WHITE & CASE

Foreign direct investment reviews 2021: A global perspective

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

Navigating foreign direct investment reviews worldwide

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Now in its sixth year of annual publication, White & Case's Foreign Direct Investment Reviews provides a comprehensive look into rapidly evolving foreign direct investment (FDI) laws and regulations in 21 key jurisdictions around the world. This 2021 edition adds five new jurisdictions—Denmark, The Netherlands, New Zealand, Romania and Switzerland—to those covered in previous editions.

Although FDI reviews were on the upswing in many parts of the globe before the start of the COVID-19 pandemic, the trade vulnerabilities exposed by the events of the past two years have only accelerated that trend. Where FDI regimes have not previously been in force, they are emerging, as in Switzerland and Denmark. Where FDI reviews have long targeted certain foreign investments, they are becoming both more stringent and more frequent, as in the United States and Germany.

Not only are governments continuing to widen their nets beyond the traditional review purview of national security into an ever-broadening array of other sectors, but also governments are becoming more proactive, stepping in to scrutinize more and more transactions falling outside mandatory notification requirements.

The Committee on Foreign Investment in the United States (CFIUS) in particular has upped its attention to such "non-notified" transactions, making due diligence for FDI review a critical step for most investments into the US, regardless of sector or the potential balance of corporate control.

For its part, the European Union continues to step up efforts to harmonize FDI regimes among Member States while also sharpening its post-pandemic focus on such issues as ensuring an independent and resilient supply chain and reliable access to healthcare resources.

Investors doing business across borders need to understand FDI restrictions as they are today, and how these laws are evolving over time, in order to avoid disruption to realizing synergies, achieving technological development and integration, and ultimately securing liquidity.

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Canada

Since COVID-19, deals involving foreign state-owned enterprises or enterprises related to public health or the supply of critical goods and services are increasingly subject to review

By Oliver Borgers[1]

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

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

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

Since the pandemic, the Canadian government announced a new policy that would subject certain investments by non-Canadians to enhanced national security review. This policy applies to investments "related to public health or involved in the supply of critical goods and services to Canadians or to the government."

The policy does not define which businesses are subject to this policy, as it is meant to apply broadly. The policy also sets out enhanced measures applicable to investments made by state-owned enterprises or investors working under the influence or direction of a foreign (non-Canadian) government.

WHO FILES

The ICA is a statute of general application that applies to any acquisition of "control" of a Canadian business by a foreign investor. Generally, "control" means ownership of more than 50 percent of the equity or voting interests of an entity, though in certain cases an acquisition of more than one-third of the voting interests of a corporation will be considered control.

If the relevant financial threshold under the ICA is exceeded, the statute provides for a process of pre-merger review and approval of foreign investments to determine if they are of "net benefit" to Canada.

If the financial threshold is exceeded, the investor must file an application for review and the transaction must be approved by the relevant minister. A key element in the application for review is the requirement to set out the investor's plans for the Canadian business, including plans related to employment, participation of Canadians in the business and capital investment. An application for review is a much more detailed document than a notification.

If the financial threshold is not exceeded, the investor has an obligation only to file a simple administrative notification form, which can be filed up to 30 days after closing. In either case (filing of an application for review or just a notification), the Canadian government has the jurisdiction for 45 days after receipt of the filing to order a national security review.

The entry point for national security review screening will usually be the obligatory filing under the ICA. The government also has the power to subject non-controlling minority investments to a national security review, although there have been no known instances of such a review to date.

TYPES OF DEALS REVIEWED

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

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

The types of transactions that have been the subject of formal review under the national security lens include those

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relating to satellite technology, telecommunications, fiber-laser technology and critical infrastructure, as well as where a non-Canadian investor proposed to build a factory located in close proximity to Canadian Space Agency facilities.

Investors subject to Canadian national security reviews have included American companies, as well as investors from emerging markets, but particular scrutiny can be expected for state-owned investors, especially since the announcement of the COVID-19 policy.

SCOPE OF THE REVIEW

A national security review will generally focus on the nature of the business to be acquired and the parties involved in the transaction (including the potential for third-party influence).

In assessing whether an investment poses a national security risk, the Canadian government has indicated that it will consider factors that focus on the potential effects of the investment on defense, technology and critical infrastructure and supply. The Canadian government will also focus on transactions related to public health or involved in the supply of critical goods and services to Canadians or to the government of Canada.

Review can occur before or after closing. Transactions that run the risk of raising national security concerns can seek clearance by making any ICA filings well before the proposed time of closing — at least 45 days, although because of the pandemic, government review times are taking longer and 90 days would be more prudent.

The Canadian government may deny the investment, ask for undertakings and/or provide terms or conditions for the investment (similar to mitigation requirements in the US), or where the investment has already been made, require divestment.

TRENDS IN THE REVIEW PROCESS

The Canadian government has steadily increased its focus on national security, including rejecting mergers due to national security concerns. Since COVID-19, the government is being particularly careful to scrutinize the transactions, although in light of the decline in value of many Canadian businesses since March 2020, fewer transactions will be subject to mandatory approval.

Given this decline in value, along with the newly recognized importance of certain businesses to Canada's ability to combat the pandemic and to ensure a continued supply of products and services essential to Canadians and the government, the enhanced review measures described above were announced to guard against potentially harmful or opportunistic foreign investments.

Under the enhanced policy, investments by foreign state-owned enterprises (SOEs) or by private investors "assessed as being closely tied to or subject to direction from foreign governments" will be subject to enhanced scrutiny to determine whether they may be motivated by "non-commercial imperatives" that could harm Canada's economic or national security interests.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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

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

REVIEW PROCESS TIMELINE

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

The Canadian government is becoming increasingly proactive and initiating many more national security reviews

OUTCOMES

- In its Investment Canada Act Annual Report (released in July, 2021), the Canadian government reported that ten national security reviews were initiated during the April 1, 2019 – March 31, 2020 fiscal year, dwarfing the 17 national security reviews from April 2015 to March 2019.
- Of those ten reviews, three transactions were abandoned and three resulted in a divestment order. The average length of review was 217 days.
- National security reviews have involved the following industries: air transportation, credit intermediation, scientific research; waste management; hardware manufacturing; power transmission; electronic shopping; urban transport systems; pharmaceutical and medical manufacturing; civil engineering construction; telecommunications, including telecom equipment manufacturing; ship and boat building; electrical equipment and manufacturing; rail transportation; computer and related services; and crude oil and natural gas.
- The majority of the national security reviews in Canada involved investors from China.
- The outcomes of the 21 instances where a formal national security review was ordered since 2016 were as follows: The investment was authorized with conditions that mitigated the identified national security risks (two cases); the investor was ordered to divest control of the Canadian business (eight cases); the investor was directed to not implement the proposed investment (one case); and the investor withdrew its application prior to a final order being made (six cases); and, no further action was required, i.e., the deal was cleared (four cases).
- We note that many more transactions have been the subject of informal national security review by the IRD, most often resulting in successful pre-clearance. Finally, it is important to remember that only a small fraction of the thousands of notifications and applications for review filed with the IRD have attracted national security scrutiny.

LESSONS LEARNED

- The Canadian government is becoming increasingly proactive and initiating many more national security reviews. A significant number of these reviews result in divestiture orders. It is therefore highly recommended for transactions that raise a Canadian national security risk that the purchaser seek and obtain national security clearance prior to consummating the transaction.
- We are also learning that the challenges that the pandemic continues to present result in slower response times from the officials, and it is therefore incumbent on parties to address Canadian national security concerns as soon as they are identified.

Mexico

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

By Henri Capin-Gally Santos and Germán Ricardo Macías Salas

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

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

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

RESTRICTED INVESTMENTS

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

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

CAPPED FOREIGN INVESTMENTS

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

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

- Manufacture and marketing of explosives, firearms, cartridges, ammunition and fireworks
- Printing and publication of newspapers for exclusive commercialization within the Mexican territory
- Ownership of agricultural, livestock and forest lands
- Fishing in freshwater, inshore and exclusive economic zones
- Integral port administration
- Piloting services in ports located within the Mexican territory
- Freight shipping within Mexican waters
- Ship, aircraft and rail equipment fuel and lubricant supply
- Broadcasting
- Air transport services

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

- Maneuvering services in ports located within the Mexican territory
- Freight shipping via coastal and ocean navigation
- Aerodrome management or operation
- Education services
- Legal services
- Construction and/or operation of railways, as well as railroad transportation services
- Holding assets with a book value that exceeds MXN 19.55 billion

AUTHORIZATION PROCESS

To obtain authorization from the CNIE, foreign investors are required to file a preinvestment control notice before the CNIE, attaching as exhibits a duly filled-in questionnaire issued by the CNIE; the financial and corporate documents of the interested foreign investors; a general description of its investment impact in terms of employment, technological

It is advisable to contact the CNIE's officials before the filing to discuss the proposed transaction.

contributions and competitiveness increase of the target company; or any other synergy that could derive therefrom; and evidence of payment of filing fees.

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

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

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

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

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

Once the pre-investment control notice is duly submitted, the CNIE has 45 business days to authorize the proposed investment.

LESSONS LEARNED

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

Under this new approach, it is advisable to contact the CNIE's officials before the filing to discuss the proposed transaction, and ask which information they would like to see explaining the potential benefits of the transaction in Mexico.

This implies submitting additional information to the formal documentation and information required in this type of process, to accelerate obtaining clearance.

United States

Expanded jurisdiction, mandatory filings and a substantially increased pursuit of non-notified transactions have changed the landscape

By Farhad Jalinous, Karalyn Mildorf, Keith Schomig and Ryan Brady

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

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) significantly overhauled the CFIUS process, including by adding new types of transactions subject to CFIUS review and, for the first time ever, mandating notification to CFIUS in certain cases. New regulations fully implementing FIRRMA's reforms took effect on February 13, 2020, and the CFIUS landscape has continued to evolve since then, as CFIUS avails itself of its greater authorities and resources.

TYPES OF DEALS REVIEWED

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

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

Despite CFIUS's broad historical jurisdiction, in recent years the shifting national security focus in the US, particularly regarding Chinese investment, exposed gaps between the transactions that CFIUS was able to review and those beyond its reach that nonetheless presented potential national security concerns. FIRRMA sought to close these gaps by expanding CFIUS's jurisdiction and mandating filing in certain cases.

FIRRMA also facilitated more robust efforts for CFIUS to identify and review non-notified transactions of interest, which has led to CFIUS reviewing increasing numbers of deals that were not voluntarily notified—including some that closed years earlier.

CFIUS

FIRRMA—the most significant CFIUS overhaul in more than a decade—has now been fully implemented. This has resulted in a number of key changes to the CFIUS process, such as mandatory filings for certain transactions, an expansion of CFIUS's jurisdiction, the introduction of a new expedited filing option, and more aggressive pursuit of non-notified transactions.

Non-US investors need to assess early in the transaction process whether the US business subject to the transaction qualifies as a "TID US business"—one involved with critical technologies, certain critical infrastructure or sensitive personal data of US citizens—as foreign investments in TID US businesses are subject to CFIUS's expanded jurisdictional reach and may trigger mandatory filing requirements. Penalties for not complying with mandatory filing obligations can be up to the value of the transaction.

Most transactions continue to be cleared by CFIUS without mitigation, but when CFIUS does have concerns, the consequences can be substantial, including unexpected costs and measures that can frustrate deal objectives. Investors must assess potential CFIUS risks and plan transactions carefully to protect themselves. Such assessments should also include determining the advisability of filing via a declaration or notice. The declaration filing option is proving to be a useful tool for many transactions, but parties should account for potential delays if CFIUS requests a notice.

CFIUS has also been pursuing non-notified transactions of interest more aggressively, while also ramping up compliance and enforcement efforts related to mitigation agreements. This changes the risk equation for not notifying CFIUS voluntarily since it is now more likely that CFIUS may reach out to request a filing, even post-closing. If CFIUS officials reach out with questions regarding a non-notified transaction or about mitigation compliance matters, it is advisable to engage CFIUS counsel right away.

With respect to investments, in addition to its traditional authorities regarding control transactions, CFIUS now has expanded jurisdiction to review certain "covered investments" in sensitive US businesses referred to as "TID US businesses" under the regulations. (TID stands for Technologies, critical Infrastructure and personal Data.)

TID US businesses are those that:

- Produce, design, test, manufacture, fabricate or develop one or more critical technologies
- Perform certain actions in relation to identified critical infrastructure assets, referred to as "covered investment critical infrastructure"
- Maintain or collect sensitive personal data of US citizens

Certain transactions involving TID US businesses are also subject to mandatory filing requirements.

A covered investment is a non-controlling transaction that affords the foreign investor any of the following with respect to a TID US business:

- Access to any material nonpublic technical information in its possession
- Board membership or observer rights
- Any involvement, other than through voting of shares, in substantive decision-making regarding sensitive personal data of US citizens, critical technologies or covered investment critical infrastructure

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

CFIUS also has jurisdiction to review changes in rights that would provide control or, for a TID US business, covered investment rights as well as transactions designed to evade CFIUS review.

WHO FILES

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

Though the CFIUS regulations now mandate filings for certain transactions, CFIUS review remains predominantly a voluntary process, as most transactions subject to CFIUS's jurisdiction do not meet the mandatory filing criteria. Even for transactions under CFIUS's voluntary authorities, CFIUS may request parties notify a transaction of interest and has the authority to initiate reviews directly. CFIUS is pursuing non-notified transactions more aggressively, so the risk of CFIUS reaching out on a non-notified transaction has generally increased compared with past years.

Mandatory filing requirements apply only with respect to controlling investments or covered investments (i.e., "covered transactions") in TID US businesses. Specifically, subject to certain exemptions, mandatory filings are required in the following two circumstances:

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

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

FIRRMA also introduced the concept of "excepted investors," which are not subject to CFIUS's expanded jurisdiction for covered investments or real estate transactions and are exempt from mandatory filing requirements.

Excepted investors and their parents must meet relatively strict nationality-related criteria related to "excepted foreign states," which are currently Australia, Canada and the United Kingdom (though this list can change). Excepted investors are not exempt from CFIUS's general jurisdiction, only from CFIUS's expanded authorities under FIRRMA.

SCOPE OF THE REVIEW

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

Based on its risk assessment, CFIUS determines whether the transaction presents any national security concerns. If CFIUS identifies such concerns, it first determines whether other provisions of US law can sufficiently address them. If no other provisions of US law adequately address the concerns, CFIUS next determines whether any mitigation measures could resolve the concerns. If mitigation is warranted, CFIUS will typically negotiate terms with the parties, which will be a prerequisite to CFIUS clearing the transaction.

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

If the parties will not agree to abandonment or divestment, CFIUS

can recommend that the President of the United States block the transaction, as only the President has the authority to prohibit a transaction. Presidential blocks are relatively rare, though they have happened more frequently in recent years. It is still more typical for parties to agree to terms for abandonment or divestment directly with CFIUS. Although the CFIUS process is confidential, presidential blocking orders are public.

REVIEW PROCESS AND TIMELINE

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

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

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

Though the shrug outcome does not confer "safe harbor" as a clearance does—after a shrug, CFIUS could potentially request a notice for the transaction in the future—in our experience clients have often found the shrug outcome to be sufficient for closing.

For a notice, the parties initially submit a draft "prefiling" on which CFIUS will provide comments and follow-up questions. After addressing those comments, parties will formally file the notice with CFIUS. CFIUS then has to accept the filing, after which a 45-calendar-day initial review begins. At the end of the review, CFIUS will either clear the transaction or proceed to a 45-calendar-day investigation. About half of cases now proceed to investigation, which reflects significant improvement since FIRRMA was enacted in 2018.

An investigation may be extended for one 15-calendar-day period in "extraordinary circumstances." If a transaction is referred to the President, the President has 15 calendar days to decide whether to prohibit the transaction. In some cases, CFIUS will need additional time to complete its process, such as when negotiating mitigation measures with the parties. In such circumstances, CFIUS may allow the parties to withdraw and resubmit the filing, which restarts the initial 45-day review period. Most transactions are cleared in one CFIUS cycle.

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

TRENDS IN THE CFIUS PROCESS

Many of CFIUS's concerns—including those addressed in FIRRMA—relate to Chinese and Chinese-connected investments in the US. Despite the substantial decline in Chinese investment in the US in recent years, China continues to be a substantial focus of CFIUS. Beyond new Chinese investments, this includes potential Chinese ties to FDI from other countries, as well as non-notified transactions that were previously closed, sometimes years prior. Based on our experience and information reported by CFIUS, we also note the following other key trends related to CFIUS.

Mandatory filing requirements mean CFIUS must be considered: Most transactions subject to CFIUS jurisdiction do not trigger mandatory filing. Now that there are mandatory CFIUS filing requirements—with potential penalties for non-compliance up to the value of the transaction—parties need to consider CFIUS issues much more carefully in connection with potential cross-border transactions. The jurisdictional analysis under FIRRMA has also grown increasingly complex, particularly for non-controlling transactions.

Parties are considering these issues, frequently addressing them in due diligence, and often incorporating CFIUS-related provisions into transaction agreements, even where no CFIUS filing is being made, to provide themselves with additional protection regarding potential CFIUS compliance obligations.

Aggressive pursuit of non-notifieds changes the risk equation on voluntary filings: Most transactions subject to CFIUS jurisdiction do not trigger mandatory filing, meaning parties can choose whether to voluntarily notify CFIUS. The risk of not voluntarily filing is that CFIUS could

learn of the transaction, request a filing, and ultimately require mitigation measures or recommend divestment to address national security concerns. Post-closing, the parties—particularly the buyer—have no contractual protections against such actions. Historically, the practical risk of CFIUS pursuing a non-notified transaction was usually quite low, but with substantially increased resources and focus, this has become a more significant risk consideration and it is getting increasingly difficult for potentially sensitive deals to "fly under the radar."

Parties may also want to obtain CFIUS clearance upfront to "future proof" their deals in case evolving national security interests or geopolitical dynamics might later make CFIUS interested in reviewing a long-closed deal. For example, ten years ago data collection was not generally considered a national security issue, but given how data has become crucial to a broad range of industries and is now widely collected, this has become a frequent CFIUS focus area, including in pursuing reviews of completed transactions. So far, as would be expected, the outreach on past transactions has largely seemed aimed at deals involving Chinese and Russian investors.

Declarations can be a valuable tool for expedited CFIUS review: When the FIRRMA regulations took effect in February 2020, declarations became a notification option for all covered transactions. In our experience, clients have been availing themselves of this option and have often found it to be effective for transactions that do not seem likely to present substantial national security concerns. This trend is also reflected in CFIUS's reporting. In 2020, there were 126 declarations submitted (up from 96 in 2019, when only transactions subject to the CFIUS Pilot Program were eligible), which corresponded to the number of formal notices declining from 231 to 187.

CFIUS has also been clearing more transactions via declarations. In 2020, approximately 64 percent of cases notified by declaration were cleared by CFIUS. This was a sharp increase from 2019, when approximately 37 percent of declarations resulted in CFIUS clearance. This increase was largely due to fewer cases receiving the "shrug" outcome. In 2020, only approximately 13 percent of declarations received the shrug, compared with approximately 34 percent in 2019. Notice requests following assessments of declarations also declined in 2020 to approximately 22 percent of cases compared with approximately 28 percent in 2019. Overall, the decision of whether to notify a transaction via a declaration or notice has become a key issue in CFIUS strategy planning, and a variety of factors must be weighed, including complexity and potential sensitivity of the transaction, and timing considerations.

Threats and vulnerabilities considered broadly: CFIUS's risk-based analysis is broad and considers various types of potential "threats" and "vulnerabilities." For example, CFIUS routinely reviews transactions for "third-country threats"—channels through which China and other deemed strategic competitors might cause harm through the foreign investor (even if the foreign investor itself is not from such a country). On the vulnerability side, FIRRMA identified key areas of potential substantive sensitivity with its expanded authorities over investments in TID US businesses and its new real estate jurisdiction.

This does not mean that critical technologies, critical infrastructure, sensitive personal data and close proximity are the only areas of concern to CFIUS. The concept of national security remains broad, and CFIUS has shown interest in transactions covering a range of industries. Indeed, we have seen CFIUS pursue reviews of numerous non-notified transactions—and identify national security risks—where the US business did not qualify as a TID US business or involve covered real estate. External events can also affect national security sensitivities, such as an increased focus on health and supply chain security issues in light of the COVID-19 pandemic.

Continued emphasis on compliance and enforcement: FIRRMA provided additional resources for compliance and enforcement, and CFIUS officials have indicated that they will be looking closely at compliance with existing mitigation agreements. CFIUS issued its first penalty in 2018, which was for US$1 million for repeated violations of a mitigation agreement. CFIUS also issued another penalty in 2019 for US$750,000 for violations of an interim CFIUS order.

CFIUS did not assess or impose any penalties due to a material breach in 2020, though CFIUS reported that remediation activities were instituted in three cases for minor violations. CFIUS officials are currently working on promulgating enforcement guidelines. Parties under existing mitigation agreements, or parties entering into new ones, should focus on compliance to avoid potential CFIUS enforcement action.

The number of CFIUS reviews continues to remain high—with the number of transactions notified to CFIUS increasing substantially in 2020.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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

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

2021 UPDATE HIGHLIGHTS

- The number of CFIUS reviews continues to remain high—with the number of transactions notified to CFIUS increasing substantially in 2020, and more parties notifying CFIUS via declarations. Though not always advisable, declarations often prove an attractive and useful option for parties, particularly for transactions that are not expected to present substantial national security concerns
- It is important to analyze potential CFIUS issues early in the deal process—including assessing whether mandatory filing requirements apply—and, where relevant, incorporate CFIUS-related terms into transaction agreements
- The substantial decline in Chinese investment in the US correlated with a notable decrease in transactions being stopped by CFIUS. China, however, remains a key focus of CFIUS—including assessment of Chinese-related risks for transactions involving non-Chinese investors
- CFIUS has substantially increased its pursuit of non-notified transactions of interest, including for transactions that previously closed, even years ago. Senior CFIUS officials have explicitly stated that no deal is too small or too old for them to pursue if it might raise national security considerations

OUTCOMES

- CFIUS continues to approve most notified transactions without mitigation measures
- Notwithstanding mandatory filing requirements, CFIUS remains predominantly a voluntary process
- Declarations—short-form CFIUS filings that are reviewed on an expedited basis—can be a valuable tool for parties in transactions that do not present national security concerns
- Where CFIUS has national security concerns, it can impose mitigation conditions that can have significant implications on the foreign investor's involvement with the US business and increase costs. It remains critical for investors to consider mitigation risks at the outset and negotiate protections into the transaction agreement
- The decrease in Chinese investment in the US has correlated with a decline in transactions being stopped by CFIUS, though China remains a key CFIUS focus even in non-Chinese transactions
- CFIUS's increasingly aggressive pursuit of non-notified transactions means closed deals could come under CFIUS scrutiny and parties to new deals should carefully assess CFIUS considerations when determining whether to voluntarily notify CFIUS

Denmark

The Investment Screening Act requires a careful assessment of investments involving Danish entities

By Louise Lundberg

In July 2021, a new act on screening of foreign direct investment (FDI) in Denmark, the "Investment Screening Act," entered into force. Even prior to the Act, Denmark occurred on the European Commission's list of screening mechanisms notified by EU Member States because of two sector- specific FDI screening regulations: the Act on War Material and the Act on the Continental Shelf and Certain Pipelines Installations on Territorial Waters, providing certain authorization requirements for foreign investors.

The Investment Screening Act thus puts Denmark on the list of countries with a general cross-sectoral FDI screening regime.

The Investment Screening Act effectively applies to transactions closed, or agreements implemented on September 1, 2021, and going forward. In addition, the Investment Screening Act is supplemented by three executive orders issued by the Ministry of Industry, Business and Financial Affairs, which provide clarifications on the scope of application and further definitions of the concept of particularly sensitive sectors and activities, application procedure and on confidentiality.

The Investment Screening Act aims to prevent foreign direct investments and certain special economic agreements from posing a threat to national security or public order in Denmark (including Greenland and the Faroe Islands) through screening and possible interventions. "National security" relates to matters involving threats to national security such as actions that threaten international relations or military interests. "Public order" concerns relate to the maintenance of a democratic, independent and secure society. The screening mechanism provides for two alternative screening procedures: a sector-specific mandatory notification and a voluntary notification for all other sectors.

Nevertheless, as a small country, Denmark is reliant on foreign trade and foreign investments. Denmark will therefore continue to welcome foreign investments, although some will need to undergo prior authorization.

The FDI regime is supervised and enforced by the Danish Business Authority (DBA) which has been granted wide investigation and decision powers.

WHO FILES

The DBA provides for template application and notification forms that will be submitted electronically to the DBA by the investor. The information requested by the DBA centers around the nature of the investment or the agreement, the investor's ownership and the target company's business.

As in a merger notification, a number of documents must be submitted, including transaction documents and contracts, and pre- and post-closing organizational charts.

TYPES OF DEALS REVIEWED

The Investment Screening Act applies to foreign direct investments and special financial agreements leading to control or significant influence over a company domiciled in Denmark.

Foreign direct investments: A foreign direct investment is defined as the acquisition of control or significant influence of a company domiciled in Denmark by direct or indirect control over shares or voting rights, or similar control by other means such as the purchase of assets and long-term loans. The concept also includes the establishment of a new company in Denmark.

Special financial agreements: A special financial agreement involves a joint venture agreement, a supplier agreement or an operating or service agreement for buildings, facilities, installations or systems that leads to the investor gaining control of, or significant influence over, the company or the entity. Agreements entered into on the basis of a standard agreement approved by the DBA or concerning only one single supply are exempted from the application of the Investment Screening Act.

The Investment Screening Act puts Denmark on the list of countries with a general cross-sectoral FDI screening regime.

Mandatory notification:

- Mandatory notification for particularly sensitive sectors and activities: A prerequisite for the triggering of an obligation of a mandatory notification is that the investment or the agreement involves a target company active in certain particularly sensitive sectors or activities listed in Section 6 of the Investment Screening Act

According to Section 6, particularly sensitive sectors include defense (for example, entities developing or producing weapons, ammunition or other technology for military use on the EU Common Military List or providing services to the Danish Defence), IT security or the processing of classified information, the production of dual-use products, critical technology (for example, AI and machine learning, industrial robot and drone technology, semiconductors, cyber protection, space technology, industrial technology for energy and healthcare and nanotechnology) and critical infrastructure. Critical infrastructure has a particularly broad scope comprising a number of activities within energy, ICT, transport, civil defense, healthcare, food and water supply, waste and wastewater disposal, financial institutions and solutions, meteorology and crisis management

The Ministry for Industry, Business and Financial Affairs has issued an executive order where it provides further details on which activities and agreements should fall within the scope of the sensitive sectors listed in the Investment Screening Act

- Mandatory notifications for foreign direct investments in particularly sensitive sectors and activities: A mandatory notification is triggered if the investment concerns a particularly sensitive sector or activity and leads to a control of at least 10 percent of the shareholding or voting rights or equivalent control by other means, and the investor is an EU-based or non-EU-based company or citizen, or a Danish company controlled by such EU or non-EU company or citizen, or a non-EU national authority or government agency
- Mandatory notifications for special financial agreements in particularly sensitive sectors and activities: A special financial agreement falls under the mandatory notification if the agreement concerns a particularly sensitive sector or activity and the investing party is a non-EU based company or citizen, or a Danish company controlled by such non-EU company or citizen, or a non-EU national authority or government agency

A special financial agreement will not fall under the mandatory screening procedure, if it involves an EU- based company or citizen.

Voluntary notification:

- Voluntary notifications for foreign direct investments that may pose a threat to national security or public order: All foreign investments involving a foreign investor may be voluntary notified if the investment leads to a control of at least 25 percent of the shareholding or voting rights or equivalent controls by other means and if the investment may pose a threat to national security or public order, and if the investor is a non-EU based company or entity

In practice, it may be challenging for investors to assess whether an investment may pose a threat to national security. It is therefore advised to enter into pre-notification contacts with the DBA, which can provide general guidance on specific investments that clearly fall outside the rules on notification. Generally, the DBA will consider whether a foreign investor is directly or indirectly controlled by a foreign government, foreign state bodies or foreign armed forces through ownership or significant funding

It should be noted that even completed investments can be voluntarily notified to the DBA. However, the DBA has the power to launch a formal investigation for up to 5 years after completion if it believes that the investment can pose a threat to national security or public order

- Voluntary notifications for special financial agreements that may pose a threat to national security or public order: A voluntary notification is triggered if the agreement concerns a non-sensitive sector or activity and the investing party is a non-EU-based company or citizen, or a Danish company controlled by such non-EU company or citizen, or a non-EU national authority or government agency. A special financial agreement will not fall under voluntary screening procedure if it involves an EU-based company or citizen

Completed agreements can be voluntarily notified to the DBA. However, the DBA has the power to launch a formal investigation for up to five years after completion if it believes that the investment can pose a threat to national security or public order.

SCOPE OF THE REVIEW AND SANCTIONS

The scope of the DBA's review is limited to assessing whether the investment can be authorized with or without remedies. If the DBA judges that an investment should be blocked, it must refer the case to the Minister for Industry, Business and Financial Affairs, who may issue a prohibition against the implementation of a foreign investment or a special agreement.

The DBA has the power to launch a formal investigation for up to five years after completion.

Failure to comply with the mandatory notification requirement will lead to the investment being illegal. The DBA has the power to open cases ex officio to investigate whether an investment has been completed without authorization. The DBA may order the investor to submit a formal notification or order the investment to be stopped. Failure to comply with such order may lead to voting rights in the Danish target being revoked.

If an investment falls under the voluntary notification scheme, the DBA cannot order the investor to file a formal notification. However, the DBA can launch a formal investigation if the investment could pose a threat to national security or public order up to five years from completion of the investment and can eventually block the investment. According to guidance published by the DBA, it can make official that it has opened an investigation into whether a foreign investment has been made in violation of the screening rules as well as the outcome of the investigation.

REVIEW PROCESS TIMELINE

The DBA has 60 business days from the receipt of a notification to issue a decision. For mandatory notifications, the DBA may prolong the review by 30 business days to a total of 90 business days.

HOW INVESTORS CAN PROTECT THEMSELVES

Although the regulatory framework, together with guidance from the Danish Business Authority, provides for material clarity about the application and scope of the screening mechanism, the Danish FDI regime remains broad in scope and will require a careful assessment in each deal. The broad definition of particularly sensitive sectors and activities will require a careful assessment of the target's Danish operations and potential risks in a notification procedure. Further, since an acquisition of just 10 percent of a target company active in a sensitive sector triggers a mandatory notification, the Danish FDI screening will affect not only acquisitions of a controlling stake but also acquisitions of non-controlling minority interests by, for example, venture capitalists.

Given that the scope of the Danish FDI regime has similar features to other EU FDI regimes, experience from handling FDI reviews in other jurisdictions will be valuable.

Finland

Deals are generally not blocked in Finland

By Janko Lindros

The Finnish government views foreign ownership positively as a catalyst for increasing internationalization and competitiveness. Deals are restricted only when they meet very specific criteria.

The objective of the Finnish Act on Monitoring Foreign Ownership is to assess foreign investments for their potential impact on national interests. When deemed necessary to protect national defense and safeguard public order and security, the government may restrict the transfer of influence to foreigners, foreign organizations and foundations.

The Monitoring Act has a special focus on defense industry companies, including dual-use companies, and companies operating in the security sector. The Ministry of Economic Affairs and Employment handles matters concerning the monitoring and confirmation of corporate acquisitions, and also serves as the national contact point in the cooperation between Member States and the EU.

FILING OBLIGATIONS

Under the Monitoring Act, a "corporate acquisition" occurs when a foreign owner gains control of at least one-tenth, one-third or one-half of the aggregate number of votes conferred by all shares in a Finnish company, or otherwise secures a holding that confers decision-making authority.

All corporate acquisitions concerning the defense and dual-use sectors require advance approval by Finnish authorities. Advance approval must also be acquired for corporate acquisitions concerning companies operating in the security sector that provide products or services that are deemed vital for national security.

Deals not related to defense or security may also be covered by the Monitoring Act if the company being acquired is considered critical for securing vital functions of society. In such cases, investors are not required to submit an application prior to completing a transaction, but in practice applications are always submitted prior to completion.

The government intentionally does not define the phrase "company considered critical for securing vital functions of society" because the definition evolves over time. The Ministry may also oblige a foreign investor, for a particular reason and after processing the matter, to submit an application concerning a measure that increases the foreign investor's influence but which does not result in exceeding the limits mentioned above. For the defense and dual-use sectors, monitoring covers all foreign owners.

For security sector companies and companies considered critical for securing vital functions of society, monitoring applies only to foreign owners residing or domiciled outside the EU or the European Free Trade Association. The Ministry may also impose mandatory conditions for the confirmation of a corporate acquisition and, where necessary, enforce compliance with the application of a conditional fine. If the Monitoring Act is breached, the transaction can be declared null and void.

REVIEW PROCESS

The review process starts when an investor submits an application to the Ministry. There are no formal requirements for the layout of the application, but the Ministry has published instructions for preparing one.

It is critical that the application be made by the potential foreign owner, not a Finnish holding company already set up by the potential new owner. After receipt of the application, the Ministry asks for input from other authorities. If deemed necessary, the Ministry may disclose confidential documents and information to these authorities.

All corporate acquisitions concerning the defense and dual-use sectors require advance approval.

The Ministry may also decide not to review a submitted application for prior approval if it determines that the acquisition does not fall within the scope of the Monitoring Act. Where it is apparent that the purpose of an acquisition or an equivalent measure is to circumvent the provisions of the Monitoring Act, the Ministry has the right to examine the acquisition at its request.

If the Ministry finds that the transaction may endanger a key national interest, it transfers the matter to the government's plenary session for resolution. The government's plenary session then decides whether to restrict or approve the deal, depending on whether it believes the deal poses a threat to the national interest. If the Ministry decides that a transaction does not endanger a key national interest, it approves the transaction. The vast majority of transactions submitted to date have been approved by virtue of this rule.

All applications are processed promptly. The Monitoring Act states that a transaction is deemed to have been approved if the Ministry does not make a decision on an in-depth review within six weeks, or if the application has not been transferred to the government's plenary session within three months dating from the day when all necessary materials were received. In practice, the process usually takes six to eight weeks.

> **It is critical that the application be made by the potential foreign owner, not a Finnish holding company already set up by the potential new owner.**

Sweden

New rules require transactions involving Swedish security-sensitive activities or assets to undergo a security screening

By Jan Jensen and Louise Lundberg

Sweden remains a country that recognizes the beneficial effects of foreign direct investment (FDI) and ownership on the Swedish economy and on consumers. However, concerns over an increase in foreign investors in Sweden following the economic situation caused by the global pandemic prompted the Swedish government to take actions in 2020 and introduce screening rules for foreign investments by amending the Swedish Security Protection Act ("Security Act," Säkerhetsskyddslagen).

Although a proposal for a more general FDI screening framework was presented by the Direct Investment Inquiry (Granskning av utländska direktinvesteringar) in November 2021, the beefed-up Security Act has already had notable impacts on deals involving Swedish entities.

As of January 1, 2021, the Security Act requires that any transaction involving a Swedish entity operating security-sensitive activities or assets must be notified and receive approval from the Swedish Security Service (SÄPO, Säkerhetspolisen), the Swedish Financial Supervisory Authority (FI, Finansinspektionen) or the Swedish Armed Forces (SAF, Försvarsmakten)--together, the "Reviewing Authorities" —before completion.

Although Sweden still does not have a general FDI screening mechanism, the new security screening obligation enables the Swedish government to supervise and ultimately block investments that may pose a threat to national security.

> **A proposal for a more general FDI screening framework was presented by the Direct Investment Inquiry in November 2021.**

The Security Act is a general national security law that aims to protect information and activities of importance to Sweden's security against for example espionage, sabotage, terrorist offenses and other threats. The Security Act imposes a number of obligations on companies, public agencies or authorities with security-sensitive operations. Companies are required to self-assess whether their operations are considered security-sensitive, and thus fall under the scope of the Security Act.

If the assessment results in the conclusion that the Security Act is applicable, the company is required to notify the relevant reviewing authority and comply with the obligations set out in the Security Act, including the preparation of a security protection analysis and the adoption of measures within information security, personnel security, physical protection, security-protected procurements and transactions.

WHO FILES

The notification must be submitted by the seller. The seller is responsible for the assessment of the applicability, as well as compliance with the obligations, of the Security Act.

The notification shall be submitted to the relevant reviewing authority which is defined depending on the target company's activities:

- SAF is the reviewing authority for transactions involving companies active within the supply of defense-related material as well as authorities and agencies under the Ministry of Defence
- FI is, as of December 1, 2021, the reviewing authority for transactions involving all companies operating in Swedish financial markets, such as banks and other credit institutions, insurance companies, stock exchanges, etc.
- SÄPO is the reviewing authority for all other transactions

TYPES OF DEALS REVIEWED

A transaction must be notified if it involves a Swedish entity that carries out security-sensitive activities or has assets that are considered security-sensitive or has access to security-sensitive information, so- called classified information.

The obligation to notify applies to both foreign (EEA and non-EEA) and non-foreign investors. Moreover, there are no specific thresholds with respect to acquired shareholding or control. The Security Act refers to the transfer of the whole or a part of the target entity. Only the transfer of shares in public limited companies are explicitly exempted from notification.

The concept of security-sensitive activities, assets or information ("security-sensitive activities" unless specified) is vaguely defined by the Security Act as activities that are of importance to Sweden's security, or are covered by an international protective security commitment that is binding for Sweden. Further guidance, although non-exhaustive, can be found in the preparatory works that mention sectors such as defense, law enforcement, energy and water supplies, vital infrastructure, telecommunications and transport.

It falls upon the target company and/or its seller, to assess whether it falls under the concept of security-sensitive activities. If the outcome of the assessment is that it falls under the notification obligation, the seller must follow the steps of the notification procedure set out in the Security Act.

- Security assessment: First, a security assessment must be carried out to identify the specific activities, assets or information the investor may get access to following the transaction. The security assessment shall be documented
- Assessment of appropriateness: Based on the security assessment, the seller shall assess if the transaction is appropriate from a security protection point of view. The assessment of appropriateness shall be documented
- Consultation: If the assessment of appropriateness concludes that the transaction is appropriate, the seller shall consult with the relevant authority by submitting a notification including the underlying assessments and general information about the parties and the transaction

SCOPE OF THE REVIEW

If the assessment of appropriateness leads to the conclusion that the transaction is not appropriate from a protective security point of view, completion of the transaction is blocked.

The reviewing authorities have the powers to block a transaction or approve it subject to commitments. Moreover, if the seller fails to notify a transaction that falls under the scope of the Security Act, a consultation procedure may be initiated ex officio and the transaction can be prohibited and held null and void, even after closing.

According to limited guidance issued by SÄPO, a transaction is considered inappropriate if the acquirer's access to the target's assets or operations may cause risks to national security. The target's operations or assets may also be of such a nature or such a significance for national security that a transfer of these to the acquirer is in itself inappropriate. A transaction may be inappropriate if the acquirer represents foreign interests.

The test is linked to a central question: What would the effects of a hostile action, such as an attack, espionage or an interruption of the target's business, products or services, have on Sweden's national security? (In this context, Sweden's national security is segmented into several categories including internal and external security, critical activities, national economy and spill-over effects on other critical activities.)

In order for the hostile action to trigger the need for security protection, the effects on national security must be material and measurable. For example, given that Sweden's population is largely geographically diverse and mainly concentrated to the Stockholm region, an attack against certain activities located in Stockholm will likely have a greater impact on national security compared to an attack against similar activities located in scarcely populated areas.

REVIEW PROCESS TIMELINE

There is no official timing for the review process. However, the Reviewing Authorities have an obligation to comply with Swedish administrative rules requiring a swift procedure. A decision should normally be issued within one to two months.

HOW INVESTORS CAN PROTECT THEMSELVES

Although the Security Act has been in force since the 1990s, it has mainly been a concern for a limited group of companies and government entities. The recent amendments, requiring certain investments to be notified, have thrown protective security issues into the spotlight of Swedish transactions. As the applicability of the Security Act is based on a self-assessment, target companies are now expected to be aware of the Security Act and whether it applies to their operations.

In view of the novelty of the notification obligation and the non-transparent nature of the Reviewing Authorities, there is limited guidance on the sectors and industries covered by the Security Act as well as the review process. A case-by-case assessment of the target is recommended for every deal.

An investor who aims to invest in any of the highlighted industries (defense, law enforcement, energy and water supplies, vital infrastructure, telecommunications and transport) should anticipate an assessment of the target company's services or products, assets, information accessed or stored and customers in order to conclude on the applicability of the Security Act.

The responsibility for the assessment of the applicability of the Security Act as well as the notification lies on the seller, and prior clearance should be a condition of the deal.

PROPOSAL FOR A GENERAL FDI REGIME

On November 1, 2021, the Direct Investment Inquiry handed over its report to the Swedish government, wherein it put forward a Proposal for a system for the review of FDI activities in Sweden.

The Proposal has a wide scope and would enable the Inspectorate of Strategic Products (Inspektionen för Strategiska Produkter) to review and block foreign investments by non-EU, EU and Swedish investors in activities "worthy of protection." Such activities include security-sensitive businesses and functions that are fundamental to the society (similar in scope to the current security screening mechanism), dual-use products, critical metal and minerals, and the development of new technologies.

According to the Proposal, the current security screening regime and the FDI regime would apply in parallel with no framework superseding the other. In practice, this means that a deal involving security-sensitive activities could be subject to two parallel notifications, one submitted by the seller under the Security Act, and one submitted by the acquirer under the FDI regime. It remains to be seen whether this potentially burdensome mechanism is maintained in the final proposal.

Compared to the current security screening, the proposed FDI screening would:

- Widen the scope of activities that would be subject to mandatory notification
- Apply a higher threshold for when transactions may be prohibited
- Introduce a threshold for when investments must be notified of 10 percent or more of the total number of votes
- Provide a more structured notification procedure with a Phase 1 (25 days) and a Phase 2 (three to six months), which would give the investing party increased foreseeability

The Proposal has been referred to stakeholders for consultation. Following the consultation, the government will put forward its official bill, which will be voted on in the Swedish Parliament. The Proposal suggests that the new act enters into force on January 1, 2023.

LESSONS LEARNED

A pragmatic approach is necessary when discussing the applicability of the Security Act in the context of a transaction for two reasons:

- Target companies may not always be familiar with the Security Act and the concept of security-sensitive activities. While it may be fairly easy for a company to provide information required for a merger filing analysis, questions related to security aspects may require more time and guidance

- The consequences of classifying as an entity operating security-sensitive activities are considerable, and go beyond the transaction. A company that falls under the Security Act must comply with a number of obligations that may require internal restructuring and costs

European Union

Member States are introducing or expanding investment screening regimes, and the European Commission is now playing an active role

By Dr. Tobias Heinrich, Dr. Tilman Kuhn, Mark Powell, Orion Berg, Thilo-Maximilian Wienke, Camille Grimaldi and Fanny Abouzeid

While there is no standalone foreign direct investment (FDI) screening at the EU level, the EU continues to push for a coordinated approach among Member States toward foreign direct investments into the EU. The key instrument is the EU Screening Regulation, which entered into force on October 11, 2020 and is now fully operational. Other legislative instruments have already been proposed, including the adoption of a regulation introducing new tools to control acquisitions by and activities of foreign-subsidized investors in the EU.

The EU has stepped up efforts to ensure a coordinated approach toward investments into health-critical EU assets during the COVID-19 pandemic. The EU is also displaying an increasing focus on an independent and resilient supply chain, especially in the area of hi-tech and products needed to drive digitalization.

PART 1: EU DEVELOPMENTS/ EU SCREENING REGULATION

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

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

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

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

The final say in relation to any FDI undergoing screening or any related measure remains the sole responsibility of the Member State conducting the review pursuant to its national FDI screening procedures. However, it cannot be excluded that (in particular) smaller EU Member States may find themselves under considerable pressure to conform to opinions or comments issued by the EC or other Member States.

> **The EU continues to push for a coordinated approach among Member States toward foreign direct investments.**

The first months of implementation of the Regulation show that national FDI authorities take different approaches. Certain FDI authorities have systematically notified, under the EU cooperation mechanism, every transaction involving non-EU investors, while others do so under specific circumstances only. Investors also face multiple EU notifications in transactions where the target has multijurisdictional presence in the EU.

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

In addition, despite the fact that the status quo of Member States being responsible for any enforcement action post-FDI screening still stands, the implementation of the Regulation has created an impetus for Member States to align themselves better with the EU Screening Regulation. This alignment may also prompt Member States to consider establishing a new national security review regime (where one does not already exist). While the EU Screening Regulation does not oblige EU Member States to introduce a national FDI review process, a number of additional Member States have done so over the last year, such as the Netherlands, Sweden, Denmark, Czech Republic, Poland, Slovakia and Ireland, and more are currently contemplating the adoption of FDI regimes. Other Member States have amended their current regimes to comply with the Regulation such as Germany, which has recently clarified the thresholds for mandatory review.

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

- Investment reviews should revolve only around the baseline substantive criteria of "security and public order"
- Investments in the following (non-exhaustive) sector-specific assets and technologies may be problematic: critical infrastructure (whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate, crucial for the use of such infrastructure); critical technologies and dual-use items (as defined in the EU Dual Use Regulation, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum technology, aerospace, defense, energy storage, nuclear technologies, nanotechnologies and biotechnologies); supply of critical inputs, including energy or raw materials, as well as food security; access to sensitive information, including personal data, or the ability to control such information; and media activities as far as freedom and pluralism are concerned
- Investments may be particularly problematic where a foreign government (including state bodies or armed forces) directly or indirectly—as through ownership structures or "significant funding"—controls the acquirer

PROPOSED REGULATION ON FOREIGNSUBSIDIZED COMPANIES

While the EU Screening Regulation has just entered into force, the EU is already preparing the introduction of new tools to control acquisitions by and activities of foreign-subsidized investors in the EU. In May 2021, the EC issued a proposal for a regulation to tackle foreign subsidies. The new instrument targets foreign-subsidized transactions as well as any kind of subsidized commercial activity affecting EU markets, including bidding for public contracts.

The EC has concerns that subsidies granted by non-EU governments ("foreign subsidies") are escaping its control because it believes that there is an enforcement gap in its current toolbox.

The proposed regulation would apply to all sectors and to a wide variety of situations. It establishes a three-tiered investigative tool for investigating foreign subsidies with the following components:

- A notification-based investigative tool for certain transactions involving a financial contribution by one or more non-EU government(s) where the turnover of the EU target (or at least one of the merging parties) exceeds €500 million and the foreign financial contribution exceeds €50 million over the previous three years
- A notification-based investigative tool for bids in public procurements involving a financial contribution by a non-EU government, where the estimated value of the procurement is €250 million or more
- A general investigative tool for the EC to investigate all other market situations, smaller transactions, and public procurement procedures, which the Commission can start on its own initiative (ex officio)

The EC has concerns that subsidies granted by non-EU governments are escaping its control because it believes that there is an enforcement gap in its current toolbox.

The enforcement of the proposed regulation would lie exclusively with the EC to ensure the uniform application of the rules across the EU.

A foreign subsidy shall be deemed to exist where the public authorities of a non-EU country provides a financial contribution that confers a benefit to an undertaking engaging in an economic activity in the EU.

Once the existence of a foreign subsidy is established, the EC has to establish whether the foreign subsidy distorts the internal market

The EC has the power to impose structural and behavioral redressive measures on an undertaking to remedy any distortion, or indeed any potential distortion, caused by the subsidy. The undertaking concerned also has the possibility

to offer commitments to remedy the distortion, such as offering to repay the subsidy to the third country that granted it, together with appropriate interest.

The EC can impose fines and periodic penalty payments for procedural infringements, for failure to notify, and/or for supplying incorrect or misleading information.

The proposals are extremely far-reaching and, if adopted into legislation, will increase the regulatory risk and burden for companies operating or investing in the EU with support from foreign states. They may also open up new opportunities for strategic complaints by competitors.

The new measures will add complexity to the regulatory clearance path for M&A by state-backed investors involving EU targets, as companies may potentially have to file notifications under the new mandatory procedures, "regular" merger control at the EU or national level, and pursuant to national FDI regimes prior to closing their transactions.

The proposals will be the subject of significant debate during the legislative process under the ordinary legislative procedure between the European Parliament and the Council, which may take approximately two years.

PART 2: FDI AT THE MEMBER STATE LEVEL

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

- Whether they provide for mandatory or voluntary filings, or ex officio intervention rights of the government
- Where filing requirements exist, whether there is a threshold related to the percent of voting rights or shares acquired, a turnover-based threshold, or another type of trigger
- Which industries are viewed as "critical" and may hence trigger a filing obligation and/or government intervention
- Whether the government has a right to intervene below the thresholds
- Whether they are suspensory (i.e., provide for a standstill obligation during the review)
- Whether they cover only investments by non-EU/EFTA-based investors or by any non-domestic investor
- The duration and structure of the proceedings, including whether clearance subject to remedies (e.g., compliance or hold separate commitments) is possible

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

OVERVIEW OF REGIMES WITH/WITHOUT STANDSTILL OBLIGATION

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

If these thresholds are not met, the government may still intervene, and investors may consider making voluntary filings, under certain circumstances. For an ex officio investigation or a voluntary filing, there still needs to be a direct or indirect acquisition of at least 25 percent of the voting rights of a German company by a non-EU/EFTA-based investor — otherwise the government does not have jurisdiction to review the transaction. The regime provides for a standstill obligation where filings are mandatory, but not where they are voluntary.

COVERAGE OF INVESTMENTS BY NON-EU INVESTORS ONLY?

The various national regimes also differ in terms of whether they only cover investments by non-EU-based investors or any non-domestic acquirer. Some regimes are, again, hybrid: For example, the German regime scrutinizes investments by any non-domestic acquirer in the defense sector (as of a 10 percent stake), while in all other sectors, investments by EU or EFTA-based acquirers are permitted by law (although the government takes a very broad view as to whether an investor is non-EU/EFTA-based).

The French regime captures acquisitions of control by any non-French investor, but minority acquisitions only if the investor is non-EU/EEA-based (as of 25 percent of voting rights for all kinds of entities and, until the end of 2021, as of 10 percent of voting rights with respect to listed companies).

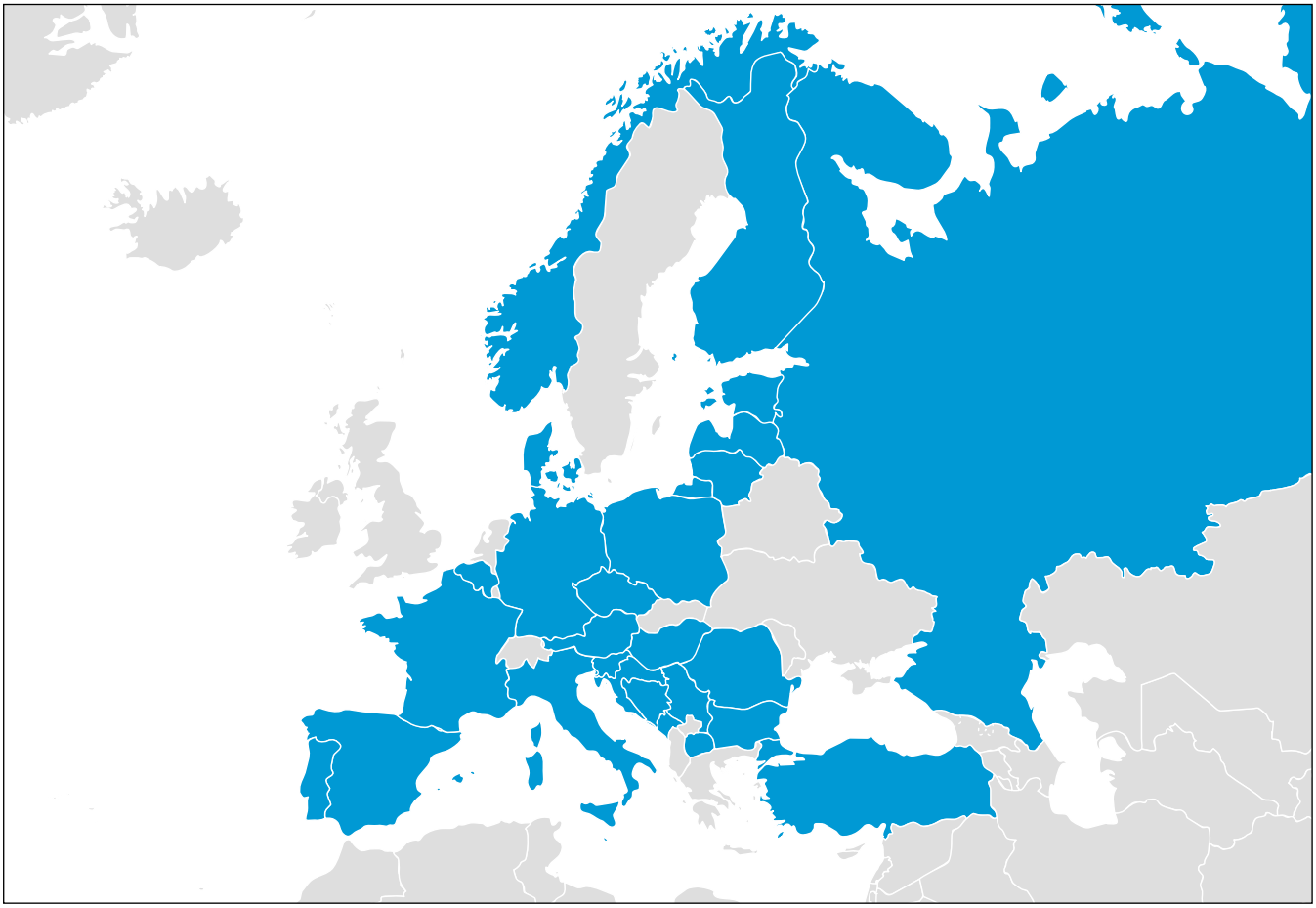
In contrast, the Spanish regime only captures acquisitions by non-EU/EFTA investors if they exceed a 10 percent share or control threshold. However, this does not include government investors, investors undergoing administrative or criminal proceedings in another Member State, or investors that already invested in sensitive sectors in another Member State, which are always captured as long as they are not Spanish.

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

INDUSTRIES SUBJECT TO SCRUTINY

We are seeing an increased convergence in views across the US, Europe and elsewhere that so-called "sensitive" sectors need to be protected in a more or less coherent way from what is being

FDI regime in place	FDI regime mandatory	FDI only for non EU/EEA, or all foreign investors



FDI regime in place

- Austria
- Belgium
- Bosnia and Herzegovina
- Bulgaria
- Croatia
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Hungary
- Italy
- Latvia
- Lithuania
- Malta
- Montenegro
- North Macedonia
- Norway
- Poland
- Portugal
- Romania
- Russia
- Serbia
- Slovenia
- Spain
- Turkey

described in the US as "adversarial capital." This trend is displayed through both the lowering of thresholds that trigger FDI reviews and an expansion of what qualifies as a sensitive sector for purposes of FDI reviews, export controls and international trade compliance.

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

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

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

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

Country	Defense	Healthcare	Energy	Telecom	Agriculture/ Food production	Transportation	Real estate	Other
Austria	▫	▫	▫	▫	▫	▫		Food, IT, water
Bulgaria	▫		▫				▫	Finance
Croatia								Finance
Czech Republic**	▫	▫	▫			▫		Finance, data, critical technologies
Denmark	▫		▫					
Estonia			▫		▫		▫	
Finland	▫							
France	▫	▫	▫	▫	▫	▫	▫	Data, media
Germany	▫	▫	▫	▫	▫	▫	▫	Media, cloud computing, telematics, finance, dual-use goods
Hungary	▫	▫	▫	▫	▫	▫		
Italy	▫	▫	▫	▫	▫	▫	▫	Finance, data, media, critical technologies
Latvia			▫	▫	▫		▫	Gambling
Lithuania	▫		▫	▫		▫		Finance
Malta	▫	▫	▫	▫		▫	▫	
Poland	▫	▫	▫	▫	▫	▫	▫	
Romania	▫		▫	▫		▫	▫	Finance
Russia	▫		▫	▫		▫		Media, insurance
Slovenia	▫	▫	▫	▫	▫	▫	▫	Finance, insurance, data, critical technologies
Spain	▫	▫	▫	▫	▫	▫	▫	Finance, data, media, critical technologies
Turkey			▫	▫		▫	▫	
United Kingdom*	▫							Financial sector, media

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

**On the basis of a bill currently under discussion

FILING THRESHOLDS

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

For example, in the healthcare sector, the German regime provides for a filing obligation for an investment of at least 10 percent by a non-EU/EFTA-based acquirer, inter alia, into Germany:

- Hospitals handling 30,000 or more cases/year
- Production facilities for direct life-saving medical products with an annual turnover of €9.068 million
- Production facilities and warehouses for other pharmaceuticals as well as pharmacies with 4.65 million packages put on the market per year
- Diagnostic and therapeutic laboratories with 1.5 million orders/year

Prior approval is required in Austria only if the target company has an annual revenue of €700,000 or more.

INTERVENTIONS OUTSIDE THE FORMAL SCOPE

Triggered by the COVID-19 pandemic, the German Federal Ministry for Economic Affairs and Energy announced in June 2020 that the state-owned Kreditanstalt für Wiederaufbau (KfW) will acquire a 23 percent interest in CureVac, a biopharmaceutical company whose focus is on developing vaccines for infectious diseases like COVID-19 and drugs to treat cancer and rare diseases, in order to avoid its potential acquisition by any foreign investor.

Similarly, in July 2018, the German Federal Government decided to prevent the acquisition of a 20 percent stake in the power grid operator 50Hertz by a Chinese investor by arranging for an investment by KfW (because it did not have jurisdiction to block the deal under the then-pertinent FDI regime). The German Federal Government officially confirmed that the acquisition by KfW was aimed at protecting critical infrastructure for energy supply in Germany.

DURATION OF PROCEEDINGS (INCLUDING SCOPE FOR EXTENSIONS)

The duration of proceedings differs widely between jurisdictions. Generally, the process takes several months, and many feature a two-phase process (initial review period followed by in-depth review) and provide for stop-the-clock mechanisms, such as suspension based on information requests, or negotiation of mitigation requirements.

POSSIBLE OUTCOMES OF PROCEEDINGS

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

Teledyne has finally decided to withdraw its offer. In January 2021, French finance minister Bruno Le Maire expressed public opposition to Canadian store operator Alimentation Couche-Tard Inc.'s proposed €16.2 billion takeover of French retail group Carrefour. Le Maire reportedly said Carrefour is a "key link in the chain that ensures the food security of the French people" and that its acquisition by a foreign competitor would put France's food sovereignty at risk. Couche-Tard finally decided to withdraw its offer.

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

Some national FDI regimes determine filing requirements or intervention rights based solely on the size of the stake acquired.

"Initial review"
(2 months)

In-depth review (4 months from receipt of full documentation)
Extension by 3 months for extraordinary cases
Suspension possible in case of mitigation requirements
Deadline runs anew when additional information is required

Phase 1
(30 business days)

Phase II (45 business days)
Suspension possible for information request
Extension possible if mitigation requirements (in practice 3 – 4 months)

Review during 45 business days
Suspension possible (10 to 30 business days) for information request

Review by the Government within 6 months
Suspension possible for information request

Non standalone regime

Merger control: Phase I (40 business days) and Phase II (24 weeks) → UK government can ask the CMA to report a "public interest" case and the FDI control will run alongside merger review

Expected regime

Review during 30 business days
Extension of 45 days possible if necessary (further extension if the parties agree)
Suspension possible for information request

LESSONS LEARNED

- While the EU Screening Regulation is by and large an instrument of "soft law," it does add substantial complexity and uncertainty to security reviews performed at the Member State level. It puts additional pressure on Member States to consider a broader range of security interests, which is likely to facilitate lobbying efforts from other stakeholders taking an interest in a transaction.
- From a practical point of view, the new EU Regulation established an automatic information exchange system between all Member States on every notified transaction. Investors should make sure that a comprehensive multijurisdictional FDI assessment is carried out in transactions involving potentially strategic sectors and a variety of jurisdictions where the target business operates. Investors should also anticipate a proper strategy to deal with multiple parallel EU notification processes in several Member States and to ensure a consistent approach.

France

Following major reforms, the French Foreign Investments Control regime is now reaching cruising speed

By Nathalie Nègre-Eveillard and Orion Berg

Since 2014, the scope of the French Foreign Investments Control regime has been substantially expanded. In May 2019, the so-called PACTE (Plan d'Action pour la Croissance et la Transformation des Entreprises) law strengthened the powers of French authorities in case of breach of the filing requirement or commitments imposed in the context of a clearance decision.

Subsequently, Decree No. 2019-1590 of December 31, 2019 and the Ministerial Order of December 31, 2019 relating to foreign investments in France, which entered into force in April 2020, amended the regime to capture new strategic sectors, refine certain concepts and provide a clearer review framework for foreign investors.

The regime has since been updated in the context of the COVID-19 health and economic crisis. No substantive reform is expected to be adopted in the next few years. The Ministry of Economy (MoE) is currently working on guidelines clarifying the rules, notably regarding sectors affected.

The Bureau Multicom 4, located within the MoE's Treasury Department, conducts the review. The process generally involves other relevant ministries and administrations depending on the areas at stake. Since January 2016, a commissioner of strategic information and economic security (attached to the MoE) also assists the Treasury when coordinating inter-ministerial consultations.

WHO FILES

The foreign investor files a mandatory request for prior authorization, which must include detailed information on the investor and its shareholders, the target, the pre- and post-closing structures, financial terms of the transaction and the sensitive activities at stake.

TYPES OF DEALS REVIEWED

Transactions reviewed under the French Monetary and Financial Code (MFC) include:

- Acquisition by a foreign investor of a direct or indirect controlling interest in a French entity
- Acquisition by a foreign investor of all or part of a branch of activity of a French entity. For non-EU/EEA investors only, the acquisition of more than 25 percent of voting rights of a French entity, whether made directly or indirectly, by a sole investor or by several investors acting in concert (instead of the 33 percent threshold of the share capital or voting rights under the former regime). In light of the COVID-19 crisis, a decree of July 22, 2020 lowered the voting rights threshold from 25 percent to 10 percent for listed companies. This measure is temporary, and has been extended until December 31, 2021.

The review applies only to foreign investments made in the sensitive activities listed in the MFC. Previously, the scope of the review differed depending on the origin of the investor. The Decree of December 2019 abandoned this distinction.

For both European Union/ European Economic Area (EU/ EEA) investors and non-EU/EEA investors, the list of strategic sectors notably includes:

- Activities relating to dual-use goods and technologies, and activities of undertakings holding national defense secrets or that have concluded a contract to the benefit of the French Ministry of Defense
- Activities relating to the interception/detection of correspondences/conversations, capture of computer data, security of information systems, space operations and electronic systems used in public security missions
- Activities relating to infrastructure, goods or services essential to guaranteeing energy supply, water supply, transport networks, telecom networks, space operations, public security, public health and vital infrastructure
- R&D activities in cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, certain dual-use goods and technologies, sensitive data storage, energy storage and quantum technologies. A ministerial order of April 27, 2020 broadened the list to include biotechnologies

Since the Decree of 2019, the screening obligations also cover print and digital press, as well as activities relating to the production, transformation or distribution of agricultural products enumerated

in Annex I of the Treaty on the Functioning of the European Union (TFUE) when they contribute to food security objectives, such as ensuring access to safe, healthy, diversified food, protecting and developing agricultural lands, and promoting France's food independence.

SCOPE OF THE REVIEW

The MoE assesses whether the transaction may jeopardize public order, public safety or national security based on the information the investor provided in its submission. Follow-up Q&A and meetings with the MoE and other involved ministries are customary. The seller and the target company may also be requested to cooperate with the review.

The Decree of December 2019 specified the standard of review. The MoE is now expressly entitled to take into consideration the ties between a foreign investor and a foreign government or foreign public entity. In addition, the MoE may refuse to grant authorization if there is a "serious presumption" that the investor is likely to commit or has been punished for the commitment of certain enumerated infringements (such as drug trafficking, procuring, money laundering, financing terrorism, corruption or influence peddling). The MoE may also take into account the investor's previous breach of prior authorization requirements or of injunctions and interim measures.

In addition, the PACTE law of 2019 modified the sanctions mechanism in the event a party infringes the prior approval obligation. As such, if a transaction has been implemented without prior authorization, the MoE may enjoin the investor to file for prior authorization (this measure is not only punitive, but may also be used by the MoE to give the foreign investor the possibility to cure the situation), unwind the transaction at his own expense or amend the transaction.

If the protection of public order, public security or national defense is compromised or likely to be compromised, the MoE also has the power to pronounce interim measures to remedy the situation quickly. Remedies include suspending the investor's voting rights in the target company; prohibiting or limiting the distribution of dividends to the foreign investor; temporarily suspending, restricting or prohibiting the free disposal of all or part of the assets related to the sensitive activities carried out by the target; and appointing a temporary representative within the company to ensure the preservation of national interests.

Sanctions will also be imposed if an investor did not comply with the clearance conditions imposed by the MoE, such as the withdrawal of the clearance, compliance with the initial commitments, or compliance with new commitments set out by the MoE, including unwinding the transaction or divesting all or part of the sensitive activities carried out by the target. Non-compliance with MoE orders is subject to a daily penalty. In addition, the MoE may impose monetary sanctions amounting to twice the value of the investment at stake, 10 percent of the annual turnover achieved by the target company, €1 million for natural persons or €5 million for legal entities.

In addition, the PACTE law introduced some transparency into the French review system. The MoE is now required to issue yearly public general statistics (on a no-name basis) related to French national security reviews, to provide a better sense of the general approach adopted by the MoE.

TRENDS IN THE REVIEW PROCESS

In 2017, following several cross-border deals involving French flagships acquired by foreign investors, the French National Assembly created a Parliamentary Enquiry Committee to investigate decisions made by the French State and explore how French national security interests are protected on such occasions. This put increased pressure on the services conducting and coordinating the review process to ensure that they have completed a thorough review of both the activities at stake and the profile and intentions of the foreign investors.

All relevant administrations are involved in the review process, and the investor and its counsel, as well as the target company, may be convened to meetings and Q&A sessions in relation to the envisaged transactions. Delineating and retaining strategic activities, jobs and resources (including IP rights and know-how) in France has also become an increasing strategic concern in the review process, especially as they relate to clearance commitments that may be required of a foreign investor.

Based on general statistics published by French authorities, it is relevant to note that 275 transactions were filed for foreign direct investment (FDI) screening in 2020. Approximately 30 percent of those transactions were related to defense/security areas and 50 percent to sectors outside defense/security. Non-EU investments represented 49.5 percent of the notified transactions with top non-EU investors originating from the US, followed by Canada and Switzerland. Main EU investors were UK-, Germany- and Luxembourg-based.

In the context of the COVID-19 crisis, close attention seems to be given by French authorities to transactions involving public health issues (notably in relation to targets active in the medical technology area and to acquisitions involving cybersecurity activities). Increased scrutiny is also expected in the area of food security.

In January 2021, French finance minister Bruno Le Maire expressed opposition to Canadian store operator Alimentation Couche-Tard Inc.'s proposed €16.2 billion takeover of French retail group Carrefour. Le Maire reportedly said Carrefour is a "key link in the chain that ensures the food security of the French people" and that its acquisition by a foreign competitor would put France's food sovereignty at risk. Couche-Tard finally decided to withdraw its offer.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors must anticipate foreign investment control issues before planning and negotiating transactions. The responsibility for filing lies primarily on the buyer and, if the transaction falls under the MFC regulation, prior clearance by the MoE should be a condition of the deal. The parties may also seek a ruling from the MoE to confirm whether a contemplated transaction falls within the scope of the MFC. The Decree of 2019 opened a new option for the target, which may now submit a request to obtain comfort about whether its activity falls within the scope of the MoE review.

The seller's cooperation in the preparation and review of the filing is important. If the parties expect conditions or undertakings will be imposed, the buyer should anticipate discussions with the MoE and other interested ministries that may impact the timeline for clearance. In addition, the buyer should consider including a break-up fee or opt-out clause in the transaction documentation to protect its interests if the conditions imposed on the transaction are too burdensome. Preliminary informal contacts with French authorities may also be advisable.

REVIEW PROCESS TIMELINE

Under the new framework, the MoE has 30 business days to indicate whether a transaction falls outside the scope of the review, is cleared unconditionally or requires a further analysis. Where further analysis is required and mitigating conditions are necessary, the MoE has an additional period of 45 business days to provide the investor with its final decision, refusal of the investment or clearance with commitments. In practice, longer periods, such as three or four months, should be anticipated if the MoE requests supplemental information and considers imposing conditions to clear the case.

Since October 2020, the MoE standard practice is to notify the European Commission and other Member States via a short form summarizing the transaction in investments involving non-EU investors under the new EU cooperation system. To date, the practical implementation of the EU notification process has not generated notable delays in the French review process.

2021 UPDATE HIGHLIGHTS

The French review process has integrated the EU cooperation mechanism since October 2020. Under the EU system, the MoE notifies certain transactions to the European Commission and other Member States that may request from French authorities additional information. The EC and other Member States may provide non-binding comments to French authorities.

OUTCOMES

- Once the review is completed, the MoE may:
  - Authorize the transaction without condition (a rather rare outcome)
  - Authorize the transaction subject to mitigating conditions/undertakings aimed at ensuring that the transaction will not adversely affect public order, public safety or national security (most of the cases when the MoE decides to review the investment)
  - Refuse to authorize the transaction if adverse effects cannot be remedied (also a very rare outcome)
- Mitigating conditions/undertakings may pertain to the investor's preservation of the continuity of the target's activities and the security of its supply of products or services; for example, maintaining existing contracts with public entities, or maintaining R&D capabilities and production in France. They may also include corporate requirements such as ensuring that sensitive activities are carried out by a French legal entity, and/or imposing information-access/governance requirements involving French authorities.
- The MoE review is a mandatory process. Contractual agreements in breach of the mandatory process are deemed null and void. The PACTE law amended the sanctions mechanism in case of breach of the notification requirement and granted the MoE additional powers in that regard.

LESSONS LEARNED

- Clearance with remedies is customary in most of the transactions that the MoE decides to review. It is key to anticipate those remedies that are generally standard, and to prepare for potential discussions with the MoE. Possible adaptation of those remedies post-closing is also an option to be considered by the investor since the new FDI regime gives the MoE the power to revise conditions over time.
- With the entry into force of the EU cooperation mechanism and increased international cooperation (notably between French and German authorities), the French FDI review should be considered a part of a more global and multijurisdictional assessment.

Germany

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

By Dr. Tobias Heinrich, Dr. Tilman Kuhn and Thilo-Maximilian Wienke

In Germany, the investment climate remains liberal in principle. Nevertheless, since around 2016, German foreign investment control has continuously toughened, and the German Federal Government has become more sensitive about protecting key technologies, industries and know-how.

Several transactions involving critical infrastructure, telecommunication networks or the like have been cleared only after lengthy investigations, and are subject to strict compliance remedies. The other focus areas for review are the potential use of key technologies, as in the semiconductor space or in military applications, and in healthcare.

Following earlier revisions triggered by the EU Screening Regulation and the COVID-19 pandemic, the German regulatory framework has — once again — undergone substantial, expansive revisions throughout the past year, further adding to the complexity and scope of the review process.

THE REGULATORY FRAMEWORK

The German rules on foreign direct investment (FDI) are set out in the German Foreign Trade and Payments Act (Außenwirtschaftsgesetz; AWG) and the German Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung; AWV). The regulatory framework is broadly structured as follows:

- The competent authority is the Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie; BMWi), which involves other ministries and government agencies depending on the target activities
- The German foreign direct investment regime is partly mandatory, and partly voluntary. In essence, the activities of the target and the "nationality" of the direct or indirect investor determine the process and whether there is a filing obligation
- For all foreign direct investments that are subject to the mandatory regime, the investment threshold is 10 percent (shares or assets) if the target is active in defense-related fields or in "classical" critical infrastructure, and 20 percent for all other critical activities listed in the AWV, and the transaction is subject to a standstill obligation (subject to criminal sanctions) until clearance
- For all other foreign direct investments, the investment threshold allowing the BMWi to review an investment on its own account is 25 percent, and there is generally no equivalent standstill obligation
- The AWV includes clearly defined thresholds for additional mandatory filings at 20 percent (in case the initial threshold was 10 percent), 25, 40, 50 and 75 percent. Whenever the next threshold is reached, an additional filing is required (including standstill and criminal sanctions)
- The review timeline includes an initial review period of two months and, to the extent the BMWi decides to initiate a full review, a subsequent in-depth review of four months from the full documentation (subject to suspensions and extensions)
- The material review criterion to be applied by the BMWi is whether the foreign direct investment results in a probable impediment to the public order or security (öffentliche Ordnung oder Sicherheit) of the Federal Republic of Germany, of another EU Member State, or in relation to so-called projects or programs of Union interest (in defense-related deals, the review criterion is a probable impediment to essential security interests of the Federal Republic of Germany)

Since 2016, the number of deals reviewed by the BMWi has continuously increased.

SCOPE OF REVIEW AND TYPES OF DEALS REVIEWED

In summary, the activities of the target and the nationality or origin of the investor determine the review process.

Regarding certain highly sensitive industries such as arms and military equipment, encryption technologies and other key defense technologies such as reconnaissance, sensor and protection technologies, investments of at least 10 percent

(voting rights in an entity or assets constituting a business) by any foreign investor are subject to a mandatory review, a "sector-specific review."

Such reviews now include all products in Part I Section A of the Export List (instead of the limited number of products under the previous rules) and now also include: the modification or handling of such products (in addition to development and manufacturing); military goods and technologies that are based on restricted patents or utility models (including the modification and handling of such products); and so-called "defense-critical" facilities, such as entities active in the production of military equipment if they are necessary to safeguard the defense-readiness and cannot readily be replaced.

Any other type of investment may only be scrutinized if the investor is based outside the EU/EFTA (a so-called "cross-sectoral review"). The BMWi takes a broad view and looks at all entities in the entire acquisition chain from the direct acquirer to the ultimate parent, and also at shareholders such as limited partners.

Whether a review is mandatory or voluntary further depends on the target's activities. In particular, the review is mandatory if a non-EU/EFTA investor acquires 10 percent or more of a domestic target that:

- Operates "critical infrastructure" (as legally defined in great detail) or develops and modifies software specifically for such "critical infrastructure"
- Has been authorized to carry out organizational measures pursuant to the Telecommunications Act, or produces or has produced the technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about this technology
- Provides large-scale cloud computing services
- Holds a license for providing telematics infrastructure components or services
- Is a company of the media industry that contributes to the formation of public opinion via broadcasting, telemedia or printed products, and is characterized by particular topicality and breadth of impact
- Provides services that are needed to ensure the trouble-free operation and functioning of state communication infrastructures

The ownership threshold is 20 percent if the German target:

- Develops or manufactures personal protective equipment
- Develops, manufactures or markets essential medicines, including their precursors and active ingredients
- Develops or manufactures medicinal products within the meaning of medicinal product law that are intended for diagnosis, prevention, monitoring, predicting, forecasting, treating or alleviating life-threatening and highly infectious diseases
- Develops or manufacturers in vitro diagnostics, within the meaning of medicinal product law, that serve to supply information about physiological or pathological processes or conditions, or to stipulate or monitor therapeutic measures relating to life-threatening and highly infectious diseases
- Operates high-quality remote earth sensing equipment (as defined in the German Satellite Data Security law)
- Develops or manufactures AI systems, including for automatic cyber-attacks; impersonating others; generating targeted false information; analyzing verbal communication or biometric identification for surveillance or retaliation measures; analyzing movement, positioning or traffic data for similar purposes
- Develops or manufactures automated driving and aviation (vehicles or unmanned aircraft with highly automated steering or navigation including components and software)
- Is a developer or manufacturer of industrial robotics. (Last-minute revisions significantly reduced the scope of the new business to only include certain robotics, including for handling explosives, radiation and other adverse conditions)
- Is a developer, manufacturer or processor of semiconductor products (micro- or nano-electronic circuits (optical and non-optical, integrated and discrete), including all relevant production and processing equipment (including crystal pulling, lithography, epitaxy, grinding, cutting, etching, doping, testing and so on, but not input material more broadly).
- Develops or manufactures cybersecurity products: IT products or major components with the primary function of securing the availability, integrity, authenticity and confidentiality of IT systems/components/processes; defending against attacks on IT systems (including damage analysis and recovery); or detecting and investigating criminal offences/securing evidence by law enforcement
- Undertakes certain aviation and aerospace activities (including systems and components)
- Is active in the field of nuclear technology
- Is a developer or manufacturer of quantum technology, including quantum computers, sensors, metrics crypto-technology, communication and simulation

Recent geopolitical tensions and the vulnerability of supply chains demonstrated during the COVID-19 pandemic will very likely lead to increased FDI scrutiny.

- Is a developer or manufacturer of additive manufacturing technology (such as 3D printing, including major components and input material), following last-minute revisions limited to additive manufacturing based on metal or ceramic materials (and in particular not plastic)
- Develops or manufactures products specifically for operating cable or wireless data networks (including cable or optical fiber transmission, network connection, signal amplification, control and management)
- Manufactures smart-metering products
- Employs personnel with detailed information regarding vital parts of the federal IT infrastructure
- Extracts, processes or refines critical raw materials, including lithium, gallium, silicon metal and rare earth minerals
- Develops or manufactures products based on restricted patents or utility models, as for nuclear or crypto technology or the production of banknotes
- Is relevant for the security of food supply, cultivated area of 10,000 hectares or more

For all of the target activities outlined above, an additional filing is required (including standstill and criminal sanctions) when reaching the 20 percent threshold (in case the initial threshold was 10 percent), 25, 40, 50 and 75 percent.

For any other type of target, a filing is voluntary. Even then, the BMWi may initiate proceedings on its own account where a non-EU/EFTA investor acquires 25 percent or more of a domestic target.

The BMWi is entitled to review all types of acquisitions, including share deals and asset deals. The BMWi now also has additional review possibilities (but no standalone filing obligation) in cases of "atypical" control: influence beyond the shareholding, in particular additional board seats, veto rights, and access to certain information. The previous draft covered any other kind of agreement in favor of the investor; the final rules are limited to the atypical means of control expressly listed. The calculation of voting rights held in the target company will take into account certain undertakings that may be attributed to the ultimate owner, such as an agreement on the joint exercise of voting rights.

In order to prevent circumvention transactions, the AWV provides more details on how to calculate and attribute acquired voting rights. Asset deals require a comparable test for the respective asset values, whereby 25 percent, 20 percent or 10 percent of the total assets of the acquired business are deemed relevant—in essence, deals that substitute the acquisition of a shareholding above the relevant thresholds, defined in the AWV as the acquisition of a definable part of an enterprise, or all relevant resources needed for the enterprise, or a definable part thereof.

PROCESS CONSIDERATIONS AND TIMELINE

The BMWi must be notified of any transaction subject to a mandatory review.

All transactions that require flings are subject to a "standstill obligation." In particular, it is prohibited to allow the acquirer to directly or indirectly exercise voting rights or grant the acquirer access to certain sensitive data before clearance has been or is deemed to be granted.

In addition, the purchasing agreement (also under the voluntary regime) is subject to the condition subsequent (auflösend bedingt) to a prohibition. Under the mandatory regime only, any closing steps are provisionally void (schwebend unwirksam) until clearance.

Public takeovers must be notified to MOE directly after the publication of the intention to launch a takeover offer, and the shares can then be acquired prior to clearance. However, the standstill obligations otherwise still apply, and the acquisition is subject to unwinding through a sale to the market or transfer to a trustee in case the transaction is not subsequently cleared.

The review timeline is two months for the initial review that determines whether to open a formal review, which then lasts another four months, starting upon receipt of all necessary documentation. The BMWi has broad discretion in formal review cases regarding the point at which flings are complete so that the statutory deadlines are triggered.

The BMWi can extend the formal review period by another three months in exceptionally complex cases (four months in defense deals). In addition, the period available to conduct the formal review measures is suspended in case of additional information requests, and for as long as negotiations on mitigation measures are conducted between the BMWi and the parties involved. Such considerations outside the official review timeline can therefore have a significant impact on the transaction timetables.

Even if the transaction does not trigger a notification obligation, foreign investors often decide to initiate the review process by voluntarily submitting an application to the BMWi for a non-objection certificate (Unbedenklichkeitsbescheinigung) in order to obtain legal certainty. After complete submission of the application, the BMWi has two months to decide whether to issue the certificate or open the formal review procedure. Upon expiration of this period, the non-objection certificate is deemed to have been issued if no review procedure has been opened.

POWERS AND SANCTIONS

In order to safeguard public order or security, the BMWi may—in accordance with a number of other Federal Ministries—prohibit transactions or issue "instructions" taking the form of mitigation measures or "remedies."

Clearances subject to remedies (such as compliance commitments in the form of a trilateral agreement between the ultimate acquirer parent, target and the German Federal Government) have become a common form of resolving issues. For acquisitions included in the cross-sectoral review procedure, the imposition of mitigating measures requires approval by the German Federal Government.

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

Breaches of the standstill obligation or against orders by the BMWi are subject to criminal sanctions, including imprisonment of up to five years or criminal fines. Negligent violations are considered an administrative offense, punishable by an administrative fine of up to €500,000.

Any BMWi decision can be challenged before a German court. However, court action often is not a practical option for the parties (sometimes in light of timing or publicity concerns), and the Government enjoys broad discretion as to what constitutes a probable impediment to public order or security.

RECENT DEALS REVIEWED BY THE BMWI

Since 2016, the number of deals reviewed by the BMWi has continuously increased.

From January 2016 to December 2018, 185 transactions have been subject to BMWi investment reviews, of which 75 acquisitions were attributed directly or indirectly to a Chinese acquirer. In 2018, 78 transactions were reviewed by the BMWi, almost double the 41 reviews of 2016. From 2018 to 2019, the numbers continued to rise to 106 cases, with the complexity of the review cases also increasing. In 2020, the number of cases increased significantly again to a total of 159 cases—excluding acquisitions reported to the BMWi exclusively through the EU cooperation mechanism (which far exceed the initially expected numbers).

The BMWi expects that the new case groups introduced in 2021 alone will add at least another approximately 165 cases per year. In addition, the UK's exit from the EU is expected to result in still more cases.

According to the BMWi, almost all of the cases in which security concerns were identified in 2019 and 2020 were resolved through contractual arrangements (which is becoming the tool of choice, especially in deals involving German targets that have activities viewed as critical for the German healthcare system).

On substance, only two vetoes by the BMWi have become public since 2018:

- According to press sources, in July 2020 the German Federal Government vetoed Chinese Vital Material Co.'s proposed acquisition of PPM Pure Metals GmbH, part of the French Recylex group and a manufacturer of certain metals used in semiconductors and infrared detectors, including for military applications. The BMWi decided to veto the deal despite the fact that PPM had filed for bankruptcy two months earlier
- In December 2020, a cabinet decision to authorize a prohibition of the planned acquisition of IMTS, a research-driven industrial engineering and design house specializing in radio technologies and microelectronics, by Chinese Casic, active in the field of military equipment, became public

Breaches of the standstill obligation or against orders by the BMWi are subject to criminal sanctions, including imprisonment of up to five years or criminal fines.

Other noteworthy interventions include the following:

- In July 2018, the German Federal Government had decided to prevent the acquisition of a 20 percent stake in the power grid operator 50Hertz by a Chinese investor by arranging for an investment by the state-owned Kreditanstalt für Wiederaufbau (KfW), because it did not have jurisdiction to block the deal under the then pertinent FDI regime. The Government officially confirmed that the acquisition by KfW was aimed at protecting critical infrastructure for the energy supply in Germany
- In August 2018, the BMWi—for the first time—had threatened to veto a Chinese inbound transaction. In the end, the Chinese investor dropped its attempt to acquire German toolmaker Leifeld ahead of the expected veto. This decision would have been the first prohibition of a transaction under the German investment control regime
- In contrast, in February 2020, the BMWi cleared the acquisition of German locomotive manufacturer Vossloh by Chinese train manufacturer CRRC
- Triggered by the COVID-19 pandemic, the BMWi announced in June 2020 that the KfW will acquire 23 percent of CureVac, a biopharmaceutical company that develops vaccines for infectious diseases like COVID-19 and drugs to treat cancer and rare diseases, in order to avoid its potential acquisition by any foreign investor

TRENDS IN THE REVIEW PROCESS

The current market climate is characterized by the BMWi's substantially increased awareness and persistent efforts toward enhanced scrutiny, including regarding a potential use of key technologies, in military applications.

But the overall number of approved transactions clearly shows that the investment climate in Germany remains liberal for the overall majority of transactions. The recent clearance of the CRRC/Vossloh transaction is a clear sign that Germany generally continues to welcome foreign direct investment.

There is also a clear trend toward the use of remedies to mitigate security concerns. In the same vein, the German investment in CureVac may be seen as a first step toward more scrutiny in the healthcare sector. In fact, the BMWi justified the decision by citing German security interests. At the same time, the review thresholds for many healthcare-related activities have been increased from 10 percent to 20 percent, indicating that the strict rules introduced at the height of the COVID-19 pandemic had likely overshot the mark.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Parties to M&A transactions — whether public or private — should carefully consider the risk of foreign investment control procedures typically starting at the front-end of the due diligence process. Given the potential for considerable FDI review risks, it may be appropriate for the parties to initiate discussions with the BMWi even before the signing and/or announcement of a binding agreement.

From an investor's perspective, regulatory conditions and covenants relating to the regulatory review process serve to protect the acquirer from having to consummate a transaction under circumstances in which the German Federal Government has imposed regulatory conditions or mitigation measures that would change the nature of or the business rationale behind the proposed transaction.

Contractual undertakings intended to protect the acquirer from these risks may take the form of regulatory material adverse change clauses and/or covenants that specify the level of effort that the investor must expend in order to obtain the necessary regulatory approval.

OUTLOOK

- Recent legislative expansions and the implementation of the European screening mechanism in October 2020 have led to the numbers of cases reviewed by the BMWi skyrocketing, with the BMWi firing on all cylinders and beefing up staff but still somewhat overwhelmed by the sheer number of cases to deal with, which is leading to ever-longer reviews. The German Federal Government understands that review duration is a problem, but (apart from a reduction of the initial review period to two months) has not done anything substantial about review duration yet
- The expansion of the list of target activities subject to FDI scrutiny means that the timing of more and more deals will hinge on FDI clearance, rather than merger clearance with its shorter review periods, as has often been the case previously
- Recent geopolitical tensions and the vulnerability of supply chains demonstrated during the COVID-19 pandemic will very likely lead to increased FDI scrutiny
- A positive development is the smooth and constructive coordination between the BMWi and its peers in other EU Member States as well as the European Commission

Italy

In response to the COVID-19 emergency, the screening powers of the Italian government were significantly expanded

By Michael Immordino, Ferigo Foscari, Leonardo Graffi, Alessandro Seganfreddo, Tommaso Tosi and Sara Scapin

The Italian government, led by the President of the Council of Ministries, together with any other relevant ministry, reviews any transaction relating to Italian companies that carry out "strategic activities" in the defense and national security sector or hold "assets with strategic relevance" in certain specific sectors deemed strategic for the Republic of Italy. To the extent that non-EU persons are involved, the review of the Italian government also applies to any agreement concerning the acquisition of assets or services relating to 5G technology infrastructures.

Italian law provisions on the so-called "golden power" review were first adopted in March 2012 and were subsequently amended and supplemented by several law decrees.

In response to the COVID-19 pandemic and in furtherance of the EU Guidelines on the screening of foreign direct investments (FDI) in Europe issued by the EU Commission on March 25, 2020, during 2020 the Golden Power Law was further amended in order to protect Italian strategic assets against potential speculative transactions carried out by foreign investors. Pursuant to the 2020 Amendment, the Italian government significantly expanded the scope of application of the Golden Power Law.

In particular, the Golden Power Law was expanded by the 2020 amendment to cover a broad range of new strategic sectors, which now include the following "New Strategic Sectors":

- Water
- Health
- Critical infrastructures in the energy, transportation and communication sectors
- Technology, including artificial intelligence, robotics, semi-conductors, cybersecurity, nanotechnologies, biotechnologies and logistics
- Dual-use items, including artificial intelligence, robotics and biotech
- Supply of critical inputs, including raw materials, steel industry, agri-food sector and security
- Treatment, storage, access, control of sensitive data and information, including personal data
- Electoral infrastructure platforms
- Non-military aerospace infrastructure and technology
- Freedom and pluralism of media
- The financial sector, including credit, insurance and financial markets

In December 2020, the Italian government issued two decrees, the "Implementing Decrees," that set forth the exact list of relevant strategic assets and businesses falling within the New Strategic Sectors, as well as the updated list of strategic assets and businesses falling within the energy, transport and communication sectors.

The Implementing Decrees clarified that intra-group reorganizations and transactions carried out by and between Italian companies holding strategic assets in any of the sectors covered by the Golden Power Law are subject to filing obligations, but the application of the special veto powers by the Italian government is excluded in relation to such transactions.

FILING OBLIGATIONS AND SANCTIONS

If a transaction falls within the scope of the Golden Power Law, filing is mandatory, and the notification must be made by the target company or by the seller/purchaser, in relation to any relevant transaction or resolutions adopted by the target company, and any acquisition of interests in a target company by a foreign investor.

The Italian government has the power to trigger the Golden Power Law review on its own motion and regardless of a filing having been made by a party involved in the transaction.

A breach of the filing obligations under the Golden Power Law can lead the purchaser to be held liable for a general monetary sanction equal to no less than 1 percent of the cumulative turnover realized by the companies involved in the transaction and up to twice the value of the transaction. When transactions involve 5G technology agreements, sanctions can amount to no less than 25 percent and up to 150 percent of the value of the transaction.

TYPES OF DEALS REVIEWED

Under the Golden Power Law, the Italian government has jurisdiction to review any transaction in the defense and national security sectors that may harm or constitute a material threat to the Italian government's

essential interests in the defense and national security of Italy, and in any other strategic sector under the Golden Power Law that may harm or constitute a material threat to the fundamental interests of Italy relating to the security and operation of networks and systems, to the continuity of supplies or to the preservation of high-tech know-how.

The government may also review the execution of any agreement with any non-EU persons relating to the acquisition of assets or services relating to 5G technology infrastructure, or any 5G technology- related components.

The types of transactions that the Italian government can review are various in nature and include:

- Deals structured as stock or asset purchases, mergers, and joint ventures in which the foreign partner is investing in an Italian business
- Transactions or corporate actions that may have the effect of changing the target company's ownership structure or purpose
- Transactions that can cause a transfer of headquarters outside of the Italian territory
- Transactions triggering a winding-up of the target company's business

For companies in the defense and national security sectors, a filing will be required in connection with any extraordinary resolution or corporate transaction (including asset sale, merger, demerger, transfer of headquarters outside of the Italian territory, changes to the corporate purpose) or any acquisition by a person other than the Italian State or any Italian public or publicly controlled entity of an equity interest (each a "Relevant Transaction") exceeding the thresholds of 3, 5, 10, 15, 20, 25 and 50 percent ownership in the share capital of the target company by both EU/EEA and non-EU/EEA entities.

For companies in any other strategic sector (including any of the New Strategic Sectors), a filing will be required in connection with a Relevant Transaction relating to energy, transportation and communication sector assets, and up to December 31, 2021, in connection with assets falling within the New Strategic Sectors, in both cases resulting in a change of ownership, control or availability of such assets.

Until December 31, 2021, a filing will also be required for a Relevant Transaction by EU/EEA entities involving controlling interests in companies operating in any of the strategic sectors covered by the Golden Power Law.

Filing is also required in all sectors covered by the Golden Power Law (including the New Strategic Sectors) for Relevant Transactions carried out by any non-EU/EEA entity of any interest representing at least 10 percent of the corporate capital or otherwise entitling to cast at least 10 percent of the voting rights of the target company, so long as the value of the Relevant Transaction is equal to or exceeds €1 million (and any subsequent acquisition exceeds 15 percent, 20 percent, 25 percent and 50 percent of the target company's capital),

From January 1, 2022, subject to any further extension of the temporary regime, non-EU/EEA investors will continue to be subject to the obligation to notify the acquisition of a controlling interest in companies operating in any strategic sector, including the New Strategic Sectors.

SCOPE OF THE GOLDEN POWER REVIEW

Based on the publicly known precedents of reviews completed since the adoption of the Italian Golden Power Law, the Italian government has applied its special powers mainly in relation to the following types of transactions:

- Transactions leading to changes in governance and internal policies that can harm Italian national interests
- Transfer of headquarters outside of the Italian territory and total or partial delocalization of the manufacturing and/or research and development activities
- Transfer of intellectual property rights and/or know-how outside of Italy and for the benefit of foreign investors

The Italian government enjoys broad powers to impose restrictions, including the power to veto the transaction or impose special conditions; however, the main measures and special conditions that have so far been imposed by the Italian government have included:

- Control measures, in particular with reference to corporate governance and composition of the management bodies of the target companies (for example, the board must include at least one director appointed by the Italian government)
- Safety measures, such as the approval of safety contingency plans to monitor strategic assets and operations (for example, appointment of a chief safety officer designated by the Italian government)
- Monitoring measures, such as the establishment of independent committees within the target company tasked with the duty to monitor the target's compliance with the above measures imposed by the Italian government
- Other management, organizational and technical measures aimed at preserving the confidentiality of information and the technological know-how of the target company

TRENDS IN THE REVIEW PROCESS

On the basis of public documentation made available by the Italian government and from White & Case's direct experience in assisting companies in connection with Golden Power Law reviews, the number of reviews activated and completed before the Italian government has progressively increased. Following the adoption of the 2020 Amendment on the back of the COVID-19 pandemic, the number of filings has significantly increased, from approximately 83 known filings in 2019 to 341 filings made in 2020.

Among these, during the year 2020, the Italian government exercised its special powers only in relation to a minority of the publicly known review procedures, mainly in relation to defense and national security, communications and 5G network technology, and in relation to certain New Strategic Sectors, such as technology (biotechnology and cybersecurity), financial and credit sectors. In only one known instance has the Italian government vetoed the transaction.

REVIEW PROCESS TIMELINE

The filing under the Golden Power Law must occur within ten days after the execution of the Relevant Transaction (for example, in an acquisition, typically after signing or in a capital increase transaction, following the adoption of the relevant corporate resolution, as applicable). Upon receipt of the filing, a standstill period of 45 business days (30 business days for agreements relating to 5G technologies) begins to run. During this period, the Italian government carries out the review of the Relevant Transaction, and any voting rights attached to the acquired interests of the target company are frozen until the date on which the Italian government decides whether to exercise its powers.

If the government requests additional information from the filing person, the 45-business-day term may be suspended by the Italian government only once, and for a maximum period of 10 additional business days, to permit the collection of additional information from the filing person, and 20 additional business days if the government requests additional information from a third party. With respect to agreements relating to 5G technologies, the review term is 30 business days and may be extended twice for a maximum of 20 additional business days per each extension, if the case is particularly complex.

EU Regulation 452/2019 sets forth a framework for the screening of foreign direct investments in the European Union, pursuant to which each Member State carrying out an FDI review process would need to notify the EU Commission and the other Member States so that they can submit any observation or comment or, in the case of the EU Commission, an opinion.

Starting from October 11, 2020, if another EU Member State or the EU Commission decides to review a Relevant Transaction (independently or at the request of the Italian government), the standstill period will pause until the observations or opinion of the relevant EU Member State or the EU Commission have been delivered. This may take up to 35 calendar days after receipt of the filing; the period can be extended further due to the request for additional information.

While other EU Member States or the EU Commission may raise concerns, such concerns are not binding and they cannot block or unwind the investment in question. The final decision on whether a foreign investment is authorized remains exclusively with the Italian government.

If the Italian government does not issue clearance, extend or suspend the review period, or exercise its powers to block or impose conditions before the end of the standstill period, the Relevant Transaction is deemed tacitly cleared and can be legitimately implemented.

LESSONS LEARNED

- Foreign investors willing to enter into a transaction in relation to any Italian company operating in the defense or national security sector, or holding assets in any of the strategic sectors (including the New Strategic Sectors), or operating in the 5G technology sector, should carefully evaluate the possibility that a filing pursuant to the Golden Power Law is required, and should carry out the relevant analysis before entering into any transaction
- It is crucial for foreign investors to understand and consider the risk that, in the event that a transaction falls within the scope of the Golden Power Law, the Italian government might veto, or impose certain measures or conditions to, the completion of the transaction. Early contacts on an informal basis with the competent Italian authorities should be initiated in order to efficiently plan the timetable and structure of the transaction
- Given the very short notification term (ten days from the adoption of a resolution/signing of a binding agreement), tight cooperation between the parties and their legal counsel is fundamental to collect all relevant information well in advance of a signing and subsequent filing
- Since the adoption of the Golden Power Law, the Italian government has generally exercised its powers only to apply specific measures or conditions to the Relevant Transactions scrutinized by it, and only a very few known Relevant Transactions have been vetoed due to the nature of the business
- The vast majority of publicly known notified deals have been approved, or the Italian government has declared that it did not intend to exercise its special powers

The Netherlands

In the Netherlands, there are only FDI rules and FDI-like rules in place that apply to specific sectors

By Dr. Pim Jansen[1]

On October 1, 2020, the Telecommunication Sector (Undesirable Control) Act (Wet ongewenste zeggenschap telecommunicatie) came into force. This Act stipulates that an investment or acquisition requires notification to the competent minister if predominant control is acquired and this control leads to relevant influence in the telecommunications sector.

Other sector-specific legislation that can affect foreign investment can be found in sectors such as electricity and gas:

- Article 86f of the Electricity Act 1998 (Elektriciteitswet 1998) requires parties to any transaction involving a production installation with a nominal electric capacity of more than 250 megawatts or an undertaking that manages such production installation to notify the transaction to the Minister of Economic Affairs and Climate Policy
- Article 66e of the Gas Act (Gaswet) requires parties to any transaction regarding a liquefied natural gas (LNG) installation or an LNG company to notify the transaction to the Minister of Economic Affairs and Climate Policy

This sector-specific approach is about to change. On June 30, 2021, a proposal for general FDI legislation (The Investments, Mergers and Acquisitions Security Screening Act, Wet veiligheidstoets investeringen, fusies en overnames) was sent to the Dutch House of Representatives for the next steps in the legislative process. The future FDI legislation is intended to have retroactive effect, back to September 8, 2020.

WHO FILES

The parties to the transaction are required to notify investments that meet the conditions of the Draft Act to the Minister of Economic Affairs and Climate Policy. In practice, the Investment Review Agency (Bureau Toetsing Investeringen) will conduct the assessment on behalf of the Minister.

TYPES OF DEALS REVIEWED

In principle, all mergers, acquisitions and investments resulting in a "change of control" or "significant influence" over vital undertakings based in the Netherlands, may be subject to the Draft Act.

The Draft Act distinguishes between several categories important to national security based on the assessment by the National Coordinator for Security and Counterterrorism. The Draft Act further includes specific conditions within these categories to establish whether an undertaking qualifies as a "vital provider or as active in the field of sensitive technology" for the purposes of the Draft Act.

Vital providers and sensitive technologies: Undertakings that qualify as vital providers include operators of heating networks, nuclear energy providers, air transport, airport and port management operators (Schiphol Airport and the Port of Rotterdam in particular), banks and other players on the financial market, renewable energy providers and natural gas operators.

The Draft Act includes the possibility to add categories by governmental decree, although this has not happened as of this writing.

> **On June 30, 2021, a proposal for general FDI legislation was sent to the Dutch House of Representatives.**

Sensitive technologies include strategic goods such as dual-use and military goods, of which the export is subject to export controls.

SCOPE OF THE REVIEW

Relevant is whether the investment, merger or acquisition poses a risk to national security. National security refers to security interests that are essential for the democratic legal order, security or other important interests of the Dutch state or social stability. The Draft Act explicitly notes the following interests:

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

To assess the risk of the investment to national security, particular attention is given to the following factors:

- The transparency of the investor's ownership structure and relationships

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- The investor's identity and criminal record
- Whether the investor is directly or indirectly subject to restrictive measures following from national and international law, such as Chapter 7 of the Charter of the United Nations
- The security situation in the country or region of residence of the investor
- The degree of cooperation of the investor in the review procedure

Other, related criteria might apply, such as particular attention to the track record of the investor in the activities concerned, its financial stability and its motives for the investment. The reputation and potential influence of the investor's home state are likely to be of particular importance as well.

SCOPE OF THE DRAFT ACT

The Draft Act is limited to mergers, acquisitions and investments resulting in a "change of control" or "significant influence" over the vital undertakings. The concept of control follows the definition under EU and Dutch competition law and can, for instance, include the creation of a joint venture or the acquisition of certain assets.

The concept of significant influence is only relevant in relation to undertakings active in sensitive technologies. An interest of 10 percent or more and/or the ability to appoint or dismiss one or more board members is considered to constitute significant influence. Further clarification on the concept of significant influence may follow by means of governmental decree.

REVIEW PROCESS TIMELINE

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

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

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

Romania

Investments relevant to national security are subject to review

By Raluca Ioana Voinescu[1]

As a matter of principle, foreign direct investment (FDI) that falls under the scope of the economic sectors defined under the law as relevant to national security is subject to review by the relevant authorities, and may be prohibited by the Romanian government in cases where the investment is deemed to pose a threat to national security.

Review and control of FDI in Romania falls under the competence of the National Council for Country's Defence (CSAT). In essence, CSAT is an executive body chaired by the President of Romania and having the Prime Minister as its co-chair.

CSAT has the prerogative to advise the government to prohibit the closing of a transaction on the grounds that it may pose a threat to Romanian national security. However, there are as yet no reports that CSAT, in reviewing a transaction from a national security perspective, concluded that it may pose a security threat and consequently recommended its prohibition by the government.

Notification to CSAT regarding a transaction is always made via the Romanian Competition Council (RCC), which acts as proxy between the notifying party and CSAT.

Although the RCC does not have any jurisdiction over national security (being concerned exclusively with competition law), the RCC is the recipient of notifications of transactions—as part of its antitrust merger control—which may also be subject to CSAT review.

Since CSAT does not have a dedicated administrative apparatus for dealing with the receipt of notifications, legislators adopted a procedure whereby the RCC acts as a "one-stop shop," being mandated under the law to receive and forward to CSAT notifications not only of transactions subject to merger control, but also of any other transactions that fall under the scope of CSAT review.

WHO FILES

Undertakings that merge or that acquire sole or joint control, in an economic concentration, file in Romania. The parties to these transactions are referred to as "notifying parties."

A procedural distinction is made regarding whether the transaction is subject to merger control:

- If the transaction is subject to merger control, the notifying party files a merger notification with the RCC (per the usual merger filing format), without any specific mention of CSAT and without performing any assessment of whether the transaction falls under the scope of CSAT review. It is the obligation of the RCC to assess the transaction and decide whether to inform CSAT about it. The RCC will inform the notifying party when it has decided to inform the CSAT, and keep the notifying party informed as to the response received from CSAT
- If the transaction is not subject to merger control, the notifying party prepares and files with the RCC a specific CSAT notification, which consists of a brief summary of the main elements of the transaction including identity of the parties, the structure of the transaction, the target company and its business scope, as well as the economic sector where it operates. The RCC does not make its own assessment in this case, but merely forwards the notification to CSAT and acts as an intermediary between the notifying party and CSAT

TYPES OF DEALS REVIEWED

According to CSAT Decision No. 73/2012, transactions subject to the CSAT Control are those that concern the following economic sectors/domains:

- Security of individuals and of communities
- Security of frontiers
- Energy security
- Transportation security
- Vital supply systems security
- Critical infrastructure security
- IT&C systems security
- Security of financial, fiscal, banking and insurance activities
- Security of weapons, ammunition, explosives and toxic substances production and circulation
- Industrial security
- Protection against disasters
- Protection of agriculture and the environment
- Protection of state-owned company privatization or their management

The economic sectors that invoke CSAT review are both broadly and vaguely formulated, which make it quite challenging to determine whether certain transactions (e.g., the ones that concern sectors more or less linked to the ones above) fall under the review.

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One practical consequence of such vagueness is that, when in doubt, many investors prefer to notify transactions to CSAT (in cases where the transactions are not subject to merger control), leading to an overload at CSAT and unwanted delays.

SCOPE OF THE REVIEW

When CSAT reviews a transaction from the perspective of national security, its objective is to identify any actual or potential risks the deal may pose to the national security interests of Romania based on the nature of the economic sector concerned, the role and importance of the target company, the undertaking that acquires control and any foreseeable consequences of such control.

CSAT enjoys a discretionary power in assessing national security threats and taking appropriate measures to counter them. Decisions taken by CSAT in this process are not subject to judicial review.

TRENDS IN THE REVIEW PROCESS

Since the activity of CSAT is not public, trends in the review process are difficult to pinpoint. The wording of recent clearance responses given by CSAT regarding transactions reviewed from a national security perspective seem to comprise a certain disclaimer that was not used earlier.

For example, in recent clearances, CSAT mentions that, based on its assessment, no elements were identified "up to the current date" that would render the transaction likely to pose security risks; previously, "up to the current date" was not included.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors can protect themselves by ensuring that any transaction carried out in Romania is verified from a CSAT review perspective (in other words, verifying whether the relevant economic sector is one requiring review), in addition to satisfying other regulatory clearances which may be required, such as merger clearance by the RCC.

In case of transactions falling under CSAT review by virtue of the economic sector, CSAT clearance would need to be a condition precedent to the closing of the transaction. A transaction prohibited following CSAT review would have to be cancelled.

REVIEW PROCESS TIMELINE

There is no formal deadline for CSAT to issue its response. The relevant legal provisions state that if CSAT decides that the transaction is not susceptible to raising national security risks, such outcome will be communicated immediately to the RCC, which will forward it promptly to the notifying party. An average two months' term is to be expected for the CSAT to carry out its analysis and inform the RCC of the outcome. Normally, the RCC is prompt in forwarding the clearance response of the CSAT to the notifying party.

When CSAT concludes that a transaction may pose a national security threat and needs to be further assessed, the RCC will inform the notifying party within 7 days, and if also applicable, the merger clearance procedure will be suspended. Should the assessment reveal that the transaction should be prohibited, the CSAT immediately informs the RCC and the RCC has ten days to inform the notifying party. In case the respective transaction was subject to merger control also, such procedure is immediately terminated as it remains without object.

2021 UPDATE HIGHLIGHTS

On July 29, 2021, the RCC republished for public consultation the Draft Government Emergency Ordinance on measures for the implementation of the EU Regulation 2019/452, establishing a framework for the screening of foreign direct investments into the Union (Draft FDI Ordinance). The public consultation period ended on August 15, 2021, but at this writing, the Draft FDI Ordinance has not yet been adopted.

The Draft FDI Ordinance provides a new regime for FDI, in accordance with the EU Regulation 2019/452, and it applies to foreign direct investments made by foreign investors that fulfill the following two criteria:

- The value of at least the equivalent of €2 million, or investments below such threshold, which by their nature may have a significant impact on security or public order, or that present significant risks to them
- The activity is within the scope of the domains mentioned in the CSAT Decision No. 72/2012 or concerns critical infrastructure or technology, or other important domains (e.g., freedom or pluralism of media, supply in terms of critical production factors, including energy or raw materials, access to sensitive information, etc.) as provided in the Draft FDI Ordinance

According to the Draft FDI Ordinance, a new public body with jurisdiction in the FDI area, under the subordination of the government, shall be established: The Commission for Examination of Foreign Direct Investments.

OUTCOMES

- At this writing, there are no reports that CSAT, in reviewing a transaction from a national security perspective, concluded that it may pose a security threat and consequently recommended its prohibition by the government
- The RCC published its 2020 Activity Report, according to which economic concentrations were cleared in 2020, out of which three were authorized with commitments of the parties involved. The economic concentrations authorized by the RCC with commitments involved the following domains: pharmaceutical products; electronic communication services; and integrated cash management services. None of these concentrations appears to have been subject to CSAT review

Russian Federation

Further developments to Russian foreign investment laws introduce new requirements for investors and simplify regulation in some spheres

By Igor Ostapets and Ksenia Tyunik

Established by the Russian government in 2008, the Government Commission on Control over Foreign Investments in the Russian Federation is responsible for the review of foreign direct investment applications. The Government Commission is headed by the Chairman of the Russian government and composed of the heads of certain ministries and other government bodies.

Following the appointment of Mikhail Mishustin as the new Chairman of the government and formation of the new government in January 2020, the new Government Commission has been operational since March 2020.

Although the final decision on the application is made by the Government Commission, all the preparatory work (such as reviewing an application's completeness and coordinating with relevant government bodies) is done by the Federal Antimonopoly Service (FAS). Among other things, FAS performs a preliminary review of the application and prepares materials for a further assessment by the Government Commission. The Head of FAS is a member and Executive Secretary of the Government Commission.

A new composition of the Government Commission, including a new Head of FAS, Maxim Schaskolsky, was approved in November 2020.

WHO FILES

An acquirer must file if the proposed acquisition would result in the acquirer's control over an entity engaged in activities of "strategic importance" to Russian national defense and security (a "strategic entity"). The acquirer is required to obtain the consent of the Government Commission prior to the acquisition of control over a strategic entity, or the transaction is declared void.

To apply for consent, the acquirer must submit an application to FAS with attachments, which include corporate charter documents of the acquirer and the target, information on their groups' structures (including the whole chain of control over both the acquirer and the target), transaction documents and a business plan for the development of the target after closing. The obligatory document also is a table disclosing the acquirer's ultimate controlling entities, beneficiaries and beneficiary owners.

TYPES OF DEALS REVIEWED

The Government Commission reviews transactions that result in acquisition of control over strategic entities. Foreign investors must also obtain the Government Commission's consent for certain transactions involving the acquisition of a strategic entity's property.

The list of activities of "strategic importance" comprises 47 activities that, if engaged in by the target, cause the target to be considered a strategic entity. The 47 activities encompass areas related to natural resources, defense, media and monopolies.

Activities include not only those directly related to the state defense and security (such as operations with nuclear materials, production of weapons and military machines), but also certain other indirectly related activities (such as TV and radio broadcasting over certain territories, extraction of water bioresources and publishing activities).

> **Early in a transaction, a foreign investor should analyze whether the target company qualifies as a strategic entity.**

The criteria for determining control are rather wide and are lower (25 percent) for a target that is involved in the exploration of "subsoil blocks of federal importance," such as oil fields with a certain size of reserves, uranium mines, and subsoil blocks subject to exploration within a defense and security zone. Amendments to the law entered into force in July 2021 extended this lower-control threshold to entities engaged in extraction (catching) of aquatic bioresources as part of the state's policy to strengthen control in this sphere.

Foreign public investors are prohibited from obtaining control over strategic entities, or acquiring more than 25 percent of a strategic entity's property, and must obtain consent of the Government Commission for acquisitions of

the reduced stakes in strategic entities, or acquisition of blocking rights concerning such entities. These investors may acquire control over (25 percent or more of shares in) a strategic entity involved in exploration of "subsoil blocks of federal importance" or engaged in extraction (catching) of aquatic bioresources if this does not change the existing control over such entities by the Russian Federation (i.e., its stake in such entities exceeding 50 percent) and provided that the acquisition is specifically approved by the Government Commission.

Certain transactions involving strategic entities or their property are exempt from the requirement to obtain the Government Commission's approval, such as transactions in which the acquirer is ultimately controlled by the Russian Federation, constituent entities of the Russian Federation or a Russian citizen who is a Russian tax resident and does not have any other citizenship, as well as certain "intra-group" transactions.

Non-disclosing investors (those refusing to disclose to FAS information about their beneficiaries, beneficial owners and controlling persons) are subject to a special, stricter regime established for foreign public investors.

In December 2018, the Russian government approved rules for disclosing this information, according to which a foreign investor planning to enter into a transaction involving a strategic entity must make a prior disclosure of its controlling entities, beneficiaries and beneficial owners in order to avoid being treated as a "nondisclosing" investor and to ensure that the stricter regime established for foreign public investors does not apply to it. The disclosure must be made either in the form of an application for approval, if approval is required, or in the form of an informational letter filed with FAS 30 days before the transaction.

According to FAS, this advance disclosure requirement extends to exempted transactions in which the acquirer is ultimately controlled by the Russian Federation, constituent entities of the Russian Federation or a Russian citizen who is a Russian tax resident, and is a prerequisite for the relevant exemption to be applicable.

Amendments to Russia's foreign investment laws introduced in 2017 gave the Chairman of the Government Commission the right to decide that prior approval is required for any transaction by any foreign investor with regard to any Russian company (not necessarily the strategic entity), if this is needed for the purpose of ensuring national defense and state security.

The process is initiated by FAS, which obtains opinions from the Ministry of Defense, the Federal Security Service and other governing bodies whether or not the transaction needs to be sent to the Chairman for his decision. If at least one positive answer is received, FAS sends materials to the Chairman of the Government Commission for review and adoption of the decision. Upon receipt of the positive decision, FAS will notify the foreign investor about the need to receive approval for a prospective transaction. Any transaction made in breach of this requirement is void.

The structure of the types of transactions that could potentially fall under this requirement is still being formed. According to FAS, in practice the procedure is invoked for entities engaged in certain sensitive spheres for the state's policy and economy (in particular, operating certain critical technologies, such as genetic-engineering, nanodevice technologies or cryobiology and biomaterial conservation), entities being the largest or only suppliers of goods for the state needs, or those operating city-forming enterprises.

Russia's foreign investment laws establish a requirement for foreign public investors to obtain clearance for acquisition of more than 25 percent of shares in, or blocking rights to, any Russian company, even when the acquisition is performed as part of the company's establishment. Such applications are reviewed by FAS only and serve as a "double check" that the acquired Russian company indeed does not qualify as the strategic entity.

SCOPE OF THE REVIEW

Generally, a review of the application assesses the transaction's impact on state defense and security.

FAS initially requests opinions of the Ministry of Defense and the Federal Security Service as to whether the transaction poses any threat to the Russian defense and security. Additionally, if the target has a license for dealing with information constituting state secrecy, FAS requests information from the Interagency Committee for the State Secrecy Protection on the existence of an international treaty allowing a foreign investor to access information constituting state secrecy.

Russian law does not provide more details on the review's scope or the criteria on which the transaction under review is assessed.

TRENDS IN THE REVIEW PROCESS

In 2020, FAS considered 45 applications by foreign investors and sent 11 for review to the Government Commission, which approved ten and rejected one. The total value of approved transactions was approximately US$2.5 billion, of which the amount of foreign investments was approximately US$1.2 billion.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Early in a transaction, a foreign investor should analyze whether the target company qualifies as a strategic entity and whether the planned transaction triggers a requirement for the Government Commission's consent.

In light of the recent amendments, acquirers should also analyze whether such consent would be needed in case the acquirer is qualified as a "non-disclosing" investor. Answering these questions will allow the investor to start filing preparations, and then to file its application sufficiently in advance to manage the filing's impact on the timing of the transaction.

If the planned transaction does not require prior consent but consent would be needed if the acquirer is qualified as a "non-disclosing" investor, the acquirer must disclose to FAS information on the acquirer's beneficiaries, beneficial owners and controlling persons in advance, at least 30 days before the planned transaction.

Even if the target company does not qualify as the strategic entity, the investor should analyze whether it operates in certain sensitive spheres or possesses any "critical" technologies that may trigger the process of referral of the transaction by FAS to the Prime Minister and eventually result in the full-scale foreign direct investment (FDI) review of the transaction.

A foreign public investor that intends to acquire a stake exceeding 25 percent of shares in any Russian company, or blocking rights to the company, must obtain FAS clearance of the acquisition.

REVIEW PROCESS TIMELINE

The statutory period for reviewing the application is three months from the date of its acceptance for review. The Government Commission can extend the review period for an additional three months. In practice, the Government Commission uses this extension right for a large portion of applications pending review.

Amendments to the law adopted in March 2021 introduced a simplified procedure for review of transactions in which a target operates in certain "civil" sectors (such as food industry, energy/water supply, machinery) but due to specifics of production has a small strategic asset (not more than 1 percent of total assets of the company) in the form of a water supply facility, a drainage facility or a production quality-control laboratory with a "strategic" license and therefore qualifying as a strategic entity. For such transactions, the approval is generally issued by FAS itself (unless negative or no opinions on the deal were received from the Ministry of Defense and the Federal Security Service), with subsequent notification of the Government Commission of the adopted decision.

2021 UPDATE HIGHLIGHTS

- Russia's foreign investment laws were amended twice in 2021. The first set of amendments was adopted in March 2021 and aimed at establishment of simplified procedure for review of transactions involving a target operating in "civil" sectors of economy (such as the food industry, energy, machinery) and qualifying as the strategic entity only due to ownership of a small asset (not exceeding 1 percent of the target's total assets), which due to the production specifics has a "strategic" license. Such transactions are generally reviewed and approved by FAS with only subsequent notification of the Government Commission of the issued decision. This law also extended the list of obligations that may be imposed on the foreign investor in connection with its acquisition of the strategic entity.

The second set of amendments concerned companies engaged in extraction (capture) of aquatic bioresources and lowered a "control" threshold in such companies from more than 50 percent to 25 percent or more of shares. Foreign investors owning stakes in such companies that are equal to, or exceed, 25 percent, must apply to the Government Commission for subsequent approval of control over such companies, or reduce their stakes to the 25 percent level.

- At this writing, FAS has developed several other bills with suggested amendments to the foreign investment laws that have not yet been submitted to parliament, most of which are still being discussed at various levels, including with the business community and with other governing authorities.
- FAS continues to follow the general trend of strengthening control in the foreign investments sphere. In recent years, FAS has continuously applied extensive interpretation of "control, " arguing that control exists not only in situations where a foreign investor has a majority stake in the strategic entity or the ability to adopt decisions regarding the ""controlled" entity, but also in cases where a foreign investor has extensive blocking rights with respect to the strategic entity's activities and hence may influence its decision-making. This position of FAS has been confirmed by the recent court practice.

Such extensive interpretation, however, leads to unreasonably broad application of foreign investment laws, and leads to a confusion in the terminology and regulation set by the law; e.g., with respect to foreign public investors that are supposed to approve acquisition of blocking rights and are prohibited from acquiring "control" which, if properly interpreted, should not encompass blocking rights.

OUTCOMES

- Most transactions submitted to the Government Commission for review are approved. The approval contains the term within which the acquisition must be completed. The acquirer can subsequently apply to the Government Commission with a substantiated request to extend this term, if necessary

- The Government Commission can approve the transaction subject to certain obligations imposed on the foreign investor. The law contains a list of obligations that is not exhaustive. Since 2016, the Strategic Investments Law empowers the Government Commission to impose any type of obligation on the foreign investor, including the obligation to invest certain amounts of funds into activities of the strategic entity, or to process bioresources or natural resources extracted by the strategic entity on Russian territory

- Amendments to the law adopted in March 2021 extended the list of obligations listed in the law by adding such obligations as the sale of the strategic entity's products at fixed prices (tariffs), continued execution of investment programs and implementation in the territory of the Russian Federation of advanced innovative technologies and the localization of production of parts, components and accessories used by strategic entities in their production of goods

LESSONS LEARNED

- Timing for obtaining FDI clearance in Russia tends to be extremely lengthy, and often goes beyond the statutory terms specified in the law. There are several reasons for this. FAS tends to request opinions on the planned deal not only from the Ministry of Defense and the Federal Security Service, as provided in the law, but also from other governing authorities, and these authorities often delay their responses. Other reasons for delay include irregular meetings of the Government Commission and the high workload of the FAS FDI department, which delays preparation of materials for the Commission

- FAS tends to be extremely cautious, and to obtain positions of the governing bodies on the necessity to send the transaction for review by the Prime Minister (to decide whether the full-scale FDI review is needed) even in non-obvious cases

- The concept of "control" is interpreted broadly. FAS takes into account not only legal actions by the foreign investor but also factual circumstances, such as foreign investor's professional or family connections with the entities exercising control over strategic entities, and uses these as indirect evidence of control

Spain

Measures enacted to protect the Spanish economy against the COVID-19 crisis may persist longer than expected

By Juan Manuel de Remedios and Laura del Olmo

The exceptional circumstances brought about by the COVID-19 outbreak led the Spanish government to enact a number of urgent regulations in 2020, establishing a new screening mechanism for certain foreign investments by virtue of Royal Decree Laws 8/2020, 11/2020 and 34/2020.

The amended Law 19/2003 incorporated—by virtue of these urgent regulations—a new Article 7bis, suspending the liberal regime of foreign direct investments in Spain, particularly in relation to a number of critical industries.

FORMER REGIME

Spanish foreign direct investment measures before the COVID-19 outbreak included a post-investment notification for any foreign investment, and prior authorization for a number of limited investments, such as investments from countries considered tax havens, activities related to national defense and security, and (for non-EU investors only) investments in gambling, airlines and audiovisual media, among other sectors. Regardless of such authorizations, former Spanish regulations proclaimed a liberal ethos for foreign direct investment in Spain.

In response to COVID-19, and in order to avoid opportunistic investments in critical sectors for the national public security and health, the Spanish government enacted a number of amendments to Law 19/2003, anticipating the yet-to-be transposed rules of Regulation (EU) 2019/452, of March 2019. The amendments created a new screening mechanism for certain foreign direct investments.

Foreign direct investment is defined as an investment as a result of which a non-EU/non-EFTA resident directly or indirectly acquires control over a Spanish company (listed or unlisted) and/or at least 10 percent of its share capital.

Under the new regime, foreign direct investments exceeding €1 million need prior authorization if any of the following criteria are met:

- The investment is made in a strategic sector, such as critical infrastructure, critical technologies, supply of critical inputs, food security, sectors with access to sensitive information, media and any other sector that may impact public health, safety or public order as determined by the Spanish government
- The investor is controlled by a third EU Member State government
- The investor has already invested or been involved in security, public health or public policy in another EU Member State
- The investor is at serious risk of engaging in illegal or criminal activities

In addition, until December 31, 2021, EU and EFTA resident investors are also subject to these restrictions if they make investments through which they acquire more than 10 percent of the capital and/or control of a Spanish company, provided that the investment exceeds €500 million if the company is unlisted or €1 billion if the company is listed on the Spanish stock market.

> **Under the new regime, foreign direct investments exceeding €1 million need prior authorization.**

As confirmed by public officials from the relevant cabinet on foreign investment, the Royal Decree Laws adopting the new regime are undergoing enacting legislative processes. The precise content of the future legislation is still uncertain, although once enacted in the form of law, further developments and details regarding the screening mechanism may follow.

FILING OBLIGATION AND CONSEQUENCES

For tax haven approval applications, a standard form must be filed electronically at least six months prior to the transaction.

For purposes of the 2020 regime and the new screening mechanism, filing for an authorization prior to conducting the investment is required when a restricted foreign direct investment exceeds €1 billion.

If the restricted foreign direct investment exceeds €1 million but does not surpass €5 million, the transaction shall be dealt with through the interim simplified process provided for in the 2nd

Transitory Provision (Disposición Transitoria 2ª) of the Royal Decree Law 11/2020. This provision specifies that requests shall be addressed to the public official in charge of the relevant department of the Spanish government (i.e., Subdirección General de Comercio Internacional e Inversiones, the "Investment Department") that will approve or deny the request.

Investments under €1 million are thus exempt from the filing obligation of the new screening mechanism, although the relevant Spanish regulations mention that this point may be subject to adjustment once further legislation is enacted.

If the restricted foreign direct investment exceeds €5 million, the general regime set forth in Article 7bis of the Law 19/2003 applies. In this case, the investor is required to file the authorization request with the Investment Department, subject to final approval from the Spanish Council of Ministers.

Once an authorization request is submitted, the Spanish Council of Ministers has up to six months to reply. The absence of a response from the Spanish Council of Ministers after six months from filing a request will be interpreted as a denial.

Failure to file the required authorization requests when required will render the transaction null and void, and may also involve the imposition of significant fines, up to the value of the intended investment.

TYPES OF DEALS REVIEWED

The types of deals reviewed are directly related to the conditions and criteria already set forth. The review process varies on a case-by-case basis, depending on the amounts, the investor and the key strategic sector where the investments are intended to be made.

PRE-FILING ASSESMENT MECHANISM

Due to the broad drafting of the applicable provisions, it is difficult to determine whether certain investments fall within the scope of the law. Consequently, the Investment Department has made available to investors a questionnaire that can be sent informally via e-mail to clarify whether the investment is subject to authorization. Once submitted, the relevant department will confirm the need for an authorization request.

SCOPE OF THE REVIEW

The precise scope of the review that will be conducted by the Investment Department and the Spanish Council of Ministers in accordance with the new screening mechanism is not yet known. As a general rule, they will examine any concerns of security, public health or public policy that the investment may pose, and grant or deny authorization. More information will be available about the scope of review when new legislative regulations have been enacted.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors should be cautious when entering into a transaction involving a Spanish company operating in any of the key strategic sectors. The operational strategy of the investment must be reconsidered in light of the current review process of the Spanish authorities, bearing in mind that a number of laws may restrict the investment.

Anticipating any regulatory amendments and obtaining the correct legal counsel is key, as well as liaising in due time and form with the relevant governmental authority. Managing the expectations of investors, sponsors and stakeholders, and keeping them all aligned with foreign direct investment restrictions, is also crucial in these times of uncertainty.

Due to the broad drafting of the applicable provisions, it is difficult to determine whether certain investments fall within the scope of the law.

REVIEW PROCESS TIMELINE

The legally established timeline for the review of investments and for granting the required authorization, pursuant to the interim simplified process, is 30 days. The ordinary process of Article 7bis provides a generic estimated timeline of six months.

According to conversations with public officials from the Investment Department, the review under the pre-filing assessment may take four to five weeks, depending on the authority's workload, whereas the review under the ordinary process may take up to three months.

OUTCOME

Although limitations have been imposed on foreign direct investments and these limitations may persist, governmental authorities are imposing a business-friendly approach to these restrictions. They are likely to maintain this approach to the review process, to the extent that investments do not significantly pose a threat to the national security, public health or public order in Spain.

Given that these rules were imposed in a time of crisis and have not yet been properly developed and enacted, restricting foreign investments that can bring prosperity and economic growth to the country during a downturn period may seem counterintuitive. However, further developments may bring more legal certainty to this scarcely regulated regime.

LESSONS LEARNED

- So far, only 10 percent of pre-assessments have resulted in the obligation to submit formal investment authorization requests, none of which has been denied as of this writing
- Requesting a pre-assessment of the investment transaction is recommended if it potentially falls under the scope of the law, since the chances of eventually needing to request a formal investment authorization are low. Additionally, the time spent in the pre-assessment may shorten the response time in case a formal authorization has to be requested later

Switzerland

Recent political pressure has been pushing toward a specific legal regime for foreign investment in Switzerland

By Raphael Schindelholz, Marie Flegbo-Berney and Stéphane Lagonico[1]

Unlike many other European jurisdictions marked by restrictive conditions for foreign direct investment (FDI), Switzerland has been a very attractive jurisdiction for such investments, with few rules, which has encouraged significant foreign investment. In 2016 for example, Chinese investment in the whole EU amounted to US$40 billion, while in Switzerland alone, 2016 Chinese investment came to US$45 billion.

There are currently no general foreign investment controls in Switzerland. However, foreign investment controls do apply to certain industries and sectors — in particular banking, securities and real estate — where prior government approval is required. A number of additional business activities require a license from the authorities, and the licensing conditions include specific requirements regarding foreign investors in the following fields: aviation, telecommunications, nuclear energy and radio & television. (In the pharmaceutical sector, there are licensing requirements, but none related to foreign investors.)

The longstanding limitation of access to foreign investors in certain sectors is linked to the very specific context of these sectors, as opposed to a desire to control foreign investment from an economic perspective.

For example, in the banking sector, the fact that any foreign participation is subject to prior authorization is mainly due to the requirement of irreproachable activity (a change of Swiss-Swiss management body being subject to the same requirement). In the aviation sector, the criterion of majority Swiss ownership ("nationality") is linked to the specificity of the sector and in particular to the existence — and historically, the necessity — of a national airline.

While the Swiss Federal Council has been opposed to legislation on foreign investment in Switzerland, Parliament passed a motion to that effect in March 2020. In this context, the Federal Council's objective in introducing investment controls is now to ensure that Switzerland remains open and attractive to foreign investors.

In August 2021, the Federal Council unveiled the broad lines of a new draft legislation, which should be sent out for consultation in March 2022. The legislation is not likely to come into force until 2023 at the earliest.

WHO FILES

A detailed modus operandi, and most certainly a standard authorization request form, is expected at the very end of this new legal regime implementation, within two to three years.

The State Secretariat for Economic Affairs (SECO)-Federal Department of Economic Affairs, Education and Research will stand as the competent authority to consider applications submitted by or on behalf of foreign investors.

In August 2021, the Federal Council unveiled the broad lines of a new draft legislation.

TYPES OF DEALS REVIEWED

The chosen approach of the future legislation is based on two different axes. If applicable (depending on the outcome of the expedited review), a mandatory authorization regime will apply to:

- Any acquisition of certain specific industries or activities, regardless of the status of the purchaser
- Any acquisition by a foreign State or a foreign company under State influence, regardless of the target industries or activities

For private (neither State nor State-controlled) foreign investors, the relevant areas will be clearly defined at a later stage of the consultation, taking into consideration the following focal points:

- Companies that provide an essential service that cannot be replaced in the short term or for which there is a critical dependence of the Swiss military (such as suppliers of essential armament parts), of government agencies (such as suppliers of key security-related IT systems) or of international space infrastructures in which Switzerland is a stakeholder on suppliers of key components

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– Risk of access by a malicious actor to a large amount of particularly sensitive personal data

At this writing, no threshold has been disclosed regarding a target company's turnover, or regarding the percentage of stock/participation rights triggering a compulsory notification. Swiss corporate law does not provide a particular threshold, but defines the acquisition of control as "obtaining the possibility of exercising a determining influence over the activities" of the target company.

From a money laundering perspective, the threshold for identifying a control holder over an operating company is set at 25 percent.

SCOPE OF THE REVIEW

The review is to be carried out in two stages:

1. An expedited (presumably within a few weeks) review of the need for authorization. If none of the criteria are met, the acquisition may be carried out without stage 2.
2. If deemed necessary, an in-depth approval procedure (presumably, within a few months)

For State-owned or State-linked investors, there will be a special focus on the risk of major distortions of competition.

The bill will likely also include a provision allowing for cooperation and reciprocal exemptions from investment control with other States. The draft statute should include a provision allowing for cooperation and reciprocal exemptions from investment control with other States. There will be civil and criminal sanctions for infringements.

No threshold has been disclosed regarding a target company's turnover, or regarding the percentage of stock/participation rights triggering a compulsory notification.

REVIEW PROCESS TIMELINE

For the first stage, the duration will probably depend on the status of the investor (private vs. foreign State or a foreign company under State influence), the complexity of the operation and the quality/completeness of the initial request.

For the second stage, when one is necessary, the in-depth approval procