foreign investment will be withheld and foreign investment security review must commence.

## TYPES OF DEALS REVIEWED

All foreign direct investment that qualifies as a “foreign investment” as stipulated under the FIPL is subject to filing a report under the FIPL.

Generally, foreign direct investment is subject to a Foreign Investment Report (FIPL Report) to a “designated Foreign Exchange Bank.” If a foreigner intends to make a foreign investment in a defense industry company as designated by the Minister of MOTIE pursuant to the Defense Acquisition Program Act, then the foreigner needs to obtain Foreign Investment Approval (FIPL Approval) from MOTIE.



**All foreign direct investment that qualifies as a “foreign investment” as stipulated under the FIPL is subject to filing a report under the FIPL**

Foreign investment into an institution possessing industrial technology and NCT developed without government subsidies are subject to a report to MOTIE (ITPA Report) before such transaction can proceed. Foreign investment into an institution possessing industrial technology and NCT developed with government subsidies for research and development are subject to approval from MOTIE.

#### SCOPE OF THE REVIEW

##### FIPL Report

For the FIPL Report, the designated foreign exchange bank will accept the filing when all information and underlying documents are provided.

##### FIPL Approval

For FIPL Approval, the key question considered is whether the transaction poses a risk to national security. More specifically:

- Whether defense acquisition would be affected and
- Whether there is risk of technology being leaked which could present a risk to the economy or national defense

In case of an FIPL Approval, MOTIE shall consult with the Ministry of National Defense (in practice, the Defense Acquisition Program Administration, or DAPA) on whether to approve the application. The Ministry of National Defense shall consent to granting approval if it deems that the relevant defense

materials produced by a defense industry company are replaceable by products of other domestic companies, or that granting permission will not significantly affect national security.

In the event the foreign transaction at issue is determined to pose a serious risk to national security, MOTIE may order various measures to address the risk, such as an order to suspend, prohibit or even unwind a transaction.

##### ITPA Report/ITPA Approval

For the ITPA Report and ITPA Approval, the key question is similar—whether the transaction poses a risk to national security. In the event the foreign transaction at issue is determined to pose a serious risk to national security, MOTIE may order various measures to address the risk, such as an order to suspend, prohibit or even unwind a transaction.



**It is common for ITPA report/  
approval processes to take much  
longer than 15 to 30 calendar  
days due to the technology  
examination process**

#### REVIEW PROCESS TIMELINE

The FIPL Report is routinely granted within one or two business days unless the industry sector in which the Korean company receiving the investment operates is subject to other restrictions.

In case of application for FIPL Approval by MOTIE, MOTIE has 15 calendar days (with an option to extend the review by up to 15 calendar days) to notify the foreign investor whether MOTIE approves the transaction. MOTIE generally observes the review periods as stipulated under the FIPL.

In case of application for an ITPA Report, MOTIE has 15 calendar days to notify the institution and foreign investor whether MOTIE approves the transaction, and if MOTIE does not approve the transaction, it has 30 calendar days from the date of notice to order to suspend, prohibit or even unwind a transaction. Before the submission of a formal application, the foreign investor can informally consult with MOTIE in connection with such application.

In case of application for ITPA Approval, MOTIE has 45 calendar days to notify the institution and foreign investor whether MOTIE approves the transaction.

However, the above review periods does not include (i) the period necessary for the authority to examine the relevant technology (which can take several weeks or months) and (ii) the period that the foreign investor takes to respond to potential requests for information issued by MOTIE (i.e., requests for information stop the review clock until a response is submitted that is deemed sufficient by MOTIE). For more accurate estimates of review periods, before the submission of formal application, the foreign investor can informally consult with MOTIE in connection with such an application. It is common for ITPA report/approval processes to take much longer than 15 to 30 calendar days due to the technology examination process. Generally, an ITPA Report takes one to three months, while ITPA Approval may take up to six months.

#### **HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES**

There is no publicly available list of a “Defense Industry Company” currently designated by the Minister of MOTIE, or companies that hold NCT. Therefore, it is advisable to ask the target company whether it is designated as a Defense Industry Company or whether the target company holds NCT.

Furthermore, it is common for either the target company or foreign investor to contact MOTIE before filing an ITPA Report/Approval application or FIPL Approval application to confirm the details required for such application.

#### **LOOKING AHEAD**

Korea continues to maintain a relatively liberalized approach to regulating foreign direct investment that does not involve defense industries or technologies that Korea deems to be a “National Core Technology.”

However, due to growing concerns of leakage of sensitive technologies that are deemed crucial to national defense (including National Core Technology), Korea recently has introduced regulations that provide for more stringent review of foreign investment to target companies that are related to national defense or National Core Technologies.

Therefore, it is advisable that prospective foreign investors pay more attention to additional developments in foreign investment regulations in Korea. Furthermore, as target companies may be related to national defense or hold designated National Core Technologies, it is advisable for prospective foreign investors to inquire with the target company whether it is related to national defense or whether it holds designated National Core Technology before making such investments.



# New Zealand

Recent legislative reforms have increased the New Zealand government's ability to take national interest considerations into account, but have also looked to exclude lower-risk transactions from consent requirements.

By Joshua Jones and Michael Harper  
Chapman Tripp

The Overseas Investment Office (OIO) is the regulator responsible for the administration of the Overseas Investment Act 2005 (OIA), the statute that regulates investments in New Zealand assets by overseas investors.

The OIA sets out a consent regime in relation to investments that meet a value threshold or regard certain types of land. In mid-2021, a national security and public order (NSPO) regime was introduced, expanding the scope to include certain investments in strategically important businesses that don't otherwise require consent.

The OIO has delegated authority to determine most consent applications, based on an assessment of whether the investor meets an investor test and (for land acquisitions) the benefit to New Zealand test. For certain land acquisitions, or where a national interest assessment is required—including as part of the NSPO regime—ministerial approval is required.

In response to the pandemic, the New Zealand government introduced a separate notification pathway that applied to a broad range of transactions that did not already trigger a consent requirement. That regime subsequently has been discontinued, but still applies to transactions entered into before June 7, 2021.

## RECENT UPDATES

The New Zealand government had already commenced a reform program in relation to the OIA when the pandemic occurred. As a result of the pandemic, aspects of that reform process—particularly in relation to national interest considerations—were accelerated and an additional temporary

screening regime was put in place to guard against potentially harmful or opportunistic foreign investments.

In mid-2021, that temporary screening regime was suspended (with the NSPO regime coming into force) around the same time as the reform process was completed. The commencement of a number of the legislative amendments resulting from the reform process was delayed, to allow the OIO time to prepare for those changes.

While the recent reforms have resulted in a number of welcome changes to exclude lower-risk transactions from consent requirements, the New Zealand government has now given itself broader powers to intervene in transactions on national interest grounds. As those changes have only recently been implemented, there is not yet a meaningful track record of how the relevant ministers intend to wield those powers.

Historically, there have been few formal rejections of consent applications by the OIO or ministers. In part, that results from investors withdrawing applications before a decision was made, with respect to which there are no published statistics.

## WHO FILES

An overseas person making an acquisition that requires consent under the OIA's consent regime, or clearance under the NSPO regime, must apply to the OIO for such consent or clearance (as applicable) before completion of the acquisition. Any agreement to make the acquisition must be subject to receiving such consent or clearance (as the case may be).

A consent application includes a filing fee that varies according to the type of transaction and transaction value and whether a national interest assessment is required. A notification under the NSPO regime does not require any filing fee.

## TYPES OF DEALS REVIEWED

Consent under the OIA is required for a range of acquisitions by overseas persons, including an acquisition of a more than 25 percent ownership or control interest in a target entity (or an increase in an existing interest to or through 50 percent, 75 percent or 100 percent) where:

- The value of the applicable New Zealand assets, or consideration attributable to those assets, exceeds NZD 100 million
  - The target owns or controls (directly or indirectly) an interest in sensitive land. The definition of sensitive land is very detailed and requires careful checking and analysis from qualified advisers. In particular, land may be "sensitive" if it adjoins certain types of land, or is "associated" with other land already controlled by an overseas person. It also includes all residential land
  - The target owns or controls (directly or indirectly) an interest in fishing quotas
- Consent requirements can be triggered for transactions occurring upstream of the New Zealand assets, as well as for direct acquisitions in New Zealand.

Certain types of investors receive differing treatment for their transactions:

- Australian investors: A higher monetary threshold applies to acquisitions by certain Australian investors. Currently, that higher

threshold is NZD 552 million for Australian non-government investors and NZD 116 million for Australian government investors

- Free trade agreement investors: Consistent with New Zealand’s free trade agreement (FTA) commitments, a higher monetary threshold of NZD 200 million applies to acquisitions made by certain non-government investors from South Korea, Taiwan, Hong Kong, China, Brunei, Chile and countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is in force
- Residential land: Consistent with New Zealand’s treaty obligations, certain Australian and Singaporean investors are exempt from consent requirements for investments in residential land
- Foreign government investors: Further scrutiny is applied to investments by foreign government investors, in respect of which a national interest assessment is undertaken as part of the consent process

Under the NSPO regime, certain investments in strategically important businesses (where a consent requirement is not already triggered) can, and in some cases must, be notified to the OIO for clearance by the relevant minister. Notification is mandatory for investments in critical direct suppliers to New Zealand’s intelligence or security agencies and businesses involved in military or dual-use technology, but is otherwise optional. Non-notified transactions can be called in for review by the minister prior to or after completion of the transaction.

#### SCOPE OF THE REVIEW

Under the consent regime, each overseas investor and the individuals who control that investor is required to meet a bright-line investor test comprising a closed list of character and capability factors. Those factors include:

- Convictions resulting in imprisonment
- Corporate fines
- Prohibitions on being a director, promoter or manager of a company
- Penalties for tax avoidance or evasion and

- Unpaid tax of NZD 5 million or more

The overseas investor must also satisfy the “benefit to New Zealand” test. The requirements under the test differ depending on the nature of the land (for example, alternative provisions apply where the land is sensitive or residential). Generally, when determining whether the benefit test is met, the ministers will assess the benefits that will be delivered by the transaction (compared to the position if the transaction did not occur) against a list of economic, environmental and other factors, and assess whether that benefit is proportionate to the sensitivity of the land and the nature of the transaction.

In addition, a national interest assessment is applied to transactions involving strategically important businesses or being undertaken by foreign government investors. National interest assessments are supported by a cross-government standing committee that looks across the New Zealand government system to obtain and use a wide range of information. The minister has broad discretion to determine whether to block a transaction on the basis that it is contrary to New Zealand’s national interests.

Under the NSPO regime, the minister will consider whether there are any national security or public order risks associated with the transaction. If there are such risks, the minister can impose conditions on the transaction, prohibit the transaction (if not yet completed) or require a disposal (if completion has occurred).

#### REVIEW PROCESS TIMELINE

Following reforms in 2021, there are now statutory timeframes that apply to the OIO and ministers’ consideration of a consent application under the OIA. Timeframes under the regulations differ depending on the nature of the application. However, they can be paused or extended and do not create any legal obligation enforceable in a court of law, or limit or affect the way in which a person is required to exercise a statutory power of decision. There is no recourse for any applicant where the specified timeframe is not met. Depending on its complexity, a land

application can take five to seven months (or even longer).

Under the NSPO regime, an initial review period of 15 working days applies, after which the OIO will inform the applicant whether the transaction has been cleared or is being subjected to a more detailed assessment. If a more detailed assessment is required, a further 40- working-day review period applies, which can be extended once by the minister for a further 30-working-day period—i.e., a maximum overall period of 85 working days.

#### HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

In most circumstances, it is difficult to obtain consent under the OIA in advance of agreeing a transaction, as the consent regime operates to screen specific transactions rather than simply to identify the investor. It is possible for an investor to apply on a standalone basis to be screened against the investor test, but this does not negate the need to seek consent for a relevant transaction (though in theory it would make that consent application easier and quicker).

Where consent under the OIA is required, or the investor is required or wishes to make a notification under the NSPO regime, the transaction should be conditional on receiving the relevant consent or clearance, and must not proceed to completion until such consent or clearance is received.

Given the relatively long review timeframes, investors should assess early in a transaction process whether consent or notification under the OIA will be required. In some (but not most) circumstances, a discussion with the OIO ahead of filing can be helpful to gauge the OIO’s reaction to aspects of the transaction.



**The overseas investor must also satisfy the “benefit to New Zealand” test**

# Taiwan

All FDIs are subject to prior approval, but the investment climate is welcoming and liberal.

By Benjamin Y. Li, Derrick Yang, and Yu-ting Su  
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Under Taiwan law, inbound investments made by a “foreign investor” or a “PRC investor” are regulated by two different regimes, both of which are under the auspices of the Investment Commission (IC) of the Ministry of Economic Affairs (MOEA).

## RECENT UPDATES

- There do not appear to be any major changes to the Taiwan FDI legal landscape in 2022
- There continues to be fraught geopolitical tensions between Taiwan and the PRC. Due to an escalated concern regarding national security and industrial espionage, the Taiwan government has in recent years tightened the review of investment applications that involve PRC elements to deter any attempt to circumvent Taiwan’s policies governing foreign and/or PRC investments. This trend has continued in 2022.

## WHO FILES

There are generally two types of inbound investments—foreign investments and PRC investments.

### A. Foreign investment

Foreign investments are governed by the Statute for Investment by Foreign Nationals. A foreign investor may generally invest in any Taiwanese company unless (1) such company engages in any business regarding which foreign investment is prohibited or restricted or (2) the investment poses a risk to national security, public order and/or good

morals, or national health. The said restricted or prohibited businesses are enumerated in a “negative list” promulgated by the government which includes, inter alia, industries relating to chemical products for military use, firearms and weapons, transportation, postal service, electricity and gas supply, mass media and telecommunications

A foreign investor seeking to invest in a Taiwan business has to apply for the approval of the IC by submitting the investor’s identification documents/certificate of incorporation, business operation plan, funding plan, investor’s shareholding structure, transaction agreement(s) (such as the merger, acquisition or joint venture agreement, as applicable), as well as a declaration certifying that the foreign investor is not a PRC investor.

### B. PRC investment

In contrast, according to the Measures Governing Investment Permits to the People of the Mainland Area, a PRC investor means (1) an individual, juristic person, organization or any other institution of the People’s Republic of China (PRC National); and (2) any company located in any third area (an area other than the PRC or Taiwan) (i) in which, in aggregate, more than 30 percent of its equity or capital is held by the PRC National(s) or (ii) which is controlled by the PRC National(s) (the Third-Area Company). Unlike foreign investors, PRC investors may only invest in industries listed in the “positive list” promulgated by the government. In practice, in

the event that a PRC investor is involved, the investment application would face more stringent scrutiny and the IC’s approval would take a longer time to obtain, as the IC will be more careful to ensure that the positive list is observed. Moreover, the IC has the sole discretion to reject or impose conditions on a transaction if the transaction (i) leads to monopoly, oligopoly or exclusivity, (ii) is politically, socially or culturally sensitive or poses a threat to national security, or (iii) has an adverse impact on Taiwan’s domestic economic development or financial stability.

A PRC investor has to submit with his/her application to the IC supporting documents including the investor’s identification documents/certificate of incorporation, business operation plan, funding plan, investor’s shareholding structure and transaction agreement(s) (such as the merger, acquisition or joint venture agreement, as applicable). In addition, the IC will require a thorough disclosure of the PRC investor’s shareholding structure up to the ultimate beneficial owner(s). An investment by a limb of a PRC partisan, military, administrative or political organization could be rejected by the IC unless national security concerns can be cleared.



**The IC will require a thorough disclosure of the PRC investor’s shareholding structure up to the ultimate beneficial owner(s)**

## TYPES OF DEALS REVIEWED

The following types of investments will be subject to the IC's review:

- Foreign investments including (1) acquiring stock or capital contribution of a Taiwanese company; (2) setting up a branch office, proprietary business or partnership in Taiwan; and (3) providing shareholder loans for a term of one year or longer to those invested Taiwanese companies referred to in (1) and (2)
- PRC investments including (1) acquiring stock or capital contribution of a Taiwanese company, proprietary business, partnership or limited partnership (subject to certain exceptions for acquiring shares in a TWSE or TPEX listed company); (2) setting up a branch office, proprietary business or partnership in Taiwan; (3) providing shareholder loans for a term of one year or longer to those invested Taiwanese companies referred to in (1) and (2); (4) having control over a Taiwanese proprietary business, partnership, limited partnership or a private company via contractual arrangement; and (5) acquiring the business or assets of a Taiwanese private company by a Third-Area Company (referring to a company incorporated outside the areas of PRC and Taiwan)

## SCOPE OF THE REVIEW

When determining whether to approve an investment, the IC applies a totality test by taking into account the nature of the business, scale of investment, parties involved, potential impact on national security, public order, public health, technology advancement, local economics, rights of the local stakeholder and employees, and other relevant factors. If an investment involves any PRC investor or sensitive business (such as critical infrastructure, telecommunication business or other restricted business), the IC will tighten its scrutiny by requesting detailed information on the shareholding structure, explanation on the intended purpose(s) and seeking relevant governmental bodies' opinions.

The IC's investment approval is usually a condition precedent to closing a transaction. In some cases, the IC may also require undertakings per other competent authorities' requests or attach conditions to an approved investment.

## REVIEW PROCESS TIMELINE

The review process conducted by the IC would usually take one to two months for foreign investments and two to four months for PRC investments, depending on the scale and complexity of the investment. The IC has the sole discretion to request further information from the investor, seek intra-governmental consultation, and/or conduct ad hoc reviews on a case-by-case basis, which may prolong the aforesaid timeline.

## HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

While reviewing an application submitted by a foreign investor, the IC will conduct a thorough review of the shareholding structure of such foreign investor (including each layer of investment vehicle up to the ultimate beneficial owner) to ensure that the investor is not a de facto PRC investor. As foreign investors and PRC investors are subject to different regulatory regimes, the investor is advised to carefully examine its shareholding structure and the business it wishes to invest in with an experienced counsel to be able to fully assess the risks and structure the transaction appropriately.



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