THE ORRICK GUIDE TO FOREIGN INVESTMENT REVIEWS

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INTRODUCTION

Welcome to the Orrick Guide to Foreign Investment Reviews. This guide answers frequently asked questions regarding investment control regimes in various jurisdictions. It has been prepared by the experts in our offices worldwide. Their contact details are included at the end of each country section.

The regulatory landscape for foreign investments is continuously changing across all jurisdictions covered by this guide. A major contributor to this trend is concerns about investment by state-owned or state-controlled foreign players and the possibly adverse effects that such investments may have for national security or national interests. A number of countries have, therefore, introduced new measures to provide for review of investments by non-nationals or strengthened their existing measures. The next pages include a summary of recent developments.

This guide reflects the laws and practice as of October 2022. This guide is for reference only, and it should not be treated as being a substitute for legal advice.

UNITED KINGDOM:

The National Security and Investment Act 2021 came into force in the UK on January 4, 2022. The Act removes national security from the scope of the UK merger control regime and introduces mandatory notifications for acquisitions involving entities carrying on activities in certain specified sectors and voluntary notifications for other acquisitions involving entities or assets that may raise national security concerns.

FRANCE:

Various amendments to the French foreign investment control regime have been adopted (Decree n°2018-1057, Loi Pacte (Law n°2019-486), Decree n°2019-1590 and the related Orders). The latest changes apply since April 1, 2020, but additional temporary measures were introduced by a Decree dated July 22, 2020, amended by a Decree dated December 22, 2021, applying to a certain type of foreign investments up until December 31, 2022. In addition to traditional strategic sectors (defense, national security, etc.), the list of strategic sectors includes a number of recent technology-related activities, infrastructure, products and services that are vital to guarantee the protection of public health, food safety and the free press. Guidelines were published on September 9, 2022.

UNITED STATES:

Parties are required to notify the Committee on Foreign Investment in the United States (CFIUS) of certain types of foreign investment transactions involving either a so-called "critical technology" or investments by parties with substantial foreign government ownership. Moreover, some foreign investment transactions now fall within CFIUS's jurisdiction even if they could not result in control by a foreign person over a U.S. business.

More generally, concerns about Chinese and Russian investment in the United States are more pronounced, and CFIUS tends to be more aggressive today in finding national security concerns and impeding foreign investment.

ITALY:

Over the last ten years, Italy's foreign investment regulation has been consistently strengthened and its scope of application widened. The government's powers to review foreign investments have been extended to transactions involving critical infrastructure and/or critical technologies in certain key sectors (*e.g.*, critical infrastructures, data collection, management systems, financial infrastructures and critical technology, including 5G, artificial intelligence, robotics, semiconductors, dual-use technology, cybersecurity) as well as certain transactions specifically involving EEA investors. Although the government enjoys a high degree of (technical and political) discretion when it makes use of its power to intervene against a particular foreign investment, it shall still apply objective, proportionate and nondiscriminatory criteria, and its decisions may be reviewed by the administrative courts.

EUROPEAN UNION:

In March 2019, Regulation (EU) 2019/452 was adopted, which establishes a framework for the screening of foreign direct investments into the EU. The Regulation provides a mechanism for EU-wide cooperation and information sharing to allow the EU member states to make informed decisions, taking into account all relevant risks and protecting pan-European interests. This new screening mechanism fully applies since October 11, 2020.

CHINA:

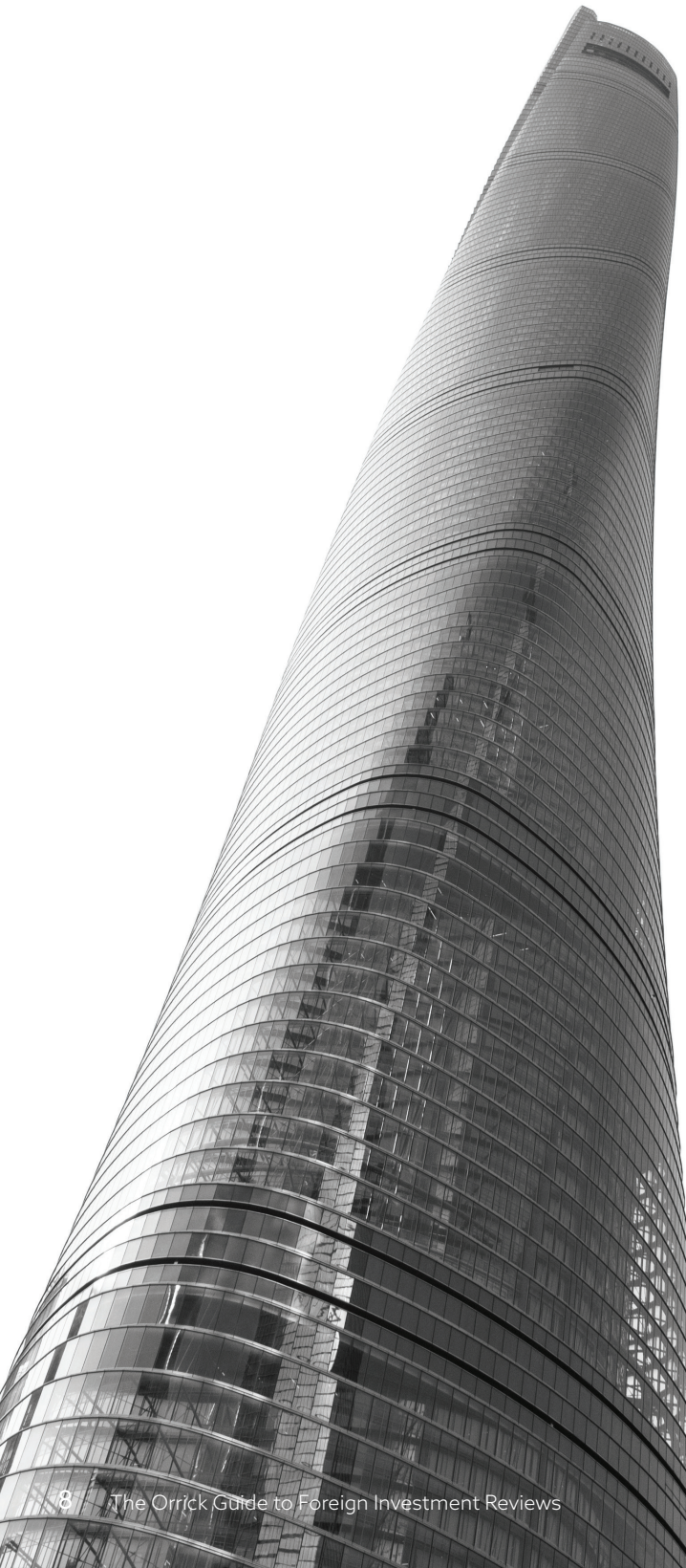
China's new Foreign Investment Law was adopted on March 15, 2019, and became effective on January 1, 2020, replacing previous laws regulating foreign investments and providing a unified framework for foreign investment. China now puts more emphasis on national security and cybersecurity concerns that may be brought by general foreign investment into, or overseas listing of, Chinese companies.

JAPAN:

The rules related to the Japanese Foreign Exchange and Foreign Trade Act were amended to give more focus on cybersecurity and to tighten the scrutiny of investments in businesses active in information processing. If a foreign investor seeks to invest in a Japanese company engaged in such activities on or after August 31, 2019, the investment may require a prior notification and may need to undergo a review by the authorities before being carried out.

GERMANY:

The German rules on foreign investments were strengthened in 2017 and 2018, in particular to address investments from Chinese investors. These amendments introduced additional filing obligations and lowered the thresholds for reviews in certain strategic sectors, in particular in the area of critical infrastructure. In addition, the German government is currently working on plans to create a state-owned investment fund that could buy stakes in strategic companies to fend off unwelcome takeovers from China.



CHINA

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

The main laws regulating foreign investments currently in effect include the Foreign Investment Law adopted by the People's Congress on March 15, 2019, and its Implementation Rules issued by the State Council on December 26, 2019. The Foreign Investment Law and its Implementation Rules have become effective on January 1, 2020.

The new law replaced the previous laws regulating foreign investments, *i.e.*, Wholly Foreign-Owned Enterprise Law, the Sino-Foreign Equity Joint Venture Enterprise Law the Sino-Foreign Cooperative Joint Venture Enterprise Law ("**Old Foreign Investment Laws**") and the regulations and rules promulgated thereunder, while the new law offers a five-year transition period within which the existing foreign-invested enterprises ("**FIEs**") may maintain their organizational forms under the Old Foreign Investment Laws.

2

Which authorities are charged with applying those laws?

The Ministry of Commerce ("**MOFCOM**"), the National Development and Reform Commission ("**NDRC**"), the State Administration for Market Regulation ("**SAMR**") and their local branches are the main authorities applying the laws relating to foreign investment.

3

What other legislation is relevant for foreign investments?

Other important legislations relevant for foreign investments include, but are not limited to:

- Measures for the Security Review of Foreign Investment, effective on January 18, 2021 ("**Security Review Measures**").
- Measures for Foreign Investment Information Reporting, effective on January 1, 2020 ("**Information Reporting Measures**").
- Special Administrative Measures (Negative List) for the Access of Foreign Investment, updated version effective on January 1, 2022 ("**Negative List**").
- Administrative Measures for Approval and Filing of Foreign-Funded Projects, effective on December 27, 2014 ("**Projects Measures**").
- Catalogue of Investment Projects Subject to Government Verification and Approval, effective on December 12, 2016 ("**Projects Catalogue**").
- Catalogue of Industries for Encouraging Foreign Investment (2020 Revision), effective on January 27, 2021 ("**Encouraging Catalogue**").
- Work Measures for Complaints of Foreign-Funded Enterprises, effective on October 1, 2020 ("**Measures for Complaints**").
- Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2021), effective on January 1, 2022 ("**FTZ Negative List**").
- Measures for Cybersecurity Review, effective on February 15, 2022 ("**Cybersecurity Review Measures**").

TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

The *Foreign Investment Law* and the related laws do not put in place a unified review requirement for all types of foreign investments; rather, the following approvals or filings may be required in different scenarios:

(i) FIE Information Reporting

The new Foreign Investment Law reemphasizes the national treatment plus "negative list" approach for access of foreign investment to China, and the Information Reporting Measures provide a streamlined filing system for FIEs based on China's existing company registration system, which replaced the previous MOFCOM approval and filing procedures. Under the new regime, specifically:

- Foreign investors or FIEs shall file foreign investment information through the online company registration system when completing company registration with the local administration for market regulation ("**AMR**"). The AMR will share the same information with MOFCOM.
- The AMR and MOFCOM will determine if the foreign investment complies with the Negative List, which sets forth areas where foreign investments are either prohibited or restricted. The restrictions may include limitations on the percentage of the foreign shareholding or a prohibition of foreign-invested partnerships. The company registration application will be rejected if noncompliance is found.

The foreign investment may be separately subject to Security Review and/or Project Review as described below, if applicable.

(ii) Security Review

The following transactions are subject to foreign investment security review by the Office of Foreign Investment Security Review Working Mechanism ("**Security Review Office**," jointly established by NDRC and MOFCOM):

- Investment in the arms industry, an ancillary to the arms industry or any other field related to national defense security and investment in an area surrounding a military installation or an arms industry facility, and
- Investment in important agricultural products, important energy and resources, critical equipment manufacturing, important infrastructure, important transportation services, important cultural products and services, important information technology and internet products and services, important financial services, key technology or any other

important field related to national security, resulting in the foreign investor's acquisition of actual control of the enterprise invested in.

(iii) Project Review

Foreign investors' investment in and construction of fixed-asset investment projects (*i.e.*, greenfield foreign investments involving fixed-asset projects) that fall into the scope of the Projects Catalogue shall be subject to approval from NDRC or its competent local branches.

Other foreign-invested, fixed-asset projects shall be pending on the completion of filing with NDRC's competent local branches.

5

How are foreign investors or foreign investments defined by the applicable legislation?

As defined in the *Foreign Investment Law*, "foreign investment" means investment carried out directly or indirectly by foreign natural persons, foreign enterprises or other foreign organizations into China, including the following circumstances:

- Foreign investors, independently or jointly with other investors, set up FIEs in China;
- Foreign investors obtain shares, equities, property shares or other similar rights and interests of Chinese domestic enterprises;
- Foreign investors, independently or jointly with other investors, invest in new construction projects in China; and
- Investment through other means stipulated in laws, administrative regulations or provisions of the State Council.

6

Are minority interests caught?

Yes. The *Foreign Investment Law* applies to all types of foreign investments regardless of the foreign investors' shareholding.

However, under the Security Review Measures, for the second category of transactions caught by Security Review, one condition for applying Security Review is that the foreign investor shall obtain the controlling power of the target after the acquisition.

7

Are there sector-specific rules?

Yes.

- **Encouraging Catalogue.** This catalogue contains sectors where foreign investments are encouraged.
- **Negative List.** Foreign investments in the listed sectors are either prohibited or restricted and subject to approval (the restrictions may include limitations on the percentage of the foreign shareholding or a prohibition of foreign-invested partnerships).
- **Projects Catalogue.** Foreign investments in projects that fall into the scope of the catalogue are subject to NDRC approval; other foreign-invested fixed-asset projects are subject to NDRC filing.
- **Other sector-specific rules** such as Telecom Enterprises Provisions, Foreign-Invested Security Company Provisions, Foreign-Invested Human Resource Company Preliminary Provisions, Foreign-Invested Futures Companies Measures and Foreign Invested Cinemas Regulations etc.

8

Is there any kind of *de minimis* threshold?

Under the Security Review Measures, for the second category of transactions caught by Security Review, one condition for applying Security Review is that the foreign investor shall obtain the controlling power of the target after the acquisition.

Acquisition of actual control includes (1) where the foreign investor holds 50% or more of the equity of the invested enterprise; (2) where the foreign investor holds less than 50% of the equity of the invested enterprise, but its voting rights have a significant impact on the resolutions of the board of directors or the shareholders' meeting; or (3) where there are any other circumstances that enable the foreign investor to exert a significant impact on the business decision-making, personnel, finance, technology, etc. of the invested enterprises.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

No.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

No. However, under the Security Review Measures, before filing a formal application for security review, an applicant may request a consultation with the Security Review Office on the procedural issues. The consultation is not a prerequisite for submitting the formal application, and the consultation result is not binding.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

When applicable, filing is mandatory.

12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

(i) FIE Information Reporting

- The company registration with the local AMR (and FIE Information Reporting at the same time) should be conducted when a new FIE is incorporated (for greenfield investment) or within 20 business days after the relevant resolution of the domestic company that is to be invested in by a foreign investor (for M&A).
- Considering that the transaction documents need to be provided for AMR registration, the applications should be made after signing. In general, the application could be submitted after closing, but it would be more advisable to consult the authorities in advance if the invested sectors fall under the Negative List.

(ii) Security Review

Where security review is applicable, the parties should not proceed to closing until the review is completed.

(iii) Project Review

Where project review is applicable, the parties should obtain approval from or complete filing with (as the case may be) NDRC or its competent local branch before starting construction of the project.

13

Which party is responsible for making the notification?

- **FIE Information Reporting.** The foreign investors or the FIE should be responsible for making the filing.
- **Security Review.** Foreign investors or the relevant parties in China should be responsible for making the filing.
- **Project Review.** All parties are equally responsible, though, in practice, usually the Chinese party mainly takes charge of the filing because of its relationship with the local government.

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Which information is required for the filing?

(i) FIE Information Reporting

The following documents are required for AMR registration and FIE Information Reporting:

- Application form;
- Articles of Association of the FIE;
- Power of attorneys (where applicable);
- Identification or registration certificates of all investors;
- Identity documents of the FIE's legal representative, directors, supervisors and manager and the relevant appointment letters (if involving change of such personnel);
- Lease and property ownership certificate for the registered office;

- Shareholder and board resolutions;
- Ownership structure chart of FIE's ultimate actual controller (if involving change of control);
- Where the business scope applied by the FIE requires approval from competent authorities regulating the relevant sectors before AMR registration, such approval should be provided.

(ii) Security Review

The following documents should be submitted when filing a formal application with the Security Review Office for security review:

- A written report;
- An investment plan;
- A statement on whether the foreign investment affects national security;
- Other materials required by the Security Review Office;

The written report shall specify the name, domicile and business scope of the foreign investor, basic information of the investment and other matters prescribed by the Security Review Office.

(iii) Project Review

Where approval is applicable:

- Project Application Report that covers status of the project and its investors; analysis on resources utilization and ecological environmental impact; analysis on economic and social impact; and M&A arrangements (where applicable) etc.;
- Registration certificates of all the investors, their latest audited financial statements and their credit certificates;
- Investment proposals and board resolutions on capital increase or M&A;
- Opinions issued by the competent planning and land authorities (where applicable);
- Approval of environmental impact assessment issued by the competent authorities of environmental protection;
- Opinions issued by the competent energy conservation review authorities;
- Other documents required by applicable laws and regulations.

Where filing is applicable, basic information on the project and investors, registration certificates of all the investors, investment proposals and board resolutions on capital increase or M&A are required.

15

Are there any filing fees?

There are no filing fees.

16

Must the parties suspend the transaction until the review is completed?

(i) FIE Information Reporting

- The parties generally do not need to suspend the transaction unless a national security issue arises, in which case the filing authority will inform the investors to submit a security review application to the Security Review Office and suspend the filing procedure.
- If the invested sectors fall under the Negative List, it is advisable to consult the authorities beforehand.

(ii) Security Review

The parties shall not proceed with the transaction until it is cleared by the Security Review Office.

(iii) Project Review

The parties shall not proceed with the project until approval is obtained, or filing is completed.

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

(i) FIE Information Reporting

- Where an FIE or its investors fail to make the necessary filing on time or provide materially incomplete filing materials, they shall be ordered to make corrections or provide the missing information/documents; if they fail to do so by the prescribed deadline or if there are serious circumstances, a fine of up to RMB 300,000 shall be imposed thereon.
- Where an FIE or its investors intentionally or repeatedly fail to make necessary filing or provide incorrect or misleading information or fake documents, they shall be ordered to make corrections and a fine of up to RMB 500,000 shall be imposed thereon.
- For foreign investment in restricted sectors while the restrictions are not complied with or for foreign investment in prohibited sectors, in addition to the above sanctions, MOFCOM or its local branches shall also have the power to unwind the transaction, though we have not seen such reported cases.

(ii) Security Review

Where the foreign investor fails to notify while the relevant authorities, enterprises, social groups, the public etc. believe security review is necessary, they may make proposals to the Security Review Office on conducting the review. The Security Review Office may initiate the review based on such proposals or if it identifies a national security concern by itself. The Security Review Office has the power to suspend or unwind transactions that have an impact on national security, though we have not seen such reported cases.

(iii) Project Review

NDRC or its competent local branches shall order the construction of the project to be suspended if such project fails to receive approval or be filed with the competent authority.

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

As mentioned in the response to question 17 above, the Security Review Office may initiate security review on its own initiative or on other parties' proposals.

19

What is the timeline of the review process? Are fast-track options available?

There are no fast-track options.

(i) FIE Information Reporting

- The company registration with the local AMR (and FIE Information Reporting at the same time) should be conducted when a new FIE is incorporated (for greenfield investment) or within 20 business days after the relevant resolution of the domestic company that is to be invested in by a foreign investor (for M&A).
- The applicant shall submit the application through the FIE Information Reporting system online and make an appointment for onsite filing. Once application documents are submitted onsite, the filing can be completed in a few days, depending on the local practice, if the business of the FIE does not fall into the Negative List.
- The local branch of MOFCOM may notify the foreign investor or FIE to report supplementary information or make corrections within 20 business days where it finds omissions or mistakes in the report.

(ii) Security Review

See the ➔ *Security Review Flow Chart*.

(iii) Project Review

- Where approval is applicable, the authority should complete the review within 20 business days, which could be extended for another 10 business days. But the time required for necessary consultation, assessment and expert deliberation should be excluded from the time limit above.
- Where filing is applicable, the authority should complete the review within seven business days.

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

Information exchange between and joint enforcement by different government bodies are increasingly common due to the support of big data. For example, the antitrust bureau may forward a case for security review if it finds a national security issue and vice versa.

21

To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

The authorities for FIE Information Reporting and project review do not expect prefiling communication; however, they are generally open to prefiling discussions.

The Security Review Measures offer a prefiling consultation procedure, but it is not a prerequisite procedure before submitting the formal application, and the consultation result has no binding power and shall not serve as the basis for the formal application.

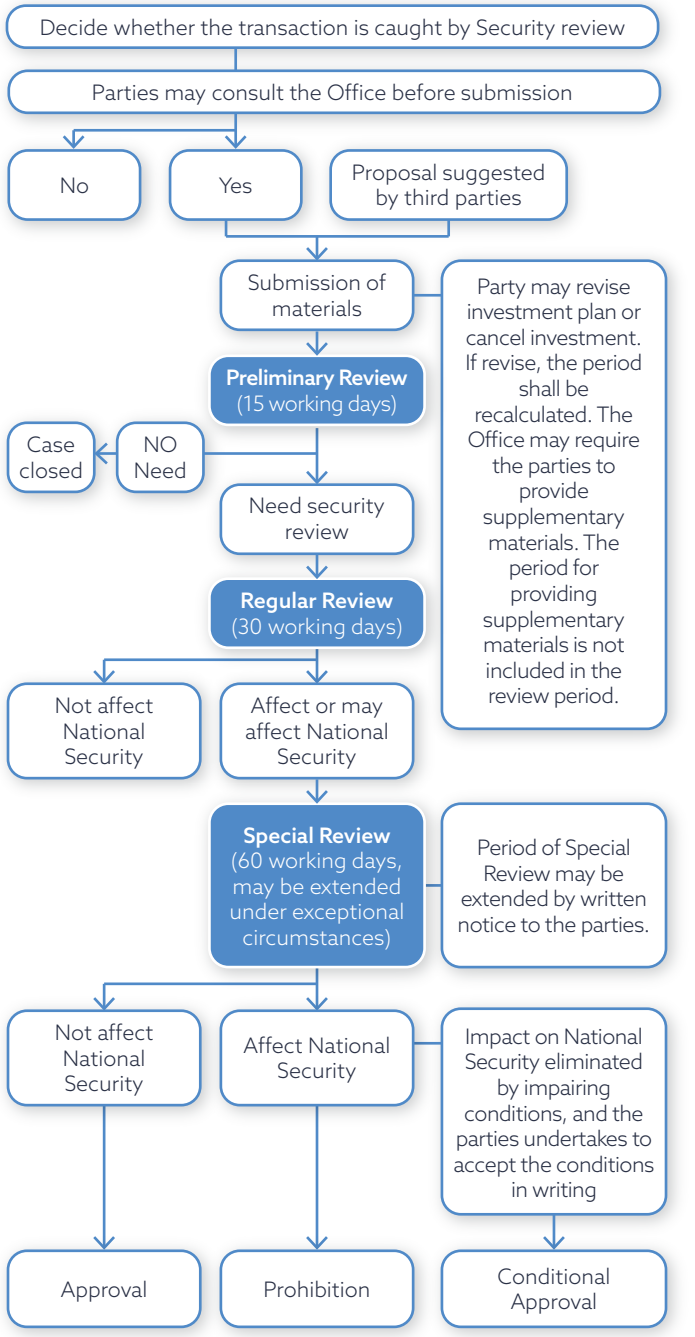
22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

Third parties (complainants) are not involved in the review. However, any persons or organizations could report to the competent authorities any unlawful behaviors of FIEs or their investors.

For a foreign investor's acquisition of a domestic enterprise, if relevant authorities, enterprises, social groups, the public, etc., believe security review is necessary, they may make proposals to the Security Review Office on conducting the review.

SECURITY REVIEW FLOW CHART



23

Are there safeguards in place to protect confidential information of the parties?

- **FIE Information Reporting.** MOFCOM may share with the AMR and departments in charge of foreign exchange, customs, taxation, etc., on relevant information of foreign investors and FIEs. Such information so shared shall not contain trade secrets of FIEs or their investors, and the authorities shall not disclose any information involving state secrets, trade secrets or personal privacy.

- **Security Review.** The authorities, relevant entities and personnel participating in the security review shall keep confidential the state secrets, trade secrets and other confidential information involved in the review.
- **Project Review.** The law does not specify safeguards to protect confidential information.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

(i) FIE Information Reporting

The local MOFCOM branches generally only conduct formality review provided the information is true, accurate and complete and the transaction does not involve restricted or prohibited sectors or national security issues.

For foreign investment in restricted sectors, the authority will review if the proposed transaction conforms to the restrictions and the relevant prior approvals (if required) have been obtained.

(ii) Security Review

Whether a foreign investor's M&A of a domestic enterprise should be subject to security review shall be determined by the substance and actual influence of the transaction.

No foreign investor can substantially circumvent the review through structuring mechanisms, including trust, multilevel reinvestment, leasing, loans, variable interest entities or offshore structure, etc.

During the review, the Security Review Office shall consider impact of the transaction on national security, stable operation of national economy, the basic societal order and people's living conditions, and R&D capacity for key technologies concerning national security.

(iii) Project Review

A foreign-invested project that is subject to approval shall be approved if it satisfies all of the following conditions. The filing of such a project will be accepted by the NDRC or its local branches if it satisfies the first two criteria:

- In compliance with the Encouraging Catalogue, the Catalogue of Priority Industries for Foreign Investment in Central and Western China, and other relevant laws and regulations;
- In compliance with development planning, industry policies and industry entry standards;
- Rational development and effective utilization of resources;
- No effect on national security and ecological security;
- No material negative impact on public interest; and
- In compliance with China's relevant foreign exchange control requirements.

25

Does the nationality of the investor play a role?

The laws do not explicitly address this issue; however, investors from countries that are in tension with China might be prejudiced, especially in security review.

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

- **FIE Information Reporting.** Where the restrictions are not complied with for foreign investment in restricted sectors or for foreign investment in prohibited sectors, MOFCOM or its local branches have the power to unwind the transaction.
- **Security Review.** Where a transaction is likely to have an impact on national security and has not been implemented yet, the parties shall suspend the transaction. The applicant shall not submit another application or proceed with such transaction before appropriately restructuring

the transaction and modifying the application documents; where a closed deal has already caused, or is likely to cause, serious impact on national security, the Security Review Office shall order the transaction to be unwound or notify the parties to spin off the relevant equity shareholding or assets or to adopt other effective measures to eliminate the influence of the transaction on national security.

- **Project Review.** NDRC or its competent local branches shall order the construction of the project to be suspended if such project fails to receive approval or be filed with the competent authority.

27

Do the authorities cooperate or consult with authorities in other countries?

No cooperation or consultation is provided for by the law, but exchange of information or views may exist between China and other countries through treaties or agreements. For example, in August 2022, the U.S. and Chinese governments reached a Statement of Protocol Agreement regarding cooperation on inspecting the audit work papers of U.S.-listed Chinese companies.

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

- **FIE Information Reporting.** If FIEs or their investors violate the obligations under the Information Reporting Measures, they are obliged to make correction; if not, they would be imposed a penalty as mentioned in the response to question 17.

- **Security Review.** During the security review, the applicant may apply for modification of the transaction plan or cancellation of the transaction.

- To mitigate the possible impact of a proposed transaction on national security, parties should adjust and refile the transaction for approval.

- To mitigate the actual or possible impact of a closed deal on national security, parties should sell the relevant equities or assets or take other effective measures.

- **Project Review.** The law does not provide for any remedies.

29

Can a negative decision be appealed?

Yes, a negative decision may be appealed through administrative review or administrative litigation.

In addition, if an FIE considers that its lawful rights and interest have been infringed upon by an administrative action taken by an administrative authority during the review process, or that there are problems existing in the investment environment and suggest improving relevant policies and measures, a complaint can be filed by the FIE to the office designated by MOFCOM pursuant to the Measures for Complaints

EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

In recent years, China gradually reduced restrictions on foreign investment, and policies are more appealing to foreign investors.

The latest Negative List has been further shortened compared to the previous version. For example, the shareholding restriction on foreign investment in manufacturers of automobiles was lifted. Tesla has established its wholly owned factory in Shanghai, and Volvo has acquired 100% equity of JMC Heavy Duty Vehicle Co. and plans to produce and sell heavy trucks in China by the end of 2022.

According to MOFCOM, foreign investment into China amounts to US$ 173.48 billion in 2021, increased by 14.9% on a year-on-year basis.[1]

[1] http://mo.mofcom.gov.cn/article/tjsj/zwqihou/202201/20220103239573.shtml

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Are there any relevant recent developments or trends?

While the latest Negative List, effective on January 1, 2022, further opens the Chinese market for foreign investors, China now puts more emphasis on national security concerns and cybersecurity concerns that may be brought by general foreign investment into or overseas listing of Chinese companies. These are evidenced by the following:

- A new provision is added in the latest Negative List that where a Chinese company, which engages in businesses prohibited for foreign investment by the Negative List, intends to list overseas, approvals from competent authorities shall be obtained;
- The national security review regime has been formally built by the new Security Review Measures, which expands the application of Security Review to a broader range of sectors and more types of foreign investments;
- The Cybersecurity Review Measures add a new provision that where a network platform operator that possesses the personal information of more than one million users intends to be listed abroad, such operator must apply for cybersecurity review.
- The national security review process and the cybersecurity review process are both time-consuming and their review results are highly uncertain. As a result, foreign investors may be discouraged to invest in areas that may trigger national security review or cybersecurity review.

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In addition, Jeff advises multinationals, financial institutions and private equity funds on their general corporate, capital markets and regulatory compliance matters.

EUROPEAN UNION

RELEVANT LAWS AND AUTHORITIES

Until recently, there were no measures at the level of the European Union ("**EU**") on the review and control of foreign direct investments. At national level, such measures have existed in several member states—and, amid growing concerns about the impact that certain foreign investments may have on national interests; some member states have made their review procedures significantly more stringent in recent years. However, the decentralized and fragmented nature of the national review procedures raised questions about their effectiveness to address adequately the potential (cross-border) impact of foreign investments in sensitive sectors.

To respond to such concerns, Regulation (EU) 2019/452 "establishing a framework for the screening of foreign direct investments into the Union" (the "**Regulation**") was adopted by the EU's Parliament and Council on March 19, 2019. The objective of the Regulation is not to harmonize the formal foreign investment mechanisms used in EU member states, or to replace them with a single EU mechanism. Rather, it provides a mechanism for EU-wide cooperation and information sharing to allow member states to make informed decisions, taking into account all relevant risks and protecting pan-European interests. The decision on whether to set up a review mechanism or to review a particular foreign investment remains the sole responsibility of the member states.

After a transitional period of one and a half years, the Regulation became fully applicable on October 11, 2020.

The list of projects or programs of "Union interest" (see below) was updated by Commission delegated regulations (EU) 2020/1298 of July 13, 2020, and (EU) 2021/2126 of September 29, 2021.

Furthermore, on April 5, 2022, the Commission published guidance for EU members states in relation to specific threats to EU security and public order from investments subject to Russian or Belarussian government influence, in the context of Russia's invasion of Ukraine.

Under the Regulation, the competent authorities of the EU member states remain in charge of screening foreign direct investments under the applicable national laws. The role of the European Commission is to facilitate coordination and to advise member states where it considers that an investment would likely affect security or public order in one or more member states.

TRANSACTIONS SUBJECT TO REVIEW

The Regulation does not put in place a review requirement for foreign investments; rather, it sets up a procedural framework for screening mechanisms created by the EU member states. The rules of the Regulation apply to any national "procedure allowing to assess, investigate, authorize, condition, prohibit or unwind foreign direct investments."

The definition of "foreign direct investments" is broad and does not require an investment above a defined threshold of shareholder rights or the acquisition of control in the target company. Any investment "aiming to establish or to maintain lasting and direct links" with a business in "in order to carry on an economic activity" in an EU member state is sufficient. The investment must be made by a "foreign investor," which is defined as "a natural person of a third country or an undertaking of a third country." Third countries are countries outside the EU. Therefore, the Regulation does not apply to the screening of cross-border investments inside the EU.

PROCEDURE

The aim of the Regulation is to enhance cooperation and increase transparency between EU member states and the European Commission. To this effect, it creates a "cooperation mechanism" that requires member states to inform each other and the Commission of incoming foreign direct investments affecting security and public order (➔ EU Cooperation Mechanism for the Screening of Foreign Direct Investments):

- Where a member state screens a foreign direct investment, it must notify the other member states and the Commission by providing, "as soon as possible," certain information on the investment (➔ Information Requirements). The other member states can then comment, and the Commission can issue an (nonbinding) opinion within certain time limits, normally within 35 calendar days following the notification (this period is extended if other member states or the Commission request additional information).

EU COOPERATION MECHANISM FOR THE SCREENING OF FOREIGN DIRECT INVESTMENTS

Information Requirements

- ☑ Ownership structure of the foreign investor and of the target business (incl. information on ultimate investor and capital participation);
- ☑ Value of the foreign direct investment;
- ☑ Products, services and business operations of the foreign investor and of the target business;
- ☑ Member states in which the foreign investor and the target business conduct business operations;
- ☑ Funding of the investment and its source;
- ☑ Date when the foreign direct investment is planned to be completed or has been completed.

In April 2021, the Commission published a template notification form on its website, that it recommends the member states use to request more detailed information from the investor in order to provide further context to the other member states. It is available at https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159530.pdf.

- Where a foreign direct investment in a member state is not undergoing screening and other member states or the Commission consider that the investment is likely to affect security or public order, the latter may request from the former certain information on the investment (➔ Information Requirements). The other member states and the Commission may then provide comments or an (nonbinding) opinion, respectively, to the member state receiving the foreign direct investment. The time limit for comments and opinions is 35 calendar days following the receipt of information on the investment, although extensions are possible.

Although the final screening decision is the sole responsibility of the member state receiving the foreign investment, it is required to give "due consideration" to the comments of the other member states and the opinion of the Commission. Moreover, in cases where the Commission believes that the foreign direct investment may affect projects or programs of "Union interest," the member state receiving the investment is required to take "utmost account" of the Commission's opinion and provide an explanation if the opinion is not followed. Projects and programs of "Union interest" are defined in the Annex of the Regulation.

They currently include:

- European GNSS programs (Galileo & EGNOS)
- Copernicus
- Preparatory Action on Preparing the new EU GOVSATCOM programme
- Space Programme
- Horizon 2020
- Horizon Europe
- Euratom Research and Training Programme 2021-25
- Trans-European Networks for Transport (TEN-T)
- Trans-European Networks for Energy (TEN-E)
- Trans-European Networks for Telecommunications
- Connecting Europe Facility
- Digital Europe Programme
- European Defence Industrial Development Programme
- Preparatory Action on Defence Research
- European Defence Fund
- Permanent structured cooperation (PESCO)
- European Joint Undertaking for ITER
- EU4Health Programme

In addition to creating the cooperation mechanism, the Regulation also imposes certain minimum standards for the national screening mechanisms of EU member states. This includes:

- National rules and procedures must be transparent and not discriminate between third countries.
- Member states must set out the circumstances triggering a screening, the grounds for screening and the applicable detailed procedural rules.

- Member states must apply time frames that allow them to take into account the comments of other member states and the opinions of the Commission under the coordination mechanism.
- Confidential information must be protected.
- Foreign investors and the undertakings concerned must have the possibility to seek recourse against screening decisions of the national authorities.
- National screening mechanism must include measures necessary to identify and prevent circumvention.

SUBSTANTIVE ASSESSMENT

The Regulation does not attempt to harmonize national rules on foreign investments in the EU member states. However, it does provide a list of factors that the member states and the European Commission may take into consideration when conducting their assessment. This includes potential effects on the following:

- critical infrastructure (incl. energy, transport, water, health, communications, media, data processing, finance);
- critical technologies and dual-use items (incl. artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum, nuclear, nano- or biotechnologies);
- supply of critical inputs (incl. energy, raw materials, food);
- access to sensitive information (incl. personal data); or
- freedom and pluralism of the media.

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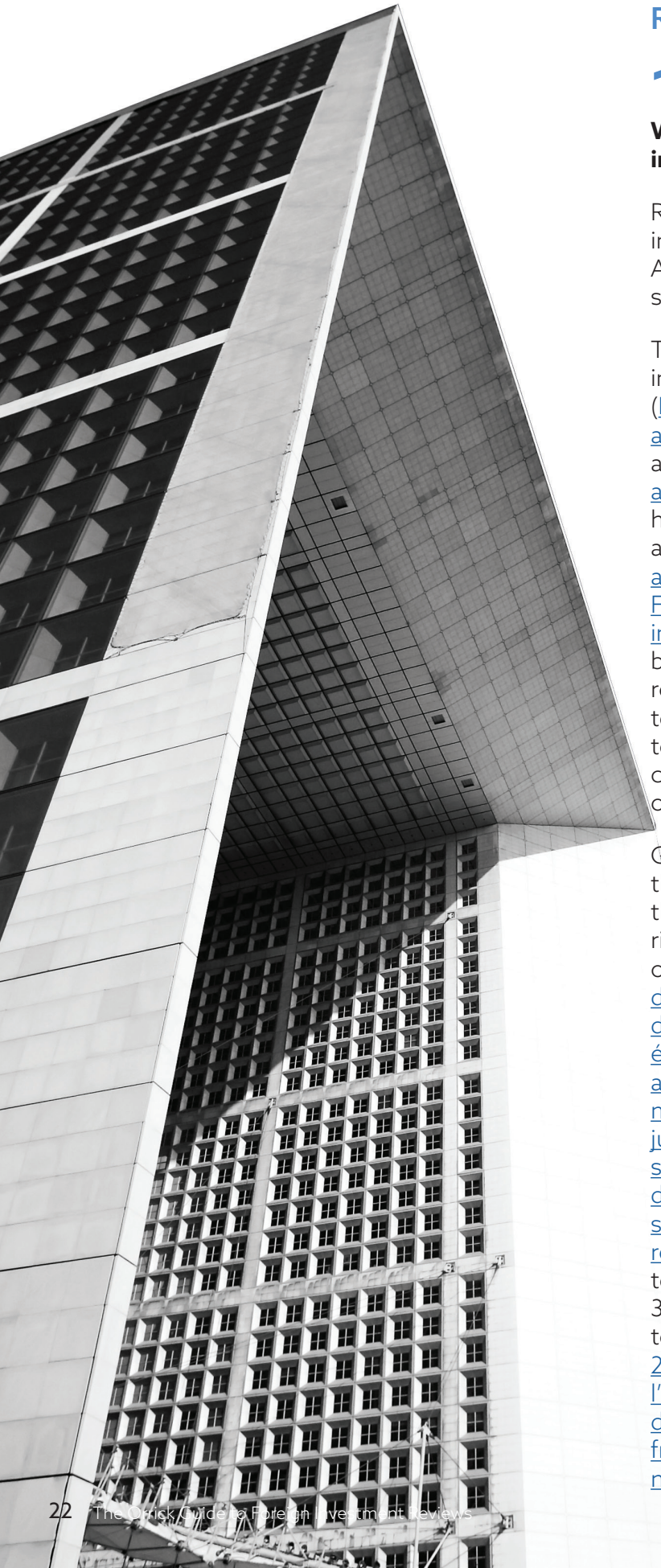


FRANCE

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

Rules regarding prior vetting of foreign investments in strategic sectors are enshrined in Articles L.151-1 and seq. and Articles R.151-1 and seq. of the Financial and Monetary Code.

The latest amendments to the regime were introduced on December 31, 2019 with a decree (Décret n° 2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France) and an order (Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France) that have applied since April 1, 2020; this order was amended by two subsequent orders (Arrêté du 27 avril 2020 relatif aux investissements étrangers en France and Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France) which added biotechnologies and technologies involved in renewable energy production to the list of critical technologies, and amended the list of documents to be filed in order to take into account the EU cooperation mechanism for the review and control of foreign direct investments.

Given the effects of the COVID-19 pandemic on the economy, a specific regime with respect to the crossing of the threshold of 10% of the voting rights of a French listed company was introduced on July 22, 2020 by a decree (Décret n° 2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé) and an order (Arrêté du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé). This specific regime was to apply temporarily, from August 7, 2020, until December 31, 2020. However, this deadline was postponed to December 31, 2022, by decree (Décret n° 2021-1758 du 22 décembre 2021 prorogeant l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé).

To further increase clarity and transparency, templates were published on February 22, 2022. Furthermore, following a public consultation launched in March 2022 in order to identify the items in the regulatory framework that need to be clarified, guidelines were published on September 9, 2022.

2

Which authorities are charged with applying those laws?

To the extent foreign direct investments in strategic sectors are concerned, the rules are enforced primarily by the Minister of Economy. A special unit is devoted to this activity within the French Treasury, which is part of the Ministry.

3

What other legislation is relevant for foreign investments?

Sectoral rules specific to foreign investments do exist in France. Sectors concerned are, ***inter alia***, banking, air transportation, defense, telecommunications, data collection, audio-visual communication and publishing. Some sectoral rules derive from EU legislation; others are France-specific.

TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

Reportable transactions concern activities that are deemed strategic because they relate to the exercise of public authority and foreign investment is likely to jeopardize national defense interests or the maintenance of public order and public safety. However, the list of strategic activities, which is set in the Financial and Monetary Code, has grown substantially in the last few years and is now quite extensive (➔ Strategic Sectors).

Where the target is active in one of these strategic sectors, it will be reportable if a "foreign investor" (see question 5 below) contemplates an acquisition falling under one of the following categories:

Strategic Sectors

1. Products for military use, dual-use products and technology, national defense, encryption, including contractors and subcontractors of the French Ministry of Defence in these areas.
2. Devices for interception or remote detection of conversation or data.
3. Assessment and certification of IT security by approved assessment centers.
4. Gambling (other than casinos).
5. Measures to address the use of biological or chemical threats or to prevent the health consequences of such use.
6. Infrastructure, goods or services that are vital to guarantee the integrity, security and continuity of:
   - energy supply;
   - water supply;
   - transport networks and services;
   - space operations;
   - electronic communications networks and services;
   - public safety missions carried out by police, gendarmerie, customs and other approved providers of security services;
   - the operation of a building, installation or of a key infrastructure ("ouvrage d'importance vitale") within meaning of French Code of Defence;
   - public health;
   - food safety;
   - print and digital press.
7. IT security services in relation to the operation of a building, installation or of a key infrastructure ("ouvrage d'importance vitale") within meaning of French Code of Defence.
8. R&D on applications for the above activities, regarding:
   - dual-use goods and technologies;
   - cybersecurity;
   - artificial intelligence;
   - robotics;
   - additive manufacturing;
   - semiconductors;
   - quantum technology;
   - energy storage.
9. Biotechnologies.
10. Technologies involved in renewable energy production.

- the acquisition of control, within the meaning of Article L. 233-3 of the French commercial code, over a French entity (by any foreign investor);
- the full or partial acquisition of a French entity's strategic business or branch of activity (by any foreign investor);
- if the investor is a non-EU/EEA entity, *i.e.*, when at least one of the members of the investor's "chain of control" is a non-EU/EEA national or entity (see question 5 below), the crossing of, directly or indirectly, alone or in concert with others, the threshold of 25% of the voting rights of a French entity. Up until December 31, 2022 (subject to further possible extension), a specific

regime (hereafter the "Temporary Regime") applies when the threshold of 10% of the voting rights of a French listed company is crossed by a foreign investor. In such case, the investment shall be completed within a six month period following the mandatory "notification" to be submitted by the investor to the Minister of Economy (see reply to question 11 below).

Acquisition of "control" may be established based on that concept's definition under corporate law. Therefore, "de facto" control may suffice to trigger foreign investment control.

5

How are foreign investors or foreign investments defined by the applicable legislation?

"Foreign investors" include:

i. any individual who is not a French national;

ii. any French national domiciled abroad as defined by the French Tax Code;

iii. any entity established under foreign law;

iv. any entity established under French law that is controlled by an individual or entity falling under one of the three categories above.

One significant key concept that has been implemented by the recent legal modifications relates to the "chain of control" of an investor. The "chain of control" constitutes the group composed of the investor and the foreign nationals and/or foreign entities which control the said investor. It is now clearly provided that all the entities and nationals in a chain of control are qualified as investors. The control of an investor is established based on the concept's definition under French corporate law or merger control law.

The definition of an investor is broad and encompasses investors from EU/EEA member states. However, additional information is required for investors from third countries (see section 14 below).

6

Are minority interests caught?

Yes, subject to the limitations and thresholds detailed in response to question 4 above.

7

Are there sector-specific rules?

Yes, but not within the framework of the foreign investment control regime.

8

Is there any kind of *de minimis* threshold?

No.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

Mandatory information to be provided by the investor in the filing now includes any significant equity link with, or financial support from, a state or public body outside the EU over the last five years. In addition, the Financial and Monetary code specifically mentions such links between the investor and a foreign government or public body as an element that may be taken into account by the Minister of Economy when issuing a prohibition decision.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

The framework only allows for comfort letters with a limited scope: a French entity may ask whether any of its activities are deemed strategic, in which case the Minister of Economy must reply within two months. A potential investor can make the same inquiry, provided the target agrees, in which case the target will also receive a copy of the response.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

Filing is mandatory for foreign investment in any of the strategic sectors, subject to the categories of operation mentioned in the reply to question 4 above.

When the operation falls within the scope of the Temporary Regime (as defined in the reply to question 4 above), the "usual" filing obligation referred to above is replaced with a specific "notification" to the Minister of Economy. The latter has 10 working days to refuse the notified operation, it being specified that in such event, the investor remains able to submit a usual filing for the contemplated operation. Failure of the Minister of Economy to provide an answer to the notification within ten working days is deemed an approval of the notified operation.

12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

There is no mandatory deadline. Filing needs to be made prior to closing. It might, however, prove useful to discuss an outline beforehand whenever the project is of major importance or politically sensitive.

In addition, as mentioned above, an operation falling within the scope of the Temporary Regime (as defined in the reply to question 4 above) must be closed within a six-month period after the Minister of Economy is notified about the operation.

13

Which party is responsible for making the notification?

The duty to notify lies with the foreign investor. It should be specified that the notification may also be submitted by any member of the chain of control of the investor.

14

Which information is required for the filing?

The filing must include detailed information in order to identify the investor's ultimate controlling individual or entity (as well as its managers and shareholders), all elements of the chain of control between the investor and its ultimate controlling individual or entity, any significant equity link with or financial support from a state or public body outside the EU as well as past criminal activities.

Other filing requirements pertain to the envisaged investment (transaction value, financial arrangements, projected timeline), the investor's strategy (generally and in each relevant sector) in France and the EU, as well as the target's activities, its market shares in France, its intellectual property rights, its clients and competitors in France and the EU, and its involvement in any projects or programs of "Union interest" that would justify a bigger involvement of the European Union (see EU chapter and relevant developments about Regulation (EU) 2019/452).

Since January 1, 2022, it is also mandatory to fill out and submit the notification form provided by the European Commission, if at least one entity in the chain of control between the investor and its ultimate controlling individual or entity is established outside the European Union.

One further element that may be highlighted is that the French Highest Administrative Court (the Conseil d'Etat) hence ruled that the identity of the limited partners of an investment fund is not required to be disclosed in the filing as opposed to the identity of the manager as well as the persons or entities controlling said manager (CE, 3 April 2020, n° 422580). Even if this ruling has been issued on the basis of the previous applicable legal framework, the conclusion that has been drawn seems to be applicable under the new regime.

Under the Temporary Regime (as defined in the reply to question 4 above), the notification must contain information in relation to the investor's shares and voting rights before and after the investment, including future or potential rights, as well as the identity and status of the investor's representative.

15

Are there any filing fees?

No.

16

Must the parties suspend the transaction until the review is completed?

Yes, the transaction must be suspended until it is authorized. There is no derogation to this standstill obligation, save when the operation falls within the scope of the Temporary Regime. Indeed, when the operation falls within the scope of the Temporary Regime, the transaction is suspended until the expiration of the ten working days allowing the Minister of Economy to refuse the notified operation. In the event that the Minister of Economy did not oppose the operation during this period, the operation may be completed even if no formal answer of the Minister of Economy has been sent to the investor.

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

Yes. There are both administrative (either, whatever is most significant, twice the amount of the illegal investment or 10% of the global annual turnover of the target) and criminal sanctions. Besides, transactions closed in breach of the duty to submit a prior notification or to get the prior approval of the Minister are deemed null and void.

The Minister has also the power to unwind a transaction and request the parties to restore the situation ex ante and impose injunctions, with penalty payments up to €50,000 per day.

Sanctions are not made public. As foreign investments in France are attracting more and more public focus and EU member states are encouraged to not only make full use of their national mechanisms, but also to cooperate with the Commission and other member states (see EU chapter), one cannot exclude that authorities may decide to adopt a tougher stance in the future.

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

No. In the context of merger control, the Minister of Economy has an evocation power (public interest clause), but it only concerns reportable mergers (*i.e.*, transactions that are subject to mandatory merger review before the French Competition Authority). A similar evocation power vested with member states exists in relation to mergers reportable at an EU level.

19

What is the timeline of the review process? Are fast-track options available?

Save for operations falling within the scope of the Temporary Regime (as defined in the replies to questions 4 and 11 above), the timeline for the usual review process is as follows:

- within 30 working days after receipt of a complete filing (phase 1), the Minister of Economy must decide whether the transaction is not reportable, should be cleared without condition or requires further scrutiny;
- where the Minister of Economy decides to investigate further, he/she has an additional 45 working days (phase 2) to choose between prohibition, approval without conditions and approval with conditions.

In both phases, a lack of response by the Minister of Economy constitutes a tacit prohibition decision. This considerable change in the regime, provided for by the new applicable legal framework, is also a significant difference with the review process under merger control rules.

No fast-track option is available to the investor.

There is only one fast-track procedure that may only be triggered by the Minister of Economy, not the foreign investor. Indeed, in case of an emergency, exceptional circumstances of an imminent threat to public order, public safety or national defense interests, the Minister of Economy may operate an expedited review and take quite invasive preventive measures. The investor must nevertheless be given formal notice to submit observations within a time frame than cannot be less than five business days.

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

Yes. The French Treasury coordinates the review process, but the request for prior approval is generally instructed by other authorities and government bodies that have their say in the proposed commitments where applicable. Several authorities or government bodies may be consulted on a given review process. The authorities or government bodies involved vary according to the strategic sector(s) concerned by the transaction (*e.g.*, Ministry of Defence in relation to defense activities, Ministry of Environment in relation to energy, etc.).

There are no procedural links between the foreign investment control process and other review processes. However, it may happen that the French Treasury has discussions with other regulators (*e.g.*, the French Financial Markets Authority

21

To what extent are the parties involved in the review? Do the authorities expect prefiling communication?

No prefiling communication is expected from the parties. Yet in practice, the French Treasury commonly requests additional information from the foreign investor to complete the filing. In the event that commitments (by the foreign investor) are contemplated, meetings may take place with the relevant authorities/governmental bodies.

22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

There is no specific provision relating to third parties' rights under the French foreign investment control regime. Their rights derive from the general regime of rights recognized to third parties in relation to administrative acts. As the review process is confidential and decisions rendered by the Minister of Economy are not made public, it is difficult, but not impossible, for third parties to assert their rights, especially, for instance, for the (minority) shareholders of the target (cf. CE, 3 April 2020, n° 422580).

Even though the European foreign investment screening regulation (see EU chapter) requires national screening mechanisms to have transparent, nondiscriminatory rules and procedures, it remains to be seen whether this could impact third parties' rights.

23

Are there safeguards in place to protect confidential information of the parties?

Yes. The process is entirely confidential, as the civil servants in charge have a duty of confidentiality.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

Criteria for an intervention are those triggering foreign investment control (see question 4 and the box "Strategic Sectors"). The core concepts which fundamentally justify foreign investment control, *i.e.*, national defense interests, the continuation of public order and public safety, are potentially very broad, so that the definitions of the "strategic sectors" are also rather vague. Thus, traditionally, the French Treasury and the other services which are participating in the instruction have enjoyed a wide margin of maneuver for their substantial assessment. Overall, nevertheless, the intervention of the Minister of the Economy in the sectors mentioned in the box "Strategic Sectors" of question 4 is the sensitivity of the activities of the target when it relates to those sectors, it being specified that this assessment is drawn on a case-by-case basis by the French Treasury.

Besides, efforts were made with the latest amendments to provide some guidance, including with practical objectives that may justify imposing conditions (remedies) on the investor (*e.g.*, ensuring that the target's knowledge and expertise is retained), or specific factors that may contribute to a prohibition decision (*e.g.*, equity link to or financial support by foreign states of public bodies). Additional guidance can now also be found in the recently released guidelines.

Finally, the principle of proportionality is also specifically mentioned as a safeguard against disproportionate measures against the investor, including when imposing conditions (remedies) on the investor.

25

Does the nationality of the investor play a role?

In principle, the nationality of the investor does not play a role (except for the differential treatments provided by law between EU/EEA and non-EU/EEA investors). However, given the confidentiality of the review process, it is impossible to determine whether and to what extent the services receive specific instructions based on the nationality of the investors. Concerning commitments required from the foreign investor, where applicable, they tend to be less far-reaching for EU/EEA investors than for third countries' investors.

The EU framework is aimed at increasing cooperation among member states. On the one hand, it will impose certain minimum standards regarding national screening mechanisms, including the principle of non-discrimination – on the other hand, this principle will likely be implemented differently within the EEA and vis-à-vis third countries.

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Minister of Economy can prohibit a transaction or make his/her prior approval subject to commitments undertaken by the foreign investors. He/she can also impose temporary protective measures and accelerate the reviewing process (see question 19). In addition, special grounds for prohibition include past or potential future criminal infringements, as well as equity links to or financial support by foreign states or public authorities (see question 9).

27

Do the authorities cooperate or consult with authorities in other countries?

Regulation (EU) 2019/452 establishing an EU framework fully applies since October 2020 (see EU chapter). No other specific cooperation or consultation mechanism is provided for by the law. General international cooperation can however be used by the competent services. In addition, informal cooperation or consultation may also exist, of which foreign investors may not be informed. In the context of the Covid-19 pandemic, informal cooperation was even publicly encouraged by the EU Trade Commissioner, ahead of the full implementation of the EU framework (see EU chapter).

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

Remedies are suggested by the authorities. Depending on the strategic sector and target concerned, there may be room for negotiations.

If the entity subject to the investment is active in strategic sectors for which the economic and regulatory framework undergoes changes that were unforeseeable on the date of completion, the investor may request the revision of the remedies (not the Minister of Economy).

In the event of changes in the shareholding, either of the entity subject to the investment, or of any entity directly or indirectly controlling it, both the investor and the Ministry of Economy can request a revision.

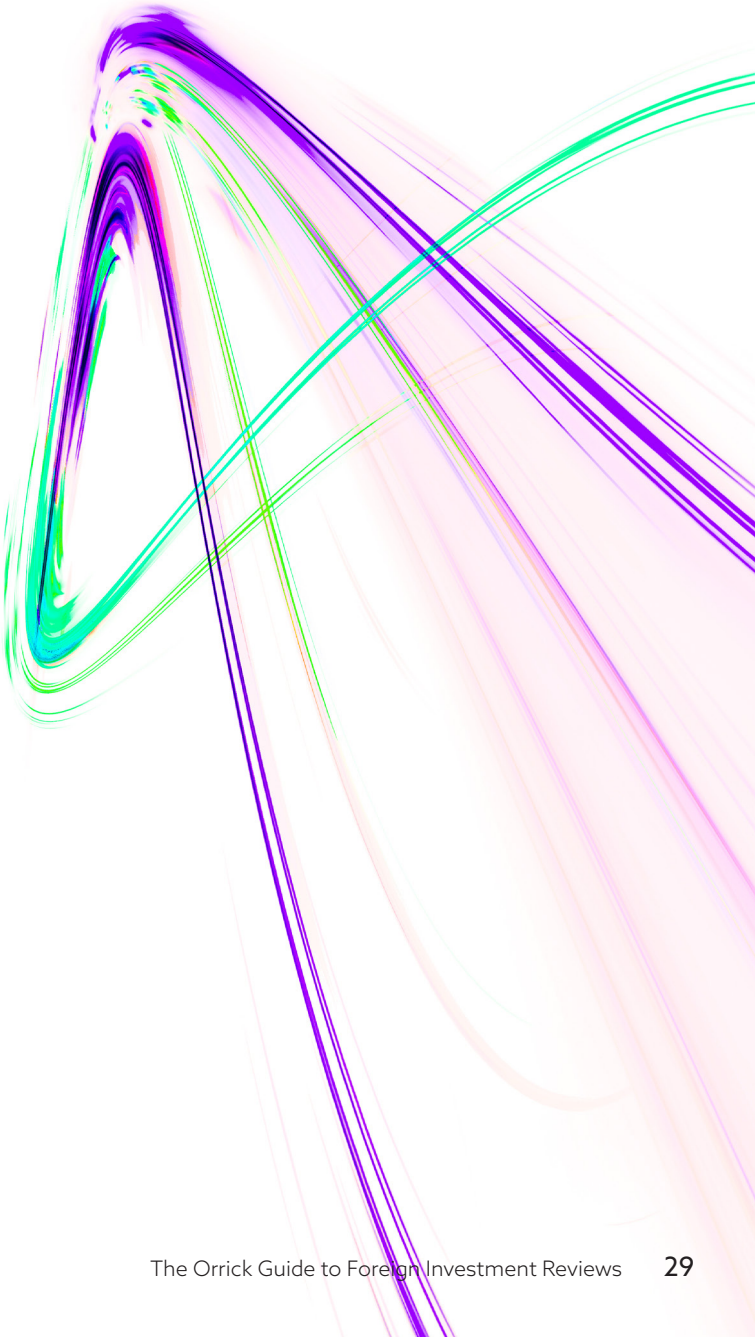
Conditions for revision can also be integrated as part of the remedies.

The Minister of Economy can also impose new remedies, when the acquisition triggering the original filing did not provide the investor with control under corporate law criteria, but later acquires such control. In that case, the Minister informs the investor with a reasoned decision, and the investor then has 45 working days to present observations on the new remedies.

29

Can a negative decision be appealed?

Yes. Negative decisions may be appealed before administrative courts in a two-month timeframe. However, there are only a handful of precedents.



EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

Recent cases have shown that authorities generally apply the texts with pragmatism and relative restraint. Present developments in the national and European economic and political context may however lead to a more aggressive and protectionist approach.

According to the first annual report by the French Treasury on Foreign Direct Investment Screening published in 2022, the government received 328 applications in 2021, an increase of 31% over 2020. While direct comparison over the years is difficult because the methodology for tallying the number of applications has changed and the scope of the regulations was expanded several times, statistics published in previous years show a steady increase in the number of screened foreign direct investments: 137 in 2017, 184 in 2018, 216 in 2019 and 275 in 2020.

Even though the United Kingdom has now left the EU and is one of the three non-EEA countries from which most of the screened investments originate, together with the United States and Canada, a substantive part of the screened investments still originated from within the EU/EEA (41.2% in 2021, mainly from Germany, Luxembourg and Ireland).

31

Are there any relevant recent developments or trends?

Present developments in the national and European economic and political context may lead to a more aggressive and protectionist approach. Even though the European Commission warned against risks of aggressive acquisitions of strategic assets by non-EU investors, particularly as a consequence of the Covid-19 pandemic, it is unclear whether such risks will materialize soon and trigger intervention or investigations by the French authorities. This approach is also illustrated by two recent developments in France following the Covid-19 pandemic: (i) the diminution of the threshold of 25% of the voting rights of a French entity to 10% of these voting rights for listed companies which is yet to be adopted but is contemplated and (ii) the inclusion of biotechnologies in April 2020 on the list of critical technologies that triggers foreign investment control.

Furthermore, at the beginning of 2021, it was made public that the government blocked an investment in a French company which had defence activities, and which was to be acquired by an US investor. This example shows, to some extent, that the government truly scrutinises the investments that are submitted to its control. It should be highlighted that refusals from the Minister of Economy are quite rare.

Finally, the cooperation with other member states and the European Commission should now increase because of the obligation for investors to include, since January 1, 2022, a notification form to be sent to the European Commission when at least one entity in the chain of control between the investor and its ultimate controlling individual or entity is established outside the European Union.

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GERMANY

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

- Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, "**AWG**"), which is an act of parliament and the statutory basis for investment reviews.
- Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, "**AWV**"), which is a legislative decree of the Federal Government implementing the AWG. It can be amended quickly, and often is, to take account of political developments. Since 2019, the AWV was amended several times, inter alia by extending the catalogue of business segment requiring a mandatory filing which now include, *e.g.*, the health sector into the foreign direct investment review due to Covid-19 pandemic or future and high-tech sectors such as artificial intelligence, autonomous driving, semiconductors, optoelectronics or quantum technology, due to a special security interest of Germany.

2

Which authorities are charged with applying those laws?

The Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Klimaschutz*, "**BMWK**") is responsible for reviewing foreign investments. It cooperates closely with other parts of the government, such as the Ministry of Defense, the Foreign Office, the Ministry of Health and the Federal Chancellery. In all cases, a prohibition needs to be approved by the entire Federal Government. Any order imposing remedies needs to be approved by the Federal Foreign Office, the Federal Ministry of the Interior and the Federal Ministry of Defense, including a consultation with the Federal Ministry of Finance.

3

What other legislation is relevant for foreign investments?

The Act on Satellite Data Security (*Satelliten-datensicherheitsgesetz*, "**SatDSiG**") lays down special rules for the acquisition of companies operating a high-grade earth-remote-sensing system. It should be noted that the general review under Section 55 et seq. AWV may be applied in addition to the SatDSiG. Further, other regulations are referred to in the AWV such as the Act for Critical Infrastructure (*Gesetz über das Bundesamt für Sicherheit in der Informationstechnik*, "**BSIG**") or respective ordinances which include relevant thresholds when mandatory filings are required and which can be amended quickly (*e.g.*, the *Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz*, "**BSI-KritisV**" as most recently amended in January 2022).

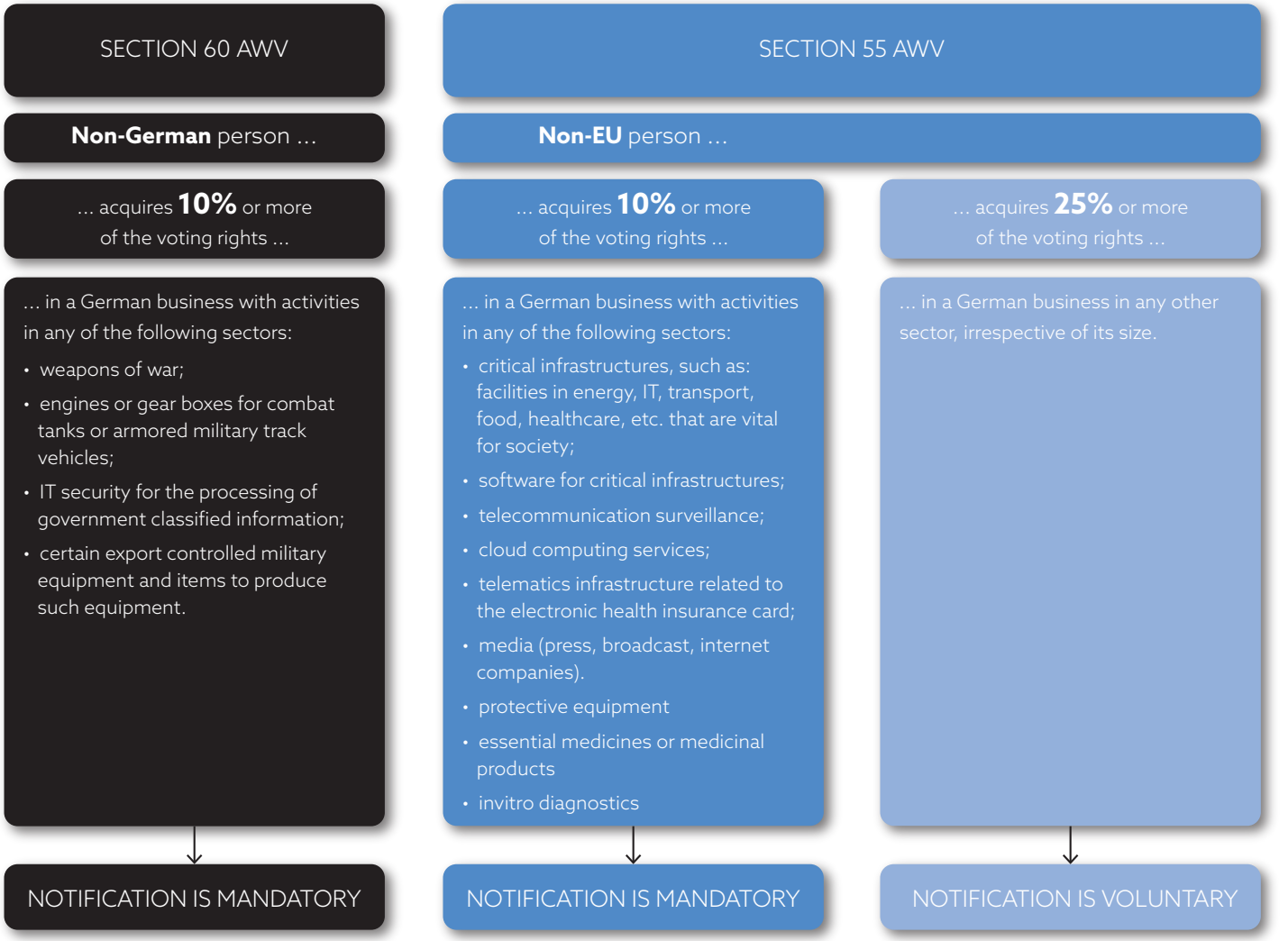
TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

The BMWk has the power to review the direct and indirect acquisition by a foreign acquirer of the shares in, or assets of, a German business above specified thresholds. The same is true for an "atypical acquisition of control" which may include additional seats or majorities on the (supervisory) board, veto rights over important business decisions, or the right to demand certain information about the German business. The definition of "foreign acquirer" and the shareholding thresholds depends on the sector in which the German target company is active (Overview of Foreign Investment Reviews in Germany below):

OVERVIEW OF FOREIGN INVESTMENT REVIEWS IN GERMANY



- The sector-specific review of Sections 60–62 AWV applies to acquisitions of certain defense and IT security companies. The review applies if (i) the acquirer is non-German; and (ii) the share of voting rights in the German business that the foreign acquirer will hold directly or indirectly after the acquisition reaches or exceeds 10%.

- The general review of Sections 55–59 AWV applies to all companies, regardless of their sizes and activities. However, the applicable shareholding threshold is dependent on the sector the target company is active in. In case the German company operates a critical infrastructure, is a media company, or is active in one of the other sensitive sectors listed in Section 55a (1) AWV, the review applies if (i) the acquirer is from a non-EU country; and (ii) the share of voting rights in the German business that the foreign acquirer will hold directly or indirectly after the acquisition reaches or exceeds 10% (lit. 1 to 7) or 20% (lit. 8 to 27).

- For target companies not active in one of the sensitive sectors listed in Section 55a (1) AWV, the general review of Sections 55–59 AWV applies if (i) the acquirer is from a non-EU country; and (ii) the share of voting rights in the German business that the foreign acquirer will hold directly or indirectly after the acquisition reaches or exceeds 25%.

- Asset deals are subject to the same rules, except for the shareholding threshold; instead, the assets that are being acquired must constitute a business enterprise.

In the case of an "atypical acquisition of control," where, comparable to the acquisition of 10%, 20% or 25% of the shares, additional seats or majorities on the (supervisory) board, veto rights for important business decisions or the right to demand certain information about the German company are granted, there is no mandatory filing requirement. Nevertheless, the BMWK has the right to initiate a review of the transaction at its discretion.

5

How are foreign investors or foreign investments defined by the applicable legislation?

The rules apply to acquisitions of domestic business enterprises by foreign investors. A legal entity or a partnership is a domestic business if it has its registered office or place of management in Germany. Branches and permanent establishments of foreign entities in Germany are also considered domestic if they are managed in Germany (with separate accounting).

- Foreign investors are non-German or non-EU persons, depending on the sector in which the German target company is active (see question 4 above): non-German persons are all individuals without residence or habitual abode in Germany and all legal entities and partnerships without registered office or place of management in Germany.

- Non-EU persons are all individuals without residence or habitual abode in the European Union and European Free Trade Association ("**EFTA**") as well as all legal entities and partnerships without registered office or place of management in the European Union and the EFTA. EFTA member states are Iceland, Liechtenstein, Norway and Switzerland.

Branches and permanent establishments of a foreign acquirer in German or in the EU are always non-German and non-EU.

6

Are minority interests caught?

Yes. Any direct or indirect acquisition of voting rights in a German company is caught provided the thresholds of 10%, 20%, or 25% are met (➔ Overview of Foreign Investment Reviews in Germany above).

7

Are there sectors-specific rules?

Yes. Acquisitions of shares in companies active in the sensitive sectors listed in Sections 60 and 55a(1) AWV are subject to more restrictive rules (➔ Overview of Foreign Investment Reviews in Germany above).

8

Is there any kind of *de minimis* threshold?

Acquisition below the thresholds of 10%, 20% or 25% are not subject to review. See question 4 above. There are no other de minimis thresholds such as turnover, number of employees etc.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

No. However, the fact that an investor is controlled by a foreign state may be a consideration in the substantive assessment of the acquisition. See question 25 below.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

The BMWK is generally willing to discuss contemplated acquisitions before a filing. However, the only way to obtain legal certainty on whether or not an acquisition is subject to review and/or whether it may be prohibited is to apply for a clearance certificate ("certificate of non-objection").

Recommended Information for Mandatory and Voluntary Filings, *inter alia*

- ☑ Identification on the (direct/indirect) acquirer and the target, including:
  - ☑ company name (also in the language / characters of origin),
  - ☑ registered office,
  - ☑ full business address,
  - ☑ trade/commercial register number,
  - ☑ tax number,
  - ☑ EORI number,
  - ☑ Managing directors or other authorized representatives (name, address, date & place of birth).
- ☑ Level of voting rights held by the acquirer before and after the acquisition.
- ☑ Description of the business of the (direct/indirect) acquirer and the target.
- ☑ Whether the target is active in a sector listed in Section 55(1), 60 AWV.
- ☑ Whether the target is obliged to protect classified State information.
- ☑ Business contacts of the target with public authorities or defense companies in the last five years.
- ☑ Shareholders of the acquirer and the target (with ownership charts).
- ☑ Shareholdings of the acquirer and the target (with ownership charts).
- ☑ Numbers of employees of the target
- ☑ Targets' turnover of the last three years
- ☑ Information on the acquisition, including:
  - ☑ Purchase price,
  - ☑ Type of acquisition,
  - ☑ Information on all voting rights held by the indirect and direct acquirer,
  - ☑ Power of attorney of the acquirer.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

A notification to the BMWK is mandatory if the German target company is active in one of the sensitive sectors listed in:

- Section 60 AWV: certain defense and IT security companies; or
- Section 55(1) AWV: *inter alia* critical infrastructure, life support equipment, artificial intelligence, autonomous driving, semiconductors, optoelectronics or quantum technology, media and other similarly sensitive sectors.

Where there is no filing, the BMWK may initiate a review on its own initiative (*ex officio*) when it learns about the acquisition (*e.g.*, from media reports or other authorities). An ex officio review can be initiated up to five years after the signing of the respective purchase agreement (➔ Timeline, below). To obtain legal certainty earlier, the acquirer may also elect to make a voluntary filing by applying for a certificate of non-objection from the BMWK.

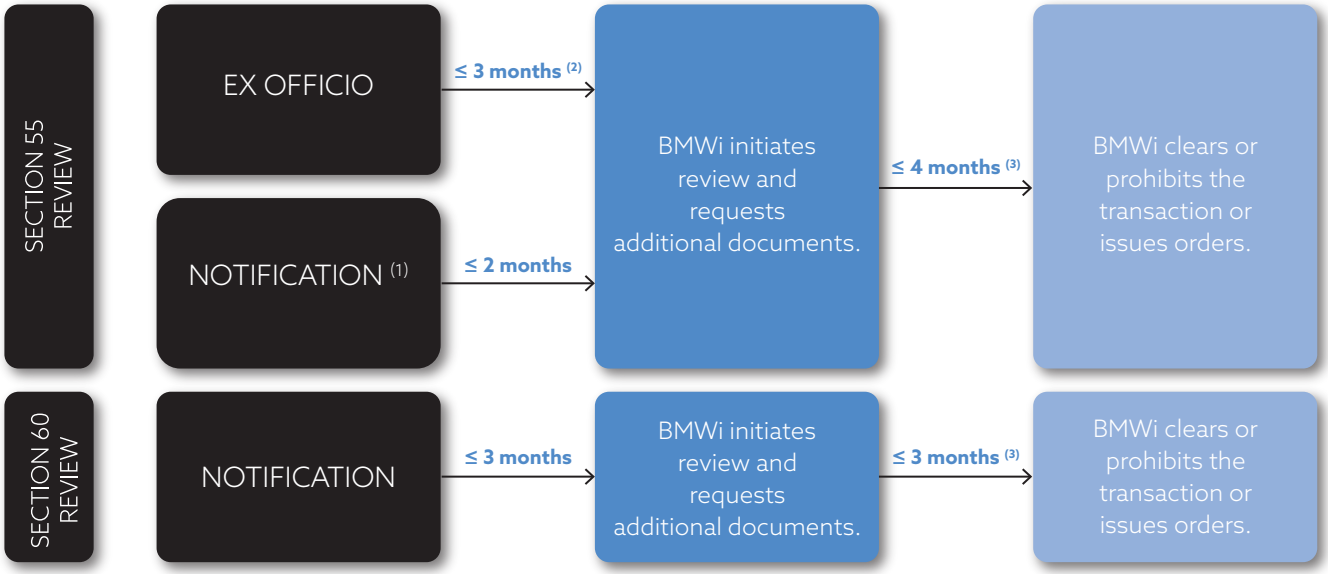
12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

There are no deadlines, even for mandatory notifications. However, it is generally advisable to make mandatory or voluntary filings before closing:

- Where a notification is mandatory under Section 60 AWV or Section 55 (1) AWV, it should be done before closing because all legal acts implementing the acquisition are invalid unless and until the acquisition is cleared by the BMWK. Without such clearance, the acquirer cannot, under German law, obtain ownership of the shares or the assets that are the object of the acquisition.

TIMELINE



(1) Applies to both voluntary and mandatory filings.

(2) The period commences upon the BMWi becoming aware of the acquisition. A review may be initiated up to five years after the signing of the purchase agreement.

(3) The period commences upon the BMWK receiving all requested documents. The period may be suspended if and as long as the BMWK requests further documents or negotiates commitments with the parties.

- Typically, all mandatory and voluntary filings under Section 55 AWV are done prior to closing, and clearance is included as a condition precedent in the purchase agreement, because a review post-closing may create considerable difficulties for the parties and may result in unwinding the transaction. See question 26 below.

Filings can already be made before signing provided the parties have agreed on the basic features of the transaction and on all items that need to be included in the filing (➔ Recommended Information for Mandatory and Voluntary Filings).

13

Which party is responsible for making the notification?

In general, the (direct) acquirer is responsible for making any mandatory or voluntary filings.

14

Which information is required for the filing?

Mandatory and voluntary filings need to provide information about the acquirer, the German target company and the basic features of the acquisition as set out in detail by the guidance provided by the BMWK: (➔ Recommended Information for Mandatory and Voluntary Filings). Filings must be made in German.

For the German Version

For the English Version

15

Are there any filing fees?

No.

16

Must the parties suspend the transaction until the review is completed?

Yes. The AWG includes a prohibition of completing the transaction for mandatory filings.

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

Yes. The AWG foresees imprisonment of up to five years or fines in case of *inter alia* a violation of prohibition of completion.

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

Yes.

19

What is the timeline of the review process? Are fast-track options available?

The timeline depends on whether or not the acquirer notifies the acquisition to the BMWK and whether or not the BMWK initiates a review (➔ Timeline, below). A prohibition or an imposition of orders is possible only within the statutory review periods; if the review periods expire without a decision from the BMWK, the acquisition is deemed cleared. There are no fast-track options.

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

The BMWK cooperates closely with other parts of the German government during the review. In particular, the Ministry of Defense, the Ministry of Health, the Foreign Office and the Federal Chancellery are involved. The latter oversees coordinating the work of the federal intelligence services. In all cases, a prohibition needs to be approved by the entire Federal Government. Any order imposing remedies needs to be approved by Federal Foreign Office, the Federal Ministry of the Interior, for Construction and the Federal Ministry of the Interior and the Federal Ministry of Defense, including a consultation with the Federal Ministry of Finance.

The German Federal Cartel Office does not participate in the review process. However, it can inform the BMWK about a notified merger and thus enable the BMWK to initiate a review ex officio.

21

To what extent are the parties involved in the review? Do the authorities expect prefiling communication?

The parties are required to submit information to the BMWK. Before issuing a prohibition or orders, the BMWK will present its concerns to the parties and offer them the opportunity to comment. The BMWK may also negotiate commitments with the parties to exclude concerns.

The BMWK does not expect prefiling communications; however, it is generally open to prefiling discussions.

22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

No, complainants do not play a role.

23

Are there safeguards in place to protect confidential information of the parties?

Yes. The BMWK and other authorities involved in the review are required to protect confidential information, including personal data and business secrets. However, recent experience has shown that, *e.g.*, draft prohibition decisions can be leaked including personal data and business secrets.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

- For a review under Section 55 et seq. AWV, the relevant criteria are "public policy or public security" of the Federal Republic of Germany, of any other member state of the EU and of projects and programs of Union interest. These criteria need to be interpreted in line with the EU guarantees on the free movement of capital, goods, services and labor. Due to an amendment in 2020, an intervention does not require a genuine and sufficiently serious threat affecting "public policy or public security" anymore but is now possible in case "public policy or public security" is likely interfered, thus, the threshold has been lowered.

- For a review under Section 60 AWV, the relevant criteria are the "essential security interests" of the Federal Republic of Germany. An intervention is justified, in particular, where the acquisition endangers German military policy or military security.

Further to the recently lowered standard of review, in practice, the BMWK has broad discretion in applying these criteria.

25

Does the nationality of the investor play a role?

In general, yes. State-owned or state-controlled acquirers and, in particular, acquirers from China or currently from Russia or Belarus due to its aggression in the Ukraine are more likely to raise concerns than acquirers from NATO member states.

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The BMWK has the power to prohibit an acquisition if it raises policy or security concerns (see question 24). If sufficient to mitigate the identified concerns, the BMWK may also impose orders or (more common) agree with the parties on contractual commitments (see question 28 below).

Where the BMWK prohibits an acquisition, the parties may no longer close the purchase agreement. In case the transaction has already been closed, the BMWK may appoint a trustee to unwind the transaction and it may prohibit or restrict the exercise of voting rights in the target company. In the case of a review of mandatory filings, any legal acts to implement the purchase agreement are void, *i.e.*, the acquirer has not become the legal owner of the shares or assets of the target company.

27

Do the authorities cooperate or consult with authorities in other countries?

Since an amendment in late 2020 there is a mechanism for EU-wide cooperation and information sharing between the member state in which the case was notified, the European Commission and other member states. It appears that in practice authorities of other member states or the European Commission are well raising issues with respect to a filing in another member state. However, the communication seems to be exclusively dealt with via the authority the filing was submitted to.

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

Yes. The parties may commit to measures to mitigate concerns identified by the BMWK (*e.g.*, protection of classified information or of sensitive know-how). Such remedies are typically proposed by the BMWK. The parties will need to conclude a (public law) contract with the Federal Republic of Germany to make the commitments binding.

29

Can a negative decision be appealed?

Yes. A decision to prohibit an acquisition or to impose orders may be appealed before the Administrative Court of Berlin.

EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

To date, there are only very few prohibition decisions according to publicly available information.

Besides prohibition decisions, there have been numerous cases where the parties either entered into commitments to avert a prohibition or abandoned the transaction altogether when they faced opposition from the BMWK. An example is the attempted takeover of Aixtron, a manufacturer of equipment for the semiconductor industry, by a Chinese investment fund. The deal was abandoned after it was prohibited in the United States and met with concerns in Berlin.

Recently, the BMWK is in particular active with respect to the amendments in the health sector and critical infrastructure and seems to make full use of its broad discretion when applying these regulations. Further, Russia's aggression in the Ukraine leads to the BMWK's attention as the case of the BMWK's review in the sale of Mr. Mordashov's stake in the German travel giant TUI indicates.

The administrative courts are currently dealing with some cases of prohibition decisions or applications for inspections of files. Oral hearings will presumably take place in autumn 2022 and spring 2023 and are expected to reveal further input on how relevant laws and policies are applied.

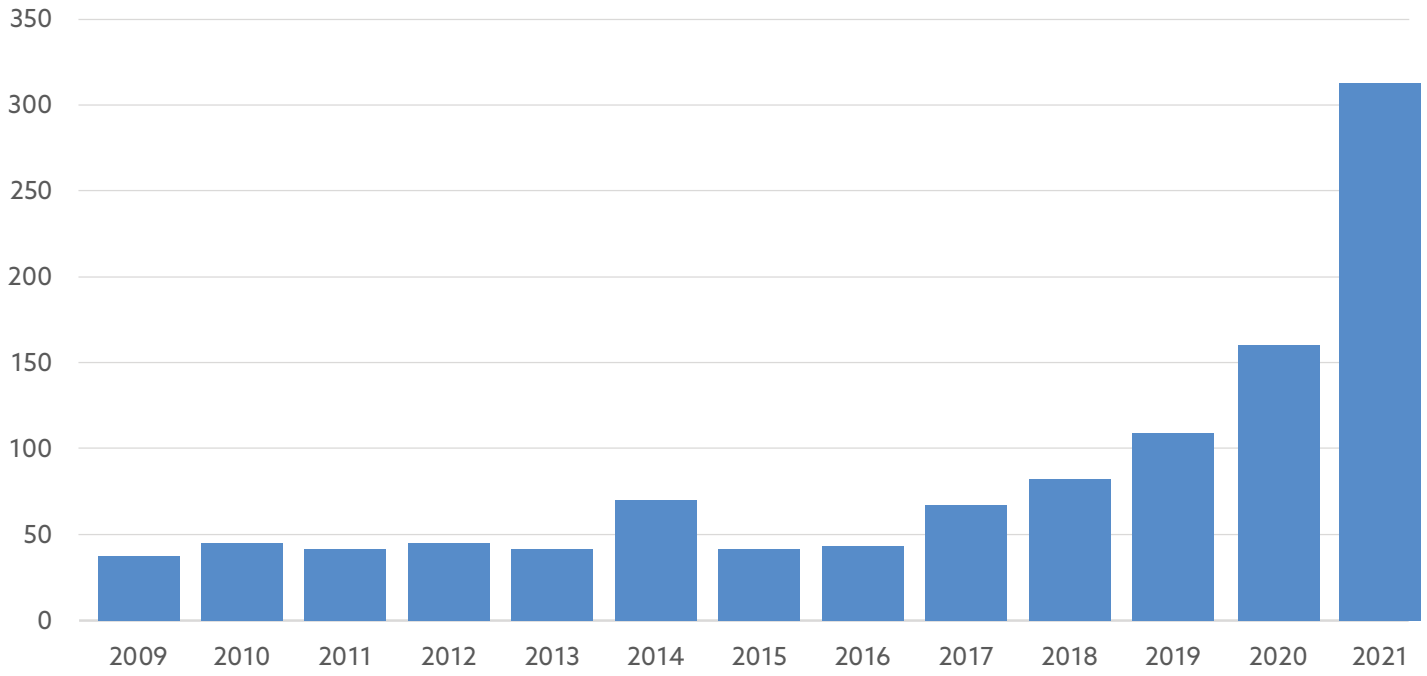
31

Are there any relevant recent developments or trends?

The Federal Government amended the AWV and the AWG several times since 2017. The 2017/2018 amendments were made in order to facilitate interventions against foreign investments. The 2018 amendment, which lowered the shareholding threshold for some acquisitions from 25% to 10%, was justified with the need to intensify the control of "state directed or state financed strategic investments".

The background to the 2018 amendment had been a significant increase in takeovers of German companies by Chinese investors. In particular, the BMWK had been unable to review the planned acquisition of 20% of the shares in 50hertz by State Grid Corporation of China. Although 50hertz, as one of the largest network suppliers in Germany, was classified as a critical infrastructure company, a review under Section 55 et seq. AWV was not possible because the acquisition would have been below the 25% threshold. Ultimately, the government succeeded in preventing the takeover by instructing its own development bank KfW to take over the shares.

TOTAL NUMBER OF FDI REVIEWS IN GERMANY



Further amendments in 2020 reflect the importance of the health sector due to the Covid-19 pandemic by including inter alia protective equipment, essential medicines or medicinal products and invitro diagnostics into the catalogue of cross-sectoral review. With respect to critical infrastructure, relevant thresholds were lowered in early 2022 enabling further mandatory reviews in this area. The reform of 2017 led to a significant increase in the number of Section 55 et seq. AWV reviews (264 Number of Reviews under Section 55 et seq. AWV and 42 Reviews under Section 60 AWV).

Due to recent amendments of AWV and AWG it can be expected that this trend will continue. According to our practical experience, the BMWK is recently very active in opening *ex officio* reviews, in particular with respect to the health sector.

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ITALY

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

The Italian foreign investment regulation, in the most strategic economic sectors, is enshrined in Decree Law No. 21, March 15, 2012 (the "**Foreign Investment Law**") and implementation of legislation.

The Foreign Investment Law establishes the special powers the Italian government can exercise in extraordinary transactions involving companies operating in sectors considered strategic—namely defense and national security—or which perform activities of strategic relevance in sectors including energy, transport, communications, 5G, high-tech, health, banking and insurance sectors, agri-food and steel sectors.

As to the other main laws regulating foreign investments, it is also worth noting Decree of the President of the Council of Ministers, August 6, 2014, governing the coordination of activities of the Office of the President of the Council of Ministers for both groups of sectors.

Furthermore, Law No. 172, December 4, 2017, extended the government's special powers to include the regulation of financial infrastructures—including both trading infrastructures such as negotiating venue-regulated markets and post-trading infrastructures performing the settlement activity of the traded financial assets—which are part of the most-strategic sectors in Italy.

Such development is highly relevant: Italy has been the first state in Europe to extend FDI regulation to the financial sector, whereas the United States has regarded such sector as strategic for more than 60 years, *i.e.*, since the Bank Holding Act of 1956. Most recently, Decree Law No. 23 of April 8, 2020—which was converted with amendments into Law No. 40 of June 5, 2020 (the "**Liquidity Law**")—expanded and the foreign investment review regime to have new sectors join the group of the "strategic sectors" to which said review applies and—for the first time since the FDI review framework was established in Italy—to have EEA persons and entities notify their relevant transactions to the government even in sectors outside the defense and national security sectors.

- Finally, there has been a recent development in the Italian legislation regarding foreign investments in Italy by Decree Law No. 21 of March 21, 2022—which was converted with amendments into Law No. 51 of May 20, 2022 (the "Energy Decree"). The Energy Decree has not introduced a structural reform of the Italian foreign investment regulation, nor has it expanded its scope of application to new sectors, as it was the case for the development in 2020. Despite this fact, the development is notable and can be summarized as follows: The notion of non-EU person (whether natural or legal person) which already existed under the previous regulation (see *e.g.*, answer to question 4) has now been clarified and expanded, meaning (a) any natural person who is not a EU citizen; (b) any natural person who is a EU citizen and who is not domiciled in a EU member state or in a State of the European Economic Area – EEA; (c) any legal person which does not have its legal seat nor the administrative seat nor its center of main interest in a EU member state or in a EEA State and which in any case is not established therein; (d) any legal person which has its legal seat or the administrative seat or its center of main interest in a EU member state or in a EEA State and which in any case is established therein, which is controlled, directly or indirectly, by a natural or legal person meeting the requirements under letter (a), (b) or (c) above; (e) any natural or legal person formally meeting the above requirements, in cases where elements exist indicating an elusive behavior with respect to the Government's special powers based on the Foreign Investment Law.

- The filing with the Government of a transaction falling within the realm of the Government's special powers as explained below can now take place through a joint filing of the buyer and target company and even in cases in which the target company has not made the joint filing with the Buyer, it is nonetheless entitled to be notified of the filing by the buyer, in order to be allowed to take part to the proceedings.

- The party or parties to the proceedings before the Government are now entitled to file briefs and exhibits within 15 days from the filing.

- Starting from January 1, 2023, there will be an obligation of filing with the Government also for natural and legal persons domiciled in Italy for the transactions leading to the acquisition of the majority company ownership, in the energy, transportation, health, agri-food, telecommunications and financial sectors (including banking and insurance).

- In case of a company holding assets in a number of strategic sectors, including the financial sector, company resolutions having an impact on the control and disposal of assets in favor of third parties, including EEA and Italian companies, are subject to the application of the Foreign Investment Regulation regime;

The right of prefiling is introduced, allowing the possibility to receive—before the filing—a preliminary assessment on the application of the law in a specific transaction and the Government's position as to the application of the Foreign Investment Regulation regime and, if so, as the possibility that said transaction can be authorized.

2

Which authorities are charged with applying those laws?

The Italian government is the authority entrusted with the task of applying the special powers set forth by the foreign investment regulation.

Pursuant to Article 2 of Decree of the President of the Council of Ministers, August 6, 2014, the Department for Administrative Coordination is the Office responsible for inter-ministerial coordinating activities and the performance of preparatory activities prior to the exercise of the government's special powers.

The Coordination Group established by Article 3 of the Decree is also involved in the above-mentioned activities in support of the Department for Administrative Coordination. It is deemed appropriate to note that Article 8 of said Decree provides for a simplified and fast-track review procedure for intra-group transactions.

3

What other legislation is relevant for foreign investments?

- Decree of the President of the Republic No. 35, February 19, 2014, sets forth the procedures for the government's special powers in cases of transactions concerning defense and national security;
- Decree of the President of the Republic No. 86, March 25, 2014, provides for the procedures for the government's special powers in case transactions concerning energy, transport and communications;
- Decree of the President of the Council of Ministries No. 108, June 6, 2014, identifies the strategic activities for defense and national security, with such activities being in the domain of the Ministry of Defense and the Ministry of Interior;
- Law No. 172, December 4, 2017, extends the scope of the Foreign Investment Law to certain types of high-tech assets, including financial infrastructures as referred to above;
- Decree Law No. 23, April 8, 2020—which was converted with amendments into Law No. 40 of June 5, 2020 (the "**Liquidity Law**") – expanded and strengthened – albeit provisionally – the FDI review regime to have new sectors join the group of the "strategic sectors" to which said review applies – adding health, banking and insurance sectors, agri-food and steel sectors – and expanded the scope of the duty to notify the government of relevant transactions.
- Decree of the President of the Council of Ministries No. 179, December 18, 2020;
- Decree of the President of the Council of Ministries No. 180, December 23, 2020;
- Decree Law No. 21, March 21, 2022—which was converted with amendments into Law No. 51 of May 20, 2022 (the "**Energy Decree**").

Finally, Italy is party to the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *i.e.*, the ICSID Convention, which established the most successful procedural mechanism to date for investor-State dispute settlement (ISDS). In this respect, since Italy is party to 102 bilateral investment treaties (BITs) with other states, providing for—among other procedural mechanisms—dispute settlement through arbitration under the auspices of ICSID, investors having claims against Italy alleging breach of international investment law obligations can submit their claims to ICSID—or the other applicable forms of dispute settlement provided for in the relevant BIT—and thus rely on ICSID arbitration for the settlement of their disputes and its more effective award-enforcement mechanism.

In addition, Italy is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, whose function, in essence, is to set forth a uniform framework and conditions for the enforcement in Italy of arbitration agreements and foreign arbitral awards.

TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

The Foreign Investment Law and the related legislation catches transactions in strategic sectors including defense and national security, energy, transport, communications, high-tech, health, banking and insurance, agri-food and steel.

Government special powers can be more vigorous or less vigorous depending on certain features of the relevant transaction, with the aim of applying the principles of proportionality and reasonableness and other criteria set forth in the Foreign Investment Law. The government shall apply objective and non-discriminatory criteria in exercising such special powers, which include the following:

- Imposition of specific conditions—regarding the security of procurement and information, technology transfers and export controls—in case of purchase of an interest in a company performing strategic activities for the defense and national security system;
- Veto of the adoption of resolutions by the shareholders or by the board of directors of a company performing said activities relating to certain extraordinary transactions, such as merger, demerger, transfer of the undertaking and other relevant transactions listed in the Foreign Investment Law; and

- Opposition to the purchase by any person—whether directly or indirectly, individually or jointly—other than the Italian state or state-controlled entities, of an interest in the voting share capital of a company performing said activities that, due to its size, may prejudice defense and national security interests.

The Foreign Investment Law includes a definition of "non-EEA investor" (please see answer to question 1 above).

The Italian government shall determine which activities and assets are subject to the foreign investment regulation set forth in the Foreign Investment Law (with updates to activities and assets at least every three years as required by law), namely:

(i) Activities deemed strategic for the defense and national security system, including electronic telecommunication services based on 5G technology;

(ii) Networks, plants, assets and relationships deemed strategic for the national interest in the sectors of energy, transportation and communications; and

(iii) Assets in the most strategic sectors, including the high-tech sector in order to verify a possible threat to national security and public order, including financial infrastructures, AI, robotics, semiconductors, dual-use technology, cybersecurity, space and nuclear technology, security of supply flows of critical inputs, access to sensitive information and capacity of control thereof.

5

How are foreign investors or foreign investments defined by the applicable legislation?

Foreign investors are defined as EEA or non-EEA persons or entities.

The government's foreign investment regulation applies to all non-Italian persons and (and starting from January 1, 2023 also to Italian persons in certain specific sectors – please see answer to question 1 above) entities—meaning both EEA persons and entities and non-EEA persons and entities (➔ please see answer to question 4). As to the broader notion of non-EU person please see answer to question 1 above.

6

Are minority interests caught?

Yes, in principle, the acquisition of minority interests is caught provided the *de minimis* thresholds are met (please see answer to question 8).

However, there are examples where the Italian government decided not to exercise its special powers in transactions concerning acquisitions of minority interests by foreign investors in the sectors falling within the scope of the application of the Foreign Investment Law. For example, in the reorganization of Cassa Depositi e Prestiti S.p.A. ("CDP," a state-controlled holding company), where the project consisted of the transfer of its share interest in the Italian electricity grid operator Terna S.p.A. to CDP Reti S.r.l.—a subsidiary of CDP—the government did not exercise its special powers in the subsequent sale of CDP's minority interest in CDP Reti S.r.l. to State Grid Europe Limited—a subsidiary of the state-owned Chinese company State Grid Corporation.

7

Are there sector-specific rules?

Yes, foreign investments may, in certain instances, be subject to specific additional review or authorization processes conducted by sector-specific regulators in regulated sectors such as telecommunications, banking and investment services, electricity and gas networks and broadcasting, due to obligations deriving from the EU level. The same EU-Italian dualism of sources setting forth certain limitations on direct or indirect ownership or authorizations being reserved to EU States and their nationals in specific sectors also applies to airline companies and television broadcasters.

In all sectors, if the parties involved in the transaction satisfy certain turnover thresholds, they are subject to the application of merger control filing before the Italian competition authority.

8

Is there any kind of *de minimis* threshold?

Yes, the Foreign Investment Law sets forth a *de minimis* minimis threshold with respect to purchases of equity interests in a listed company active in the fields of defense or national security, which triggers the notification obligation if the purchaser comes to hold, following the acquisition, an interest higher than the three-percent threshold. In addition, all subsequent purchases that exceed the thresholds of 5%, 10%, 15%, 20% and 25% shall be notified. In other strategic sectors, including energy, transport, telecommunications and financial regulation, the thresholds are 15%, 20%, 25% and 50%.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

No.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

No, however please see on prefiling the answer to question 1 above.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

When applicable, filing is mandatory.

12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

The Foreign Investment Law and the Liquidity Law mandates:

(i) Notification of a relevant resolution adopted, or transaction performed, by an Italian company exercising a strategic security activity or holding a strategic asset (including those in the fields of energy, transport, communications and high-tech, health, banking and insurance, agri-food and steel – ancillary legislation shall be adopted to specify the meaning of "strategic asset" in these fields) within 10 days after its adoption/performance and, in any event, prior to its implementation and

(ii) Notification of a purchase by a foreign investor of interests in an Italian company exercising a strategic security activity or holding a strategic asset within 10 days after the acquisition.

13

Which party is responsible for making the notification?

In case of resolutions adopted, or transactions performed, by an Italian company exercising any strategic security activity or holding any strategic asset—including those in the fields of energy, transport, communications and high-tech, health, banking and insurance, agri-food and steel—the company is responsible for notification.

In case of purchase by a foreign investor of interests in an Italian company exercising a strategic security, activity or holding a strategic asset (as identified above), the foreign investor is responsible for notification.

14

Which information is required for the filing?

In case of notification of a relevant resolution adopted, or transaction performed, by an Italian company exercising a strategic security activity or holding a strategic asset—including those in the fields of energy, transport, communications and high-tech, health, banking and insurance, agri-food and steel—the notification shall include all documents concerning the proposed resolution or

transaction, as well as any further information that may be necessary for the government to complete its assessment.

In case of notification of a purchase of interests in a company exercising a strategic security activity or holding a strategic asset (as identified above), the notification shall include the business plan pursued by the investor through the proposed acquisition, a detailed description of the investor and any further information that may be necessary for the government to complete its assessment.

The notification of the resolutions or transactions shall be made through ad hoc forms issued by the government and submitted via certified email ("PEC" – "Posta elettronica certificata").

15

Are there any filing fees?

No.

16

Must the parties suspend the transaction until the review is completed?

Yes. Moreover, until completion of the review procedure, voting rights attached to the acquired interests are suspended.

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

In case of failure to notify, a fine of up to twice the value of the transaction and at least one percent of the total turnover of all companies involved in the transaction resulting from the latest financial statements is applied. A fine of an equal value applies in the case of noncompliance with the decision adopted by the government taken after the review of the transaction. The related transactions are null and void.

For example, in May 2018, the Italian government fined Telecom Italia EUR 74.3 million for failing to timely notify of the adoption of resolutions resulting in Vivendi to acquire control over Telecom Italia (please see answer to question 30). The government quantified the amount of the fine, taking into consideration Vivendi's and Telecom Italia's aggregate turnover with exclusive reference to the relevant strategic assets in the telecommunications sector instead of the entire turnover of both companies (EUR 74.3 million was said to correspond to the one percent overall turnover of said companies).

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

As mentioned, the government may exercise its special powers under the Foreign Investment Law exclusively with respect to companies performing strategic security activities or holding strategic assets—including those in the sectors of energy, transport, communications and high-tech, health, banking and insurance, agri-food and steel.

Accordingly, as a rule, foreign investments in other sectors are not subject to such control, with the exception of the general principle of reciprocity and any applicable competition clearance.

With respect to the merger control, the Italian Antitrust Authority (AGCM) may review and challenge only reportable mergers (*i.e.*, transactions that are subject to mandatory merger review before the ICA).

19

What is the timeline of the review process? Are fast-track options available?

The standstill period is 45 business days from the date of receipt of the notification (and further 20 days in case of requests for information), during which time the Office of the President of the Council of Ministers performs the review. Should the government fail to exercise its powers within the statutory time frame, the relevant transaction may be legitimately implemented.

As to the issue of fast-track options, as discussed, Article 8 of the Decree of the President of the Council of Ministers, August 6, 2014, provides for a simplified review procedure for intra-group transactions (➔ please see answer to question 2).

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

The Bank of Italy, the National Commission for Listed Companies and the Stock Exchange (CONSOB), the Supervisory Commission for Pension Funds (COVIP), the Italian Authority for the Supervision of the Insurance sector (IVASS), the Transport Authority (ART), the Italian Antitrust Authority (AGCM), the Italian regulatory Authority in the communications sector (AGCom), the Regulatory Authority for Energy Networks and the Environment (ARERA) and the Department of Administrative Coordination of the government cooperate with each other, through the exchange of information in order to facilitate the exercise of the functions set forth by the Foreign Investment Law.

If the transaction is subject to an additional notification before another authority, no specific coordination is established between the government's review and any other process that may be required in respect of the same transaction (*e.g.*, antitrust). Therefore, the parties shall submit various notifications of the transaction for clearance.

In the course of the proceedings, EU States may intervene and file observations.

21

To what extent are the parties involved in the review? Do the authorities expect prefiling communication?

During the review, no specific procedural standing or right of the parties involved in the transaction are expressly provided for by the Foreign Investment Law. However, parties can file briefs. In addition, the general principle of good administration set forth for all administrative proceedings by law No. 241, August 7, 1990, applies. Cooperation between the government and the notifying party is thus regarded as standard practice, possibly involving preliminary discussions prior to sending the formal notification, to allow the government to conduct its review properly and to make an informed decision by the statutory time limit. In addition, since May 20, 2022, prefiling is allowed.

22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

There is no specific provision relating to third-party rights under the Foreign Investment Law. They may claim rights under the general regime set forth by law No. 241/1990 on administrative proceedings (*e.g.*, right of access to documents under certain conditions).

23

Are there safeguards in place to protect confidential information of the parties?

There is no specific provision relating to confidentiality of information; however, under general principles of good administration of (and cooperation between the parties involved in) administrative proceedings, the parties may require confidentiality of sensitive information whose disclosure may be prejudicial to their interests.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

Under the previous regime, the government had wide discretion to exercise its powers. To comply with the judgment of the European Court of Justice—which held that the previous framework breached the EU proportionality principle as it did not contain details on the circumstances in which the government's power of veto could be exercised and the criteria it laid down were not based on objective verifiable conditions—the Foreign Investment Law establishes certain specific objective criteria that the government shall take into account as a condition to exercise its special powers.

In particular, in all cases, the government has to assess the existence of a relation between the prospective investor and third countries that do not respect democracy and the rule of law, or that maintain relations with criminal or terrorist organizations.

Specific criteria have been set depending on the sector relevant for the transaction.

For example, in case of companies performing strategic security activity, the government shall assess, among other things, the suitability of the prospective investor, considering its economic, financial, technical and organizational characteristics, as well as its business plan to carry on the business regularly, safeguard its technological portfolios and abide by existing contractual commitments with public administrations.

With respect to companies holding strategic assets in the sectors of energy, transport or communication, the government has to evaluate whether the situation resulting from the transaction is suitable to guarantee the security and continuity of supply, as well as the maintenance, safety and operations of the strategic assets.

25

Does the nationality of the investor play a role?

Yes, as clarified under the Foreign Investment Law, a different regime applies to EEA or non-EEA persons or entities in terms of percentage of shares/quotas acquired in the company in a sector deemed strategic for the obligation to notify the government to be triggered (➔ please see answers to questions Nos. 4 and 5).

Moreover, under Italian law the general principle of reciprocity applies (➔ please see answers to question No. 18).

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Under the Foreign Investment Law, the government may, in the event of transactions concerning companies that perform a strategic security activity (or hold any such asset), impose specific conditions on the purchase by any person of an interest in any such company; veto the adoption of resolutions by the company's shareholders or board of directors relating to certain extraordinary transactions or veto the purchase by any person, other than the Italian state or state-controlled entities, of an interest in the voting share capital of any such company that, given its size, may jeopardize defense or national security interests.

In the case of transactions relating to a strategic asset in the sectors of energy, transport and telecommunications—including high-tech and telecommunication services based on 5G technology, health, banking and insurance, agri-food and steel —the government may veto the transaction or impose specific prescriptions or conditions.

27

Do the authorities cooperate or consult with authorities in other countries?

On April 10, 2019, the new EU framework for the screening of foreign direct investments has officially entered into force. Although member states maintain their existing foreign investment control regimes, an EU cooperation mechanism has been set forth requiring Italy to inform other member states and the EU Commission of foreign investments affecting security and public order (➔ please see the section on the European Union of the Guide).

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

Yes, in the context of possible preliminary discussions before the notification, which may give the government more time to review the transaction (considering the tight deadline after notification), either the government or the entity responsible for notification may suggest commitments aimed at eliminating any concern as to the implementation of the transaction and facilitating its clearance. After notification, the government may impose remedies as a condition to authorize the proposed transaction.

29

Can a negative decision be appealed?

Yes, the government's decisions may be appealed before the Regional Administrative Court of Lazio; the decision handed down by said court can be appealed before the Council of State.

EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

Recent cases show that the Italian government exercised its special powers mainly in the sectors of defense and national security, with particular regard to the aviation industry.

For example, in June 2013, the government authorized the acquisition of the aviation business unit of Avio S.p.A. by General Electric—through its subsidiary Nuovo Pignone Holding S.p.A.—which was notified on December 10, 2012, subject to conditions on the acquirer, namely the protection of its technologic assets, abidance by its obligations and the agreements already in force with public administrations and in particular supply of technologic instruments to the Italian Armed Forces and the appointment of Italian citizens to certain sensitive positions, which is standard practice in this specific area in which the state wishes to secure loyalty, to the extent possible, from management in key roles.

In April 2014, the government authorized the acquisition of control over Piaggio Aerospace S.p.A. by Mubadala Development Company PJSK, the United Arab Emirates' wealth fund, subject to analogous conditions as in the Avio S.p.A. case referred to above.

In November 2016, in the context of the merger between Avio and Space 2 S.p.A., based on the analysis of the strategic importance for defense and national security of Avio's activities, the government imposed the Italian citizenship of the company's CEO and imposed that it be consulted during the appointment process.

In March 2017, the government authorized the transfer of the production of certain components used by the Italian Armed Forces from Italy to the United States, subject to conditions aimed at safeguarding the protection of Italy's strategic interests.

Furthermore, the *Telecom/Vivendi* case—between the Italian telecommunications company and the French media conglomerate—is an interesting recent case concerning foreign investments in strategic sectors. After a board of directors' meeting held on July 27, 2017—in which Telecom Italia's CEO resigned, a press release was issued indicating that the board had taken note of the start of the activity of direction and coordination of Telecom Italia by Vivendi. The government then opened an investigation as to whether both Telecom Italia and Vivendi had failed to notify the government of the occurrences prior to that date based on the Foreign Investment Law, if and to the extent that the circumstances provided for the application of the government's special powers. In September 2017, CONSOB intervened, indicating that Vivendi was exercising *de facto* control over Telecom Italia. In October 2017, the government determined that Telecom Italia and its network were of strategic relevance for Italy, given its impact on the defense and national security systems. Basing its determination on the Foreign Investment Law, the government-imposed conditions on Telecom Italia's governance, on the appointment of qualified Italian citizens to certain sensitive positions and on the obligation to keep certain activities in Italy. The government also imposed the creation of a monitoring committee composed of government representatives, which is standard global practice.

31

Are there any relevant recent developments or trends?

The indication of specific and objective criteria for the exercise of the government's special powers under the Foreign Investment Law—as opposed to the previous regime on foreign investments, condemned by the European Court of Justice for violation of the principle of proportionality (please see answer to question 24)—enhances the guarantees of the parties involved in the transaction by limiting the government's degree of discretion in exercising said special powers.

In addition, there has been a recent development in the Italian legislation regarding foreign investments in Italy by Decree Law No. 21 of March 21, 2022 – which was converted with amendments into Law No. 51 of May 20, 2022 (the "**Energy Decree**"). The Energy Decree has not introduced a structural reform of the Italian foreign investment regulation, nor has it expanded its scope of application to new sectors, as it was the case for the development in 2020. Despite this fact, the development is notable and is summarized in the answer to question 1 above.

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JAPAN

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

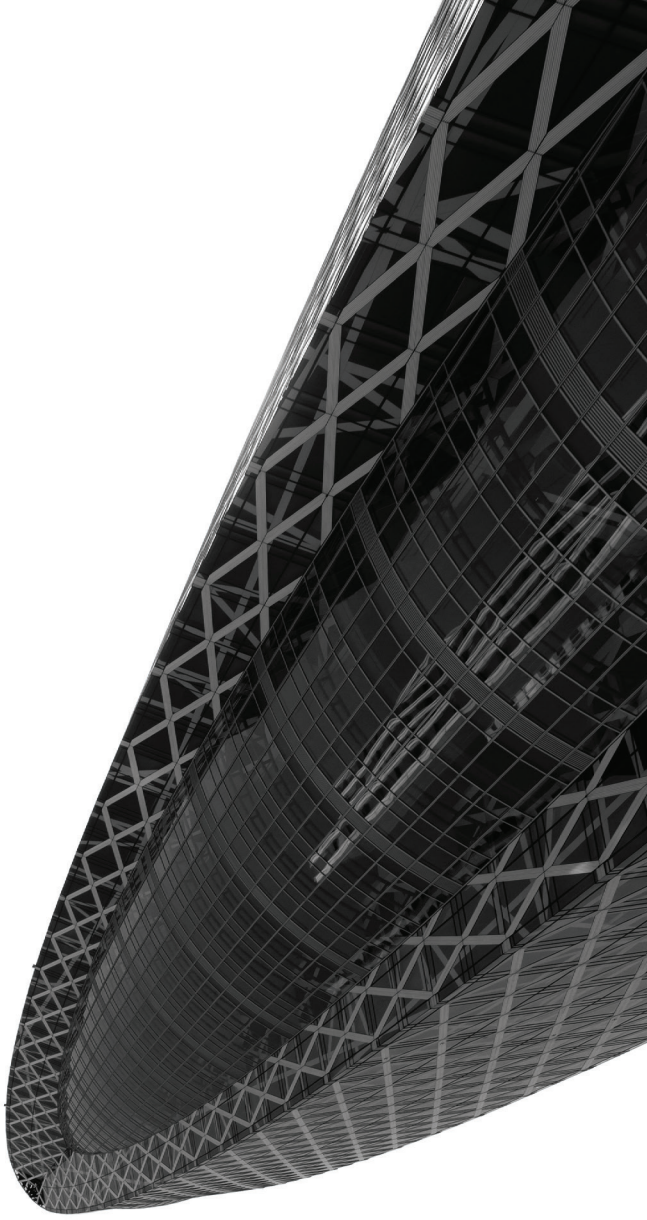
The Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949) ("**FEFTA**") and its related ordinances and regulations.

2

Which authorities are charged with applying those laws?

The Minister of Finance and the competent ministers for the applicable business ("**Competent Ministers**") are charged with applying FEFTA. The Competent Ministers are determined based on the business being conducted by the target company. For example, the Minister of Economy, Trade and Industry and the Minister of Internal Affairs and Communications are the Competent Ministers with respect to companies engaged in information and communications technology (ICT)-related businesses.

All necessary related notifications and reports, however, must be filed with the Minister of Finance and the Competent Ministers through the Bank of Japan ("**BOJ**"), which is the organization responsible for administrative processing thereof.



3

What other legislation is relevant for foreign investments?

The following is a (non-exhaustive) list of laws that impose certain restrictions on foreign investments by (a) prohibiting foreign investors from holding voting rights above a certain percentage; or (b) prohibiting licenses for applicable businesses from being granted to a company in which (i) foreign investors hold more than a certain percentage of the voting rights or (ii) the representatives or more than a certain percentage of directors or officers are foreigners:

- Ships Act (Act No. 46 of 1899, as amended);
- Radio Act (Act No. 131 of 1950, as amended);
- Broadcasting Act (Act No. 132 of 1950, as amended);
- Mining Act (Act No. 289 of 1950, as amended);
- Civil Aeronautics Act (Act No. 231 of 1952, as amended);
- Act on Nippon Telegraph and Telephone Corporation, etc. (Act No. 85 of 1984, as amended);
- Consigned Freight Forwarding Business Act (Act No. 82 of 1989, as amended).

TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

In principle, among others, the following transactions or actions conducted by a "Foreign Investor" (see question 5 below) are subject to prior filings and/or post Facto reports:

(i.) Acquisition of any (*i.e.*, one or more) shares or membership interests (collectively, "**Shares**") in an unlisted Japanese company (excluding a Specified Acquisition, as defined in (vii) below);

(ii.) Transfer of Shares in an unlisted Japanese company by a non-resident individual to a Foreign Investor (where the Shares were acquired by such non-resident individual when he/she was a resident in Japan);

(iii.) Acquisition resulting in a Foreign Investor holding at least one percent of the shares in a Japanese company listed on a Japanese stock exchange;

(iv.) Consent by a Foreign Investor to substantial change of the business purpose of a Japanese company;

(v.) Consent by a Foreign Investor with respect to a proposal to elect such Foreign Investor, or a closely related person of such Foreign Investor, as a director or statutory auditor (*kansayaku*) of the Japanese company (excluding cases where the Foreign Investor already holds 50% or more of the voting rights of the investee company and has made a prior notification to the authorities to such effect);

(vi.) Consent by a Foreign Investor with respect to a proposal for a business transfer (*jigyou jouto*), merger, company split (*kaisha bunkatsu*) or similar transaction, other than with respect to a proposal submitted to any shareholders' meeting by a third party;

(vii.) Foreign Investor's taking on (*yuzuriuke*) a restricted business of the Japanese company by means of business transfer (*jigyou jouto*), absorption-type company split (*kyushu bunkatsu*) or merger; and

(viii.) Grant to a Foreign Investor of a proxy pertaining to voting rights in an unlisted Japanese company, by persons other than other Foreign Investors, if the proxy relates to a vote on certain important matters, including the following:

a. Appointment, dismissal, or shortening of the term of office of directors;

b. Amendment to articles of incorporation to change the company's purpose or issuance of shares with veto rights);

c. Business transfer;

d. Merger; or

e. Dissolution of the company.

(ix.) Establishment of a branch, factory or other business office in Japan (collectively, "**Branch**") or substantial change of the type or business purpose of the Branch;

(ix.) Advancement of loans exceeding certain thresholds with a term exceeding one year to a Japanese company;

(ix.) Acquisition of private placement bonds exceeding certain thresholds with a maturity exceeding one year issued by a Japanese company (collectively with (i) through (xi), "**Inward Direct Investment**"); or

(ix.) Acquisition of any issued Shares in an unlisted Japanese company from another Foreign Investor ("**Specified Acquisition**," and items (i), (ii), (iii) and (xii) shall be collectively referred to as the "**Restricted Share Transactions**").

5

How are foreign investors or foreign investments defined by the applicable legislation?

Under FEFTA, a "Foreign Investor" is defined as any one of the following persons who is engaged in the transactions as provided under question 4 above:

(i.) An individual who is not a resident in Japan;

(ii.) A company or other entity established pursuant to foreign laws and regulations or having its principal office in a foreign country;

(iii.) A Japanese company in which 50% or more of voting rights are directly or indirectly held by persons meeting the descriptions in (i) and/or (ii);

(iv.) A limited partnership, if (A) 50 per cent or more of the funds of the limited partnership are directly or indirectly contributed by Foreign Investors or (B) the majority of the general partners of the limited partnership are Foreign Investors; or

(v.) A Japanese company or other entity in which a majority of its (a) officers (directors or other individuals equivalent thereto), or (b) officers who have the authority to represent the company, are individuals who are not resident in Japan.

6

Are minority interests caught?

Yes, see question 4 above.

7

Are there sector-specific rules?

Yes. As for Inward Direct Investment and Specified Acquisitions, filing of a prior notification is required if (i) the target company, (ii) the target company's Japanese subsidiary or (iii) the target company's Japanese joint venture company in which the target company (including its subsidiaries) holds 50% of voting rights equally with another joint venture partner is engaged in a type of business with respect to which a prior notification is required to be made, as prescribed under FEFTA (a "**Prior Notification Business Type**"). A Prior Notification Business Type for Inward Direct Investment is a type of business that (i) is likely to impair national security,[1] disturb the maintenance of public order,[2] or hinder the protection of public safety,[3] or (ii) is subject to a reservation lodged by Japan pursuant to the provisions of Article 2b of the Code of Liberalization of Capital Movements of the Organization for Economic Cooperation and Development (OECD Code).[4]

The Prior Notification Business Type for a Specified Acquisition consists of businesses that are highly likely to cause a situation that impairs national security.[5]

If the target company's business does not constitute a Prior Notification Business Type, only a post facto report is required for an Inward

Direct Investment, unless a prior notification is required based on the Foreign Investor's nationality (see question 25), and no filing is required for a Specified Acquisition.

[1] *E.g.*, manufacture of weapons, aircraft, goods related to nuclear power or space development or goods that are likely to be used for military purposes, manufacture of devices and parts related to information processing, software manufacture for information processing, and information communication services.

[2] *E.g.*, electricity, gas, heat supply, water supply, information and communication, broadcasting, railway transport or passenger transport.

[3] *E.g.*, biological preparations (production of vaccines) or security services.

[4] *E.g.*, agriculture, forestry and fishery, oil, manufacture of leather and leather products, air transport or marine transport.

[5] Same business types mentioned in Footnote 1 as well as electricity business (limited to ownership of nuclear power plants).

8

Is there any kind of *de minimis* threshold?

Among Inward Direct Investments and Specified Acquisition, there are certain de minimis thresholds that trigger the filing requirements depends on type of transactions or actions, or whether or not the target company is a listed company.

In addition, a foreign investor may be eligible for either so-called general exemption or blanket exemption for certain Restricted Share Transactions.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

The following foreign investors cannot use the exemptions from the prior notification requirement that are set out in the Amended Ordinances (defined below): those with a record of sanction or corrective order due to violation of FEFTA or foreign state-owned enterprises and similar entities. However, among foreign state-owned enterprises, sovereign wealth funds and public pension funds may be eligible for the prior notification exemptions (so-called general exemption) if they are accredited by the Minister of Finance. This requires the fund and the Minister of Finance to enter into a memorandum of understanding, which is not made public.

In addition, after the acquisition of shares in reliance on a prior filing exemption, if, for instance, the following changes are made to the attributes of foreign investors, a post-closing report is required: a foreign government or a state-owned enterprise has become a shareholder of 10% or more of such foreign investor's voting rights; or an officer of the foreign investor has become an official of a foreign government or has been appointed by a foreign government.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

No, except that a memorandum of understanding may be entered into with an accredited foreign state-owned enterprise, sovereign wealth funds and public pension funds as provided in the answer to question 9 above.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

When applicable (and unless any exemption applies), filing is mandatory.

12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

A prior notification relating to an Inward Direct Investment, or a Specified Acquisition must be filed no more than 6 months prior to the planned closing of the transaction. When considering the timing of the filing, a Foreign Investor should note that the planned transactions or actions must be suspended until the waiting period has expired as explained in questions 16 and 19 below.

A Foreign Investor who has filed a prior notification must file an implementation report within 45 days after implementation of certain transactions relating to the prior notification (➔ Filing of Implementation Reports).

A post facto report for Inward Direct Investment must be filed within 45 days after the planned transaction/action is consummated.

13

Which party is responsible for making the notification?

Each Foreign Investor conducting an Inward Direct Investment, or a Specified Acquisition is responsible for filing of any prior notifications or post facto reports required under FEFTA. If the Foreign Investor is a non-resident in Japan, such Foreign Investor must appoint a resident attorney-in-fact in Japan and file the prior notification or the post facto report through such attorney-in-fact in Japan.

14

Which information is required for the filing?

The following information is required for the filing:

- Name, address, nationality and occupation (or for a company, name, location of its principal office, nature of business conducted, amount of paid-in capital and its representative) of the Foreign Investor;
- Business purpose of the target company relating to the Inward Direct Investment or the Specified Acquisition, as applicable;
- Value of the Inward Direct Investment or the Specified Acquisition, as applicable, and timing of the closing;
- Reason for conducting the Inward Direct Investment or the Specified Acquisition, as applicable; and
- Other matters specified in the relevant forms as provided in the relevant ordinances to be submitted to the Minister of Finance and other Competent Ministers through BOJ.

15

Are there any filing fees?

No.

16

Must the parties suspend the transaction until the review is completed?

As to transactions/actions subject to a prior notification requirement, yes, as explained under question 19 below. As to transactions/actions subject to a post facto report requirement, no.

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

Failure to file a prior notification could result in criminal penalties and administrative penalties.

The criminal penalties include imprisonment for up to three years and/or a fine of three times the value of the Inward Direct Investment or the Specified Acquisition that was made in violation of FEFTA, as applicable, or one million yen, whichever is higher.

Failure to file a post facto report or an implementation report after related prior notification could result in criminal penalties including imprisonment for up to six months or a fine of 0.5 million yen.

If a representative, an agent or an employee of a Foreign Investor breaches the filing requirements, not only would such representative, agent or employee possibly incur a penalty but also the Foreign Investor itself could incur a penalty. However, there has been no case to date in which any penalty has been imposed for failure to file a prior notification, a post facto report or an implementation report.

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

No.

19

What is the timeline of the review process? Are fast-track options available?

A Foreign Investor who has filed a prior notification may not consummate the subject transaction unless 30 days have passed from the filing date, in principle.

Normally, this waiting period is shortened to two weeks.

Moreover, the Minister of Finance and other Competent Ministers are required to make efforts to shorten the waiting period to four business days for actions/transactions with respect to which this is judged to be possible from the standpoint of national security and other factors.

However, if the Minister of Finance and other Competent Ministers find it necessary to examine (i) whether the Inward Direct Investment subject to the prior notification is likely to impair national security, disturb the maintenance of public order or hinder the protection of public safety

or significantly adversely affect the smooth management of Japanese economy or (ii) whether the Specified Acquisition subject to the prior notification is highly likely to cause a situation that impairs national security (those criteria, collectively, "**National Security**"), the waiting period may be extended to up to five months.

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

If the Minister of Finance and other Competent Ministers determine that a transaction for which prior notification was filed is likely to harm National Security, they may recommend that the Foreign Investor change the content of the transaction or discontinue the transaction. Before issuing such recommendation, the Minister of Finance and other Competent Ministers need to hear the opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions (the "**Council**").

The process does not relate to other types of review.

21

To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

Although the Foreign Investor may receive inquiries or requests for additional information or materials or amendment of the descriptions in the submitted documents from the authorities, the parties are not formally involved in the review. Nonetheless, one may informally consult with the BOJ regarding formalities, and the BOJ will review a draft notification/report and provide comments (if any) in response to an informal request. In addition, one may informally consult with the Ministry of Finance and other ministries regarding substantial matters such as the interpretation or applicability of FEFTA.

22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

No. They do not have any rights or standing.

23

Are there safeguards in place to protect confidential information of the parties?

Yes, confidentiality is maintained throughout the process. National officials and BOJ officers and employees are obligated to keep confidential any knowledge they acquire in the course of their duties under the National Public Service Act (Act No. 120 of 1947, as amended) or the Bank of Japan Act (Act No. 89 of 1997, as amended), as applicable.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

Generally speaking, the Minister of Finance and other Competent Ministers have broad discretion in assessing whether the transaction/action is likely to harm National Security.

To improve transparency, they have disclosed the factors to be considered in such assessments (https://www.mof.go.jp/english/international_policy/fdi/gaitamehou_20200508.htm).

25

Does the nationality of the investor play a role?

Yes, from the perspective of reciprocity, Inward Direct Investments by a Foreign Investor in countries with no treaties or other agreements with Japan are subject to a prior notification requirement. Currently, there are about 163 countries/regions with such reciprocity.

In addition, Inward Direct Investments related to acquisitions of Shares by Iran-related parties (*i.e.*, the Iranian government, Iranian citizens, companies or other entities established pursuant to Iranian laws, etc.) in Japanese companies engaged in certain business are subject to a prior notification requirement.

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the notified transaction is likely to harm National Security, the Minister of Finance and other Competent Ministers may recommend to the Foreign Investor to change the content of the transaction or discontinue the transaction.

If the Foreign Investor refuses such recommendation, the Minister of Finance and other Competent Ministers may order the Foreign Investor to change the content of the transaction or discontinue the transaction.

Also, in the following cases, when a Foreign Investor conducts an Inward Direct Investment or a Specified Acquisition that is likely to harm National Security, the Minister of Finance and other Competent Ministers, after hearing the opinion of the Council, may order the Foreign Investor to dispose of the acquired Shares, in whole or in part, or to take other necessary measures:

(i.) Failure to file a prior notification;

(ii.) Consummation of a transaction during the waiting period;

(iii.) False notification;

(iv.) Failure to follow a recommendation that the Foreign Investor has accepted or violation of an order for change of the content of a transaction; or

(v.) Failure to follow a recommendation that the Foreign Investor has accepted or violation of an order for discontinuance of a transaction.

27

Do the authorities cooperate or consult with authorities in other countries?

In FEFTA, there is a provision to allow the Japanese government to exchange

information with foreign governmental organizations. This provision appears to be aimed at allowing the Japanese authorities to coordinate with bodies like the Committee on Foreign Investment in the United States (CFIUS).

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

As the parties are not expected to be involved in the review process, remedies cannot be formally offered by the parties. Remedies are not formally suggested by the authorities other than by way of recommendation as mentioned in the response to question 26 above.

29

Can a negative decision be appealed?

A negative decision can be appealed to the relevant ministers in the form of a request for review in challenge to an order to change the content of a transaction or discontinue the transaction. If the Foreign Investor is not satisfied with the determination by the relevant ministers, it can bring an action in court.

EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

Since an attempted acquisition of shares in Electric Power Development Co., Ltd. ("**J-POWER**") by Children's Investment Master Fund ("**TCI Fund**"), in May 2008, there has not been any reported order issued against Foreign Investors to change the terms of a transaction or discontinue the transaction. However, this FEFTA regime recently draws attention to the public in connection with a potential sale of Toshiba Corporation, which engages in core Prior Notification Business Type such as nuclear power generation or semiconductor business. It is currently said that the Japanese government is not supportive to the bidding where a Foreign Investor alone makes a bidding for the acquisition of a listed company especially whose business is related to the national security such as Toshiba. There was also a scandal in 2021 whether Toshiba Corporation's executives and an official of the Minister of Economy, Trade and Industry attempted to influence voting of some of Toshiba's foreign shareholders by referring to their potential breach of the FEFTA.

31

Are there any relevant recent developments or trends?

On June 7, 2020, the amended ordinances (the "**Amended Ordinances**") prepared by the Japanese government to implement amendments to FEFTA were fully implemented, after coming into effect on May 8, 2020 (the "**FEFTA Amendments**"). Although the contents are complicated, we have summarized the exceptions created by the Amended Ordinances and the effects of the FEFTA Amendments in our client alerts (here, here and here).

If you have any further questions, please feel free to contact our Tokyo team

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UNITED KINGDOM

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

The National Security and Investment Act 2021 (the "**NSI Act**") came into force in the UK on 4 January 2022 and gives the UK Government powers to scrutinise and intervene in acquisitions to protect national security. There is no formal distinction between domestic and foreign investment under UK legislation.

2

Which authorities are charged with applying those laws?

The Investment Security Unit (the "**ISU**") that sits within the Department for Business, Energy and Industrial Strategy ("**BEIS**") is responsible for identifying, addressing and mitigating national security risks to the UK arising when a person gains control of a "qualifying entity" or "qualifying asset" as set out in the NSI Act.

The Secretary of State also has the power under the NSI Act to "call in" an acquisition for assessment if they reasonably suspect the acquisition has given, or may give, rise to a risk to national security, or arrangements are in progress or contemplation which, if carried into effect, will result in an acquisition that may give rise to a risk to national security.

3

What other legislation is relevant for foreign investments?

The Enterprise Act 2002 ("**EA 2002**") provides the UK Government with the power to intervene in merger investigations by the Competition and Markets Authority (the "**CMA**") on public interest grounds, namely media plurality, financial stability, and the need to maintain the capability to combat and to mitigate the effects of public health emergencies. The UK merger control regime is not considered further in this section.

TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

The NSI Act applies to all acquisitions involving a "trigger event," where a person gains control of a qualifying entity or qualifying asset. For acquisitions of an entity, a person gains control of a qualifying entity if the person acquires a right or interest in, or in relation to, the entity and as a result one or more of the following cases arises:

(i.) where the percentage of the shares or voting rights that the person holds in the entity increases from 25% or less to more than 25%, from 50% or less to more than 50%, or from less than 75% to 75% or more;

(ii.) where the acquisition is of voting rights in the entity that (whether alone or together with other voting rights held by the person) enable the person to secure or prevent the passage of any class of resolution governing the affairs of the entity; or

(iii.) where the acquisition, whether alone or together with other interests or rights held by the person, enables the person materially to influence the policy of the entity.

Under the NSI Act, a "notifiable acquisition" takes place when a person gains control, by virtue of cases (i) or (ii) described above, of a qualifying entity that carries on activities in one or more of 17 specified sectors of the economy (see question 7). Such acquisitions are subject to a mandatory notification requirement (see question 11). Case (iii) above is an additional threshold applicable to voluntary notifications only.

For acquisitions of an asset, a person gains control of a qualifying asset if the person acquires a right or interest in, or in relation to, the asset and as a result the person is able: (i) to use the asset, or use it to a greater extent than prior to the acquisition; or (ii) to direct or control how the asset is used, or direct or control how it is used to a greater extent than prior to the acquisition. Asset acquisitions are not subject to mandatory notification requirements.

5

How are foreign investors or foreign investments defined by the applicable legislation?

The Act does not distinguish between foreign and domestic investors, and there is no definition for foreign investors or foreign investment under the NSI Act.

6

Are minority interests caught?

Yes, minority interests are caught where the acquisition involves a trigger event for the purposes of the NSI Act (see question 4).

7

Are there sector-specific rules?

Irrespective of the sector concerned, any acquisition involving a trigger event (see question 4) may be called in by the Secretary of State under the NSI Act.

Qualifying acquisitions involving an entity that carries on activities in one or more of 17 specified sectors of the economy are subject to mandatory notification requirements. The 17 specified sectors are: (1) Advanced Materials, (2) Advanced Robotics, (3) Artificial Intelligence, (4) Civil Nuclear, (5)

Communications, (6) Computing Hardware, (7) Critical Suppliers to Government, (8) Cryptographic Authentication, (9) Data Infrastructure, (10) Defense, (11) Energy, (12) Military and Dual-use, (13) Quantum Technologies, (14) Satellite and Space Technology, (15) Suppliers to the Emergency Services, (16) Synthetic Biology, and (17) Transport.

Definitions for each sector are set out in the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021.

8

Is there any kind of *de minimis* threshold?

There are no *de minimis* thresholds. The NSI Act applies to qualifying acquisitions regardless of deal value or the transaction parties' market shares or revenue.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

There are no specific rules.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

No. It is possible to approach the ISU informally to seek guidance on specific points of interpretation, but if parties want certainty that an acquisition will not be called in for review, a mandatory or voluntary notice would need to be submitted.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

The NSI Act provides for both a mandatory notification process for "notifiable acquisitions" of qualifying entities carrying on activities in one or more specified sectors (see questions 4 and 7), as well as a voluntary notification process for other acquisitions that are not covered by mandatory notification but for which parties want certainty that an acquisition will not be called in for review.

12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

Mandatory notifications under the NSI Act must be made – and clearance obtained – prior to implementation of the acquisition (*i.e.*, it has suspensory effect). Voluntary notifications can be made before or after signing or closing of an acquisition.

The Secretary of State can retrospectively validate a notifiable acquisition which, if completed without the approval of the Secretary of State, is void (see question 17). A retrospective validation notice automatically "cures" (renders non-void) a transaction which should have been notified and approved prior to closing under the mandatory notification regime.

13

Which party is responsible for making the notification?

Under the mandatory regime, the person acquiring control of a qualifying entity must submit the mandatory notice. Under the voluntary regime, either the acquirer, the target, or the seller can submit the voluntary notice. Any person materially affected by the fact that a notifiable acquisition is void may apply for retrospective validation.

14

Which information is required for the filing?

Information required for the mandatory and voluntary notices (and retrospective validation applications) includes: (i) details of the acquisition and relevant trigger event(s); (ii) information on the qualifying entity or asset (including pre- and post-acquisition ownership structures); (iii) information on the acquirer (including ownership structure, details of any non-UK government with a direct or indirect role in the operation or decision making of the acquirer, and personal details of Board members); and (iv) any supporting documents (including a signed declaration attesting that information provided is true, correct, and complete in all material respects, and acknowledging that it is a criminal offence to recklessly or knowingly supply false or misleading information).

15

Are there any filing fees?

There are no filing fees associated with submission of mandatory or voluntary notices, or retrospective validation applications.

16

Must the parties suspend the transaction until the review is completed?

Mandatory notifications under the NSI Act must be made—and clearance obtained—prior to implementation of the acquisition (*i.e.*, it has suspensory effect).

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

A notifiable acquisition that is completed without the approval of the Secretary of State is void.

In addition, the NSI Act includes both civil penalties (fines of up to the higher of 5% of worldwide group turnover or £10 million) and criminal penalties (imprisonment of up to five years and/or unlimited fines) for corporates and officers for implementing a notifiable acquisition without requisite approval.

The NSI Act came into force on January 4, 2022. At the time of writing, we are not aware of any such sanctions being imposed.

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

Under the NSI Act, the Secretary of State has the power to call in any acquisition if it reasonably suspects that a "trigger event" (see question 4) has taken place in relation to a qualifying entity or qualifying asset, or arrangements are in progress or in contemplation which, if carried into effect, will result in a trigger event taking place in relation to a qualifying entity or qualifying asset, and the trigger event may give rise to a risk to national security.

19

What is the timeline of the review process? Are fast-track options available?

As soon as reasonably practicable after receiving a mandatory or voluntary notice (or retrospective validation application), the Secretary of State must decide whether to reject or accept the notice/application. This process typically takes two-three working days. Once accepted, notifications are subject to a review period of up to 30 working days. Before the end of the review period the Secretary of State must either issue a call-in notice or confirm that no further action will be taken under the NSI Act. If an acquisition is subject to a call-in notice, the Government has a further 30 working days to conduct a national security assessment. This may be extended by 45 working days subject to certain conditions. If necessary, a further voluntary extension is possible, again subject to certain conditions. There are no fast-track options available.

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

The ISU may contact other authorities or government bodies to solicit their views where it is deemed appropriate. There is a formal Memorandum of Understanding in place between BEIS and the CMA which establishes a framework for cooperation, coordination and information sharing in the operation of the NSI Act.

21

To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

In general, parties have a limited role in the review of an acquisition under the NSI Act. The NSI Act gives the Secretary of State powers to request information from parties by way of an "information notice," and they may also require persons to give evidence in person by way of an "attendance notice". This includes powers to issue information notices and attendances notices to persons outside the UK, in certain circumstances.

The ISU does not expect any prefiling communication, although it is possible to approach the ISU informally to seek guidance on specific points of interpretation.

22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

The Secretary of State can issue information notices or attendance notices to third parties (see question 21) where it is deemed appropriate.

23

Are there safeguards in place to protect confidential information of the parties?

The ISU will not publicly disclose confidential information unless it is required to do so by law.

The Secretary of State has the power to disclose information received under the NSI Act to other public authorities—including overseas public authorities—in certain circumstances. The NSI Act requires that, in deciding whether to disclose such information, the Secretary of State must consider whether the disclosure would prejudice, to an unreasonable degree, the commercial interests of any person concerned, whether the law of the country or territory to whose authority the disclosure would be made provides protection against self-incrimination in criminal proceedings which corresponds to the protection provided in any part of the UK, and whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

A qualifying acquisition can be called in for a national security assessment if the Secretary of State reasonably suspects that the acquisition has given, or may give, rise to a risk to national security or arrangements are in progress or contemplation which, if carried into effect, will result in an acquisition that may give rise to a risk to national security. The NSI Act intentionally does not set out the circumstances in which national security is, or may be, considered at risk.

Decisions by the Secretary of State on whether to exercise the call-in power are made on a case-by-case basis, considering three primary risk factors:

- Target risk: This concerns whether the target of the qualifying acquisition (the entity or asset being acquired) is being used, or could be used, in a way that raises a risk to national security.

- Acquirer risk: This concerns 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.
- Control risk: This concerns the amount of control that has been, or will be, acquired through the qualifying acquisition. A higher level of control may increase the level of national security risk.

Guidance issued by the Government notes an expectation that all three risk factors will be present when calling in an acquisition, but it does not rule out calling in an acquisition on the basis of fewer risk factors.

If an acquisition is called in for assessment, the Secretary of State may issue a "final order" (see question 26) if they: (i) are satisfied, on the balance of probabilities, that a trigger event has taken place (or that arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event), and a risk to national security has arisen from the trigger event (or would arise from the trigger event if carried into effect); and (ii) reasonably consider that the provisions of the final order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk.

25

Does the nationality of the investor play a role?

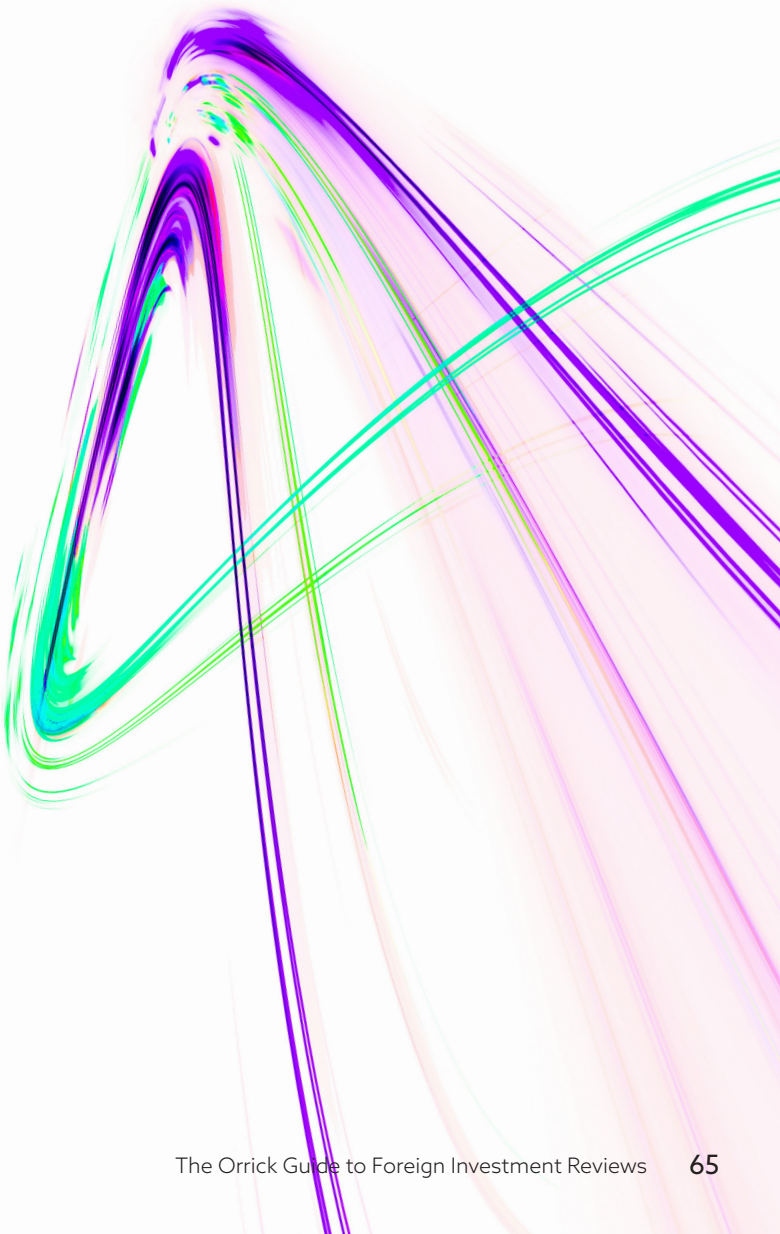
All nationalities are subject to the same requirements, including UK-based investors. Government guidance notes that judgements will not be made based solely on an acquirer's country of origin. However, an acquirer's ties or allegiance to a state or organization which is considered hostile to the United Kingdom will be a factor when assessing whether a qualifying acquisition has given, or may give, rise to a risk to the UK's national security.

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If an acquisition is called in for assessment, the Secretary of State can issue a "final order" that imposes conditions to mitigate national security risks. These can include: (i) placing conditions (whether structural or behavioral) on an acquisition prior to completion; (ii) unwinding the acquisition; or (iii) blocking the acquisition from taking place. A final order remains in place until varied or revoked by the Secretary of State, but an expiry date may be applied to some of its conditions, or the whole order.

At any time during the assessment period, the Secretary of State may also issue an "interim order" that prevents parties taking any steps which might undermine any conditions the Secretary of State could seek to impose through a final order.



27

Do the authorities cooperate or consult with authorities in other countries?

See question 23.

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

See question 26.

29

Can a negative decision be appealed?

Decisions made by the Secretary of State under the NSI Act can be appealed by applying to the High Court for judicial review.

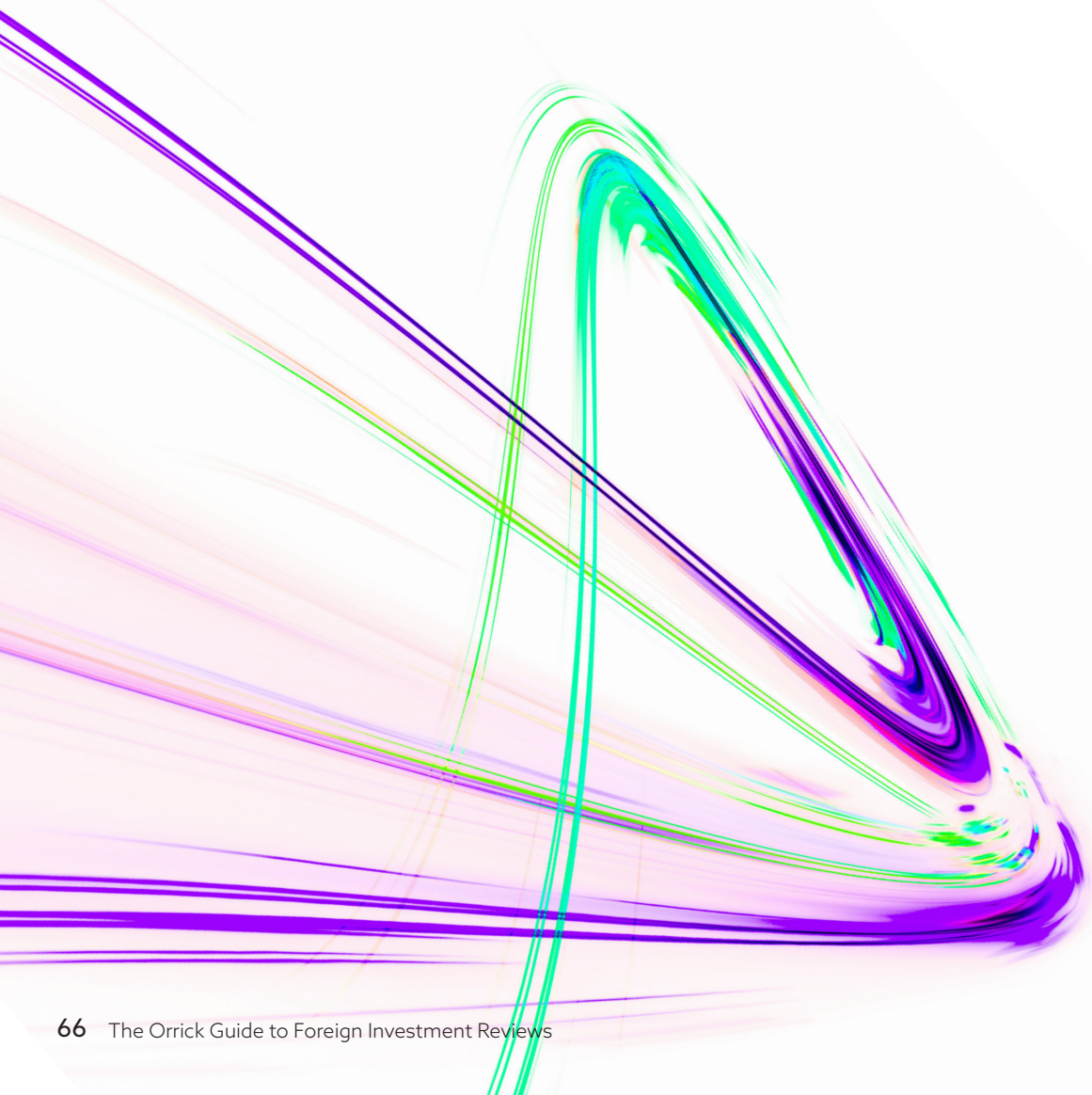
EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

The ISU does not routinely publish details of notified acquisitions, the identity of parties, or other information submitted to it via mandatory or voluntary notices, or retrospective validation notices.

Under the NSI Act, the Secretary of State must publish an annual report containing various statistics. The first annual report was published in June 2022 (see question 31) and confirms that the ISU received 222 notifications from January to March 2022, of which 17 were called in for national security assessment. At the time of writing, BEIS has issued two public statements relating to call-ins, the first relating to the acquisition by Nexperia of Newport Wafer Fab, and the second relating to the acquisition by Altice of 6% of shares in BT.



At the time of writing, the Secretary of State has issued five final orders, including two prohibitions, the first relating to an acquisition of IP from the University of Manchester by Beijing Infinite Vision Technology Company Ltd, and the second relating to the acquisition of Pulsic Limited by Super Orange HK Holding Limited. The other three final orders imposed certain conditions on the private equity acquisition of Sepura Ltd, the acquisition of shares in Reaction Engines Limited by Tawazun Strategic Development Fund LLC, and the acquisition of development rights for the Stonehill energy project by Stonehill Energy Storage Limited.

31

Are there any relevant recent developments or trends?

The scope of the NSI Act is very broad, applying to acquisitions in any industry sector, regardless of deal value or the transaction parties' market shares or revenue, including acquisitions, whether whole or partial, of shares or voting rights in entities, and/or assets, whether real or personal property, intellectual property, or even contractual rights. Many types of acquisitions will be captured by the requirements of the NSI Act, and transaction parties should assess possible requirements at an early stage.

The first NSI Act annual report was published in June 2022 and confirms that the ISU received 222 notifications (196 mandatory, 25 voluntary, one retrospective) from January to March 2022, which is slightly lower than initial estimates. Of these notifications, 17 were called in for national security assessment (13 mandatory, four voluntary). Of those call-ins, three were cleared and none were subject to final orders. At the time of publication of the annual report, the remaining 14 call-ins were still under review. In relation to mandatory notices, the annual report shows that the five most common sectors were Defense, Military and Dual-use, Critical Suppliers to Government, Artificial Intelligence, and Data Infrastructure.

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UNITED STATES

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

Defense Production Act, § 721, 50 U.S.C. § 4565 (commonly known as the "***Exon-Florio***" law), as amended by the Foreign Investment Risk Review Modernization Act of 2018.

2

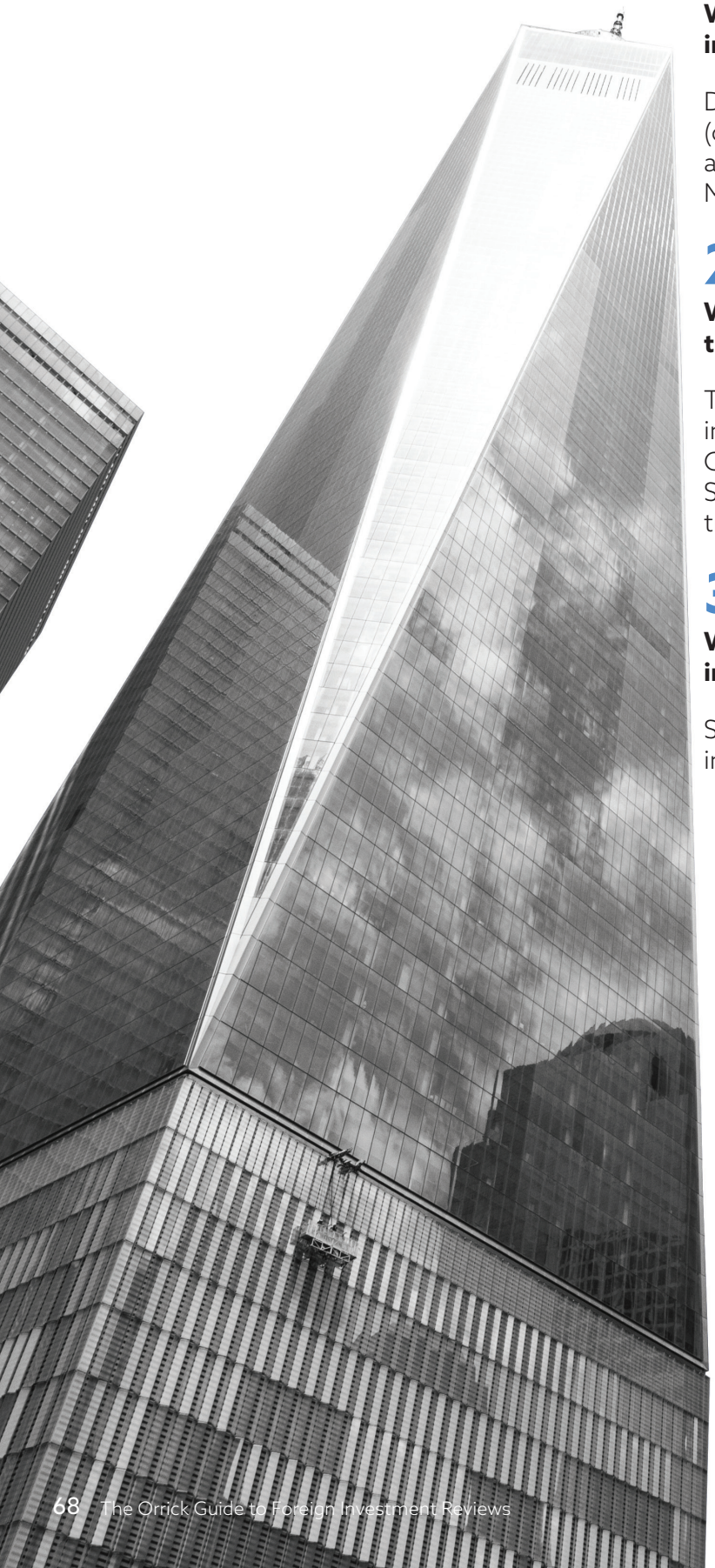
Which authorities are charged with applying those laws?

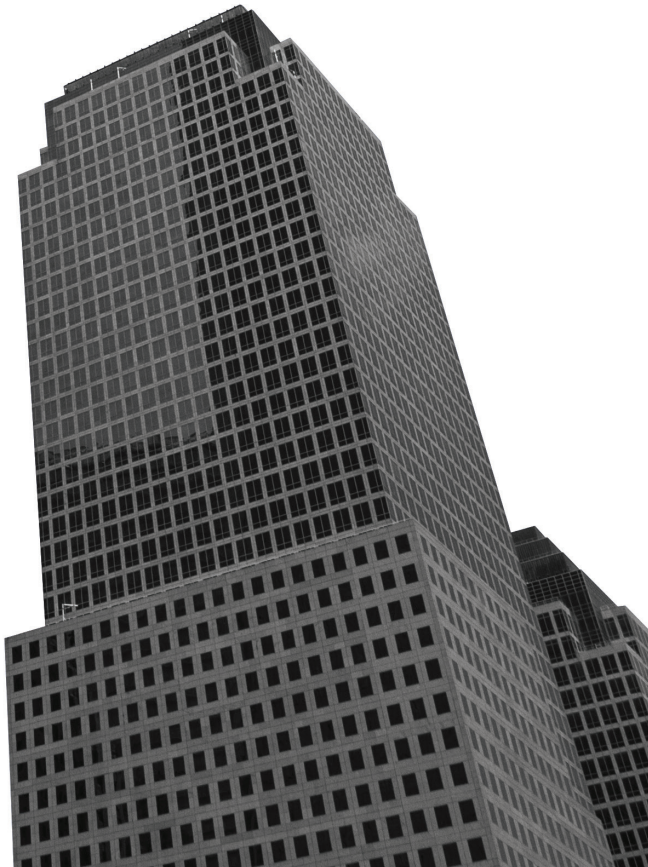
The U.S. President is authorized to block foreign investment for national security reasons. The Committee on Foreign Investment in the United States ("**CFIUS**") is authorized to examine transactions and advise the President.

3

What other legislation is relevant for foreign investments?

Sector-specific requirements regarding investment in, for example, the U.S. communications sector.





TRANSACTIONS SUBJECT TO REVIEW

4

Which types of transactions are caught?

Under the *Exon-Florio* law, the President and CFIUS have jurisdiction over:

- investment transactions in which a foreign party (foreign entity or foreign individual) will or could obtain control over a U.S. business (broadly defined);
- investment transactions in which a foreign party will gain one or more "triggering rights" with respect to an unaffiliated "**TID U.S. business"** (U.S. business involved with "critical technology," "covered investment critical infrastructure," or "sensitive personal data"); and
- under certain circumstances, real estate transactions in which a foreign party will obtain at ownership of, leasing of or a concession to real estate located within various sensitive areas of the United States.

5

How are foreign investors or foreign investments defined by the applicable legislation?

In general, the *Exon-Florio* law potentially covers an investment in a U.S. business or a real estate purchase, lease, or concession by a "foreign person"—generally, an individual who is not a U.S. citizen, a non-U.S. government, or a legal entity that is (i) organized under the laws of a country other than the United States if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges, or (ii) controlled by non-U.S. citizens or governments.

6

Are minority interests caught?

Yes, they can be. See question 4 above.

7

Are there sector-specific rules?

Not under the *Exon-Florio* law. But there are sector-specific foreign investment requirements among other laws.

8

Is there any kind of *de minimis* threshold?

No.

9

Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

The *Exon-Florio* law provides for more intensive scrutiny of U.S. investment transactions by non-U.S. governments and entities controlled by the same.

10

Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?

No. The only way to learn the U.S. government's position on a transaction under the *Exon-Florio* law is to submit a short form declaration or full notice to CFIUS.

PROCEDURE

11

Is a filing required (mandatory) or possible (voluntary)?

Some types of foreign investment transactions involving critical technology or substantial interest in a TID U.S. business are the subject of a legal requirement to notify CFIUS.

Investment transactions triggering a mandatory-filing requirement are those that:

- involve a foreign party obtaining a "**substantial interest**" (*i.e.*, a voting interest of 25% or more) in a TID U.S. business) if the foreign party is one in which a foreign government has a voting interest of 49% or more; or

- involve a foreign party obtaining a controlling or covered non-controlling interest in a TID U.S. business that produces, designs, tests, manufactures, fabricates or develops one or more "critical technology"— equipment, software, or technical information the export of which commonly requires a license from the U.S. government, where one or more "U.S. regulatory authorizations" would be required to export, reexport or retransfer one or more of the U.S. business's critical technologies to the foreign investor or a foreign person holding a significant ownership or control stake in a foreign investor.

CFIUS's regulations except certain investments from the filing requirements.

Parties involved in a transaction triggering the filing requirements must notify CFIUS of the transaction at least 30 days before closing. Parties may electronically file "declarations" (abbreviated notices) or standard written notices. Failure to comply with the filing requirements could expose parties to penalties for up to the value of the transaction.

For transactions not subject to a filing requirement, parties may elect to notify CFIUS and seek CFIUS clearance.

12

At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

If there is no filing requirement but parties voluntarily notify CFIUS, there is no specified time for doing so. However, parties normally do so shortly after they execute a definitive contract for the transaction.

If a filing requirement applies, the notification must be submitted at least 30 days before closing of the transaction.

13

Which party is responsible for making the notification?

The buy side and sell side are equally responsible. The parties normally submit a notice to CFIUS jointly.

14

Which information is required for the filing?

Regulations prescribe inclusion of specified information about the parties and transaction in the declaration or notice.

15

Are there any filing fees?

Yes, for standard notices CFIUS has a tiered filing fee structure and will not begin its review of a final filing until the applicable fee has been paid. No fee is required for transactions where parties elect to file a short-form declaration with CFIUS, rather than a formal notice.

16

Must the parties suspend the transaction until the review is completed?

The CFIUS regime does not contemplate a requirement to suspend any given transaction, unless the government issues transaction-specific instructions that the parties do so. Parties sometimes condition closing of transactions on a favorable disposition with CFIUS.

17

Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

If parties violate a filing requirement by failing to submit a mandatory notice to CFIUS, CFIUS is authorized to impose a penalty against the parties of up to the value of the transaction.

18

Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

Yes. In addition, CFIUS uses various methods to identify non-notified/non-declared transactions that are potentially subject to CFIUS's jurisdiction or mandatory filing. Among other things, CFIUS pursues information about non-notified/non-declared transactions from parties to those transactions. Sometimes CFIUS then asks the parties to file a notice with CFIUS.

19

What is the timeline of the review process? Are fast-track options available?

Following initial engagement with CFIUS, the CFIUS screening process commonly takes around four-to-five months. It can take more or less time depending on a variety of factors. Parties are free to submit a "declaration," which requires far less information than a standard "notice." And CFIUS is required to dispose of a declaration within 30 days of accepting it for review. But a possible outcome of a declaration proceeding is a CFIUS instruction to the parties to start over by submitting a full notice.

20

Do other authorities or government bodies participate in the review process? How does process relate to other types of review, *e.g.*, merger control by the competition authorities?

Since CFIUS is a multi-agency body, it encompasses most parts of the U.S. federal government the roles of which could be relevant to CFIUS screening.

CFIUS interaction with other parts of the U.S. government conducting other statutory proceedings with respect to a transaction (such as antitrust reviews) do not ordinarily affect CFIUS outcomes.

21

To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

Transaction parties submit an initial notification to CFIUS, and then CFIUS commonly elicits from the parties additional information while CFIUS is executing its examination.

For full-form "notices" (but not short-form ("declarations"), CFIUS expects prefiling communications with the parties, including, at minimum, submission of a draft notice to CFIUS for CFIUS's review and comment.

22

Are third parties (complainants) involved in the review? What rights and/or standing do they have?

No, non-parties outside of the U.S. government have no role in CFIUS proceedings.

23

Are there safeguards in place to protect confidential information of the parties?

Yes, with some limited exceptions CFIUS is forbidden to release information submitted by the parties to persons outside the U.S. government.

SUBSTANTIVE ASSESSMENT

24

What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

The *Exon-Florio* law authorizes the U.S. President to block foreign investment and to order divestment with respect to completed foreign investment transactions if he or she finds that the transaction threatens U.S. national security. The law accords the President broad discretion in this regard. The law does not define national security.

25

Does the nationality of the investor play a role?

Often, yes. CFIUS is, for example, more likely to find national security concerns regarding a transaction if the planned investment is on the part of a Chinese or Russian investor than if it is by an investor based in an allied nation.

26

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The *Exon-Florio* law provides the U.S. President plenary authority to block foreign investment and to order divestment with respect to completed foreign investment transactions if he or she finds that the transactions threaten U.S. national security.

27

Do the authorities cooperate or consult with authorities in other countries?

Yes, CFIUS does so and is doing so increasingly often.

28

Can remedies be offered by the parties? Are remedies suggested by the authorities?

CFIUS often conditions clearance of a transaction on contractual measures to which transaction parties commit that, in CFIUS's view, adequately mitigate identified national security concerns. CFIUS may consider mitigation measures proposed by parties.

29

Can a negative decision be appealed?

Essentially, no. United States courts have no jurisdiction to reverse a presidential finding under the *Exon-Florio* law that a transaction threatens U.S. national security.

EXAMPLES AND TRENDS

30

Are there any recent cases that reflect how the relevant laws and policies are applied?

According to CFIUS's most recent annual report:

- In 2021, the number of covered transactions subject to CFIUS jurisdiction increased substantially from 2020 and reached the highest number since 2012.
- CFIUS reportedly met its obligations providing comments on and accepting notices within the statutory time limits.
- CFIUS cleared majority of submitted declarations in 2021.
- During 2012-2021, the majority of notices were in Finance, Information, and Services sector and Manufacturing sector.
- In 2021, the highest number of notices were from Chinese investors (including Hong Kong) (16.5%), followed by Canadian (10.3%) and Japanese (9.6%) investors.
- CFIUS reviewed 184 covered transactions involving acquisitions of U.S. critical technology companies in 2021. The top originating countries for acquisitions of critical technology were Germany (16), UK (16), Japan (15), South Korea (13), and Cayman Islands (12). Russia (5) and China (10) were also on the list.
- CFIUS's non-notified division identified 135 potentially relevant transactions in 2021, and approximately 6% of the transactions resulted in CFIUS's request to the parties to file.

31

Are there any relevant recent developments or trends?

- All else being equal, CFIUS tends to be more aggressive today than it was several years ago in finding national security concerns and impeding foreign investment.
- Concerns about Chinese and Russian investment in the United States have become more and more pronounced.
- By statute and regulation, certain types of transactions now fall within CFIUS's jurisdiction even if they could not result in control by a foreign person over a U.S. business (see question 4 above). CFIUS is interpreting its jurisdiction more broadly to capture a larger scope of foreign investment transaction types.
- By statute and regulation, certain types of foreign investment transactions must be notified to CFIUS (see question 11 above).
- CFIUS jurisdiction now covers certain real estate transactions not involving investment in a U.S. business, although no real estate transaction is subject to a filing requirement.
- In September 2022, the U.S. President issued the first executive order providing formal direction to CFIUS on the risks that it should consider in its examination of foreign investment transactions. While the order is not likely to change substantially CFIUS's approach to foreign investment reviews, it directs CFIUS to consider certain risk factors, focusing on critical U.S. supply chain resilience, U.S. technological leadership, aggregate industry trends, cybersecurity, and risks to U.S. persons' sensitive data.

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Leader of Orrick's International Trade & Investment group, Harry Clark advises major companies and industry associations on a variety of international trade and investment rules. He has deep experience in CFIUS/Exon-Florio examinations of foreign investment, military, and "dual use" export control regulations (ITAR/EAR), economic sanctions administered by the U.S. Treasury Department (OFAC), customs regulations, the Foreign Corrupt Practices Act, anti-money laundering rules, anti-boycott requirements, and defense industrial security requirements. He executes internal corporate investigations regarding trade and investment rules and advises on such rules in the context of corporate transactions, has extensive experience with government contracting matters, represents broad industry coalitions on major trade litigations and international negotiations and antidumping and countervailing duty litigation. He also pursues policy issues with congressional and executive branch officials and advises on international trade rules (*e.g.*, GATT, WTO agreements, and NAFTA).

Chambers 2022 recognizes Harry as a leader in the field of export controls and economic sanctions (Chambers Global and Chambers USA), as well as CFIUS (Chambers USA). Previous editions have also recognized Harry's achievements regarding his work related to the Foreign Corrupt Practices Act. Clients note that Harry provides "accurate, straightforward guidance incredibly efficiently" and "he has an ability to translate complex legal requirements and rules into business-friendly jargon."

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Jeanine's clients include major U.S. and foreign financial institutions, and pharmaceutical, technology, telecommunications, energy, and natural resources companies. Jeanine is ranked in both the CFIUS Experts and Export Controls & Economic Sanctions categories by *Chambers USA* in 2019, 2020, 2021, and 2022. An interviewee had this to say of their experience working with Jeanine, "I am continuously impressed by her extensive knowledge, excellent communication skills and her ability to wrap her subject matter expertise around the details of the matter and then drive conclusions or recommendations for next steps."

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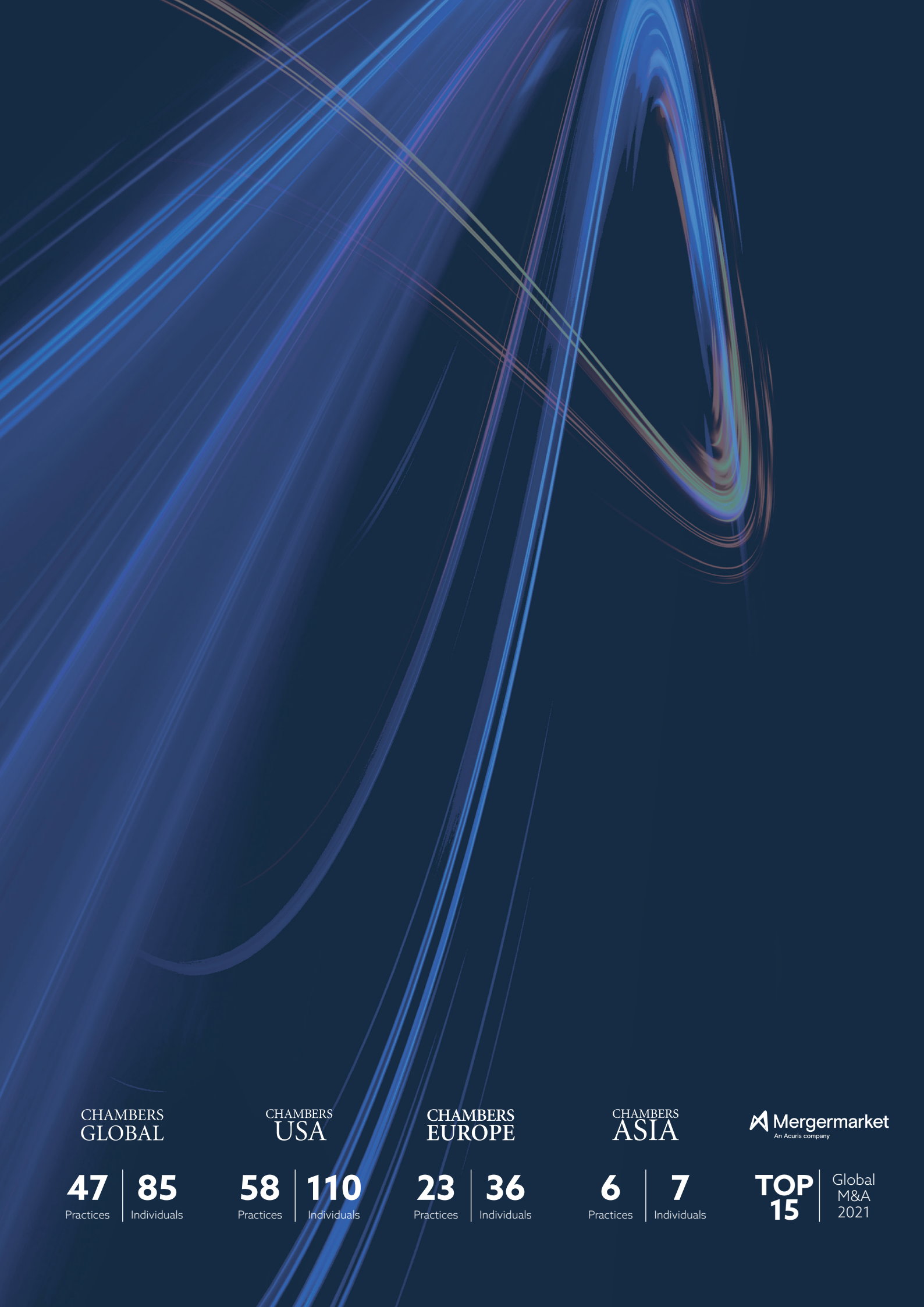
CHAMBERS GLOBAL
47 Practices
85 Individuals
CHAMBERS USA
58 Practices
110 Individuals
CHAMBERS EUROPE
23 Practices
36 Individuals
CHAMBERS ASIA
6 Practices
7 Individuals
Mergermarket
An Acuris company
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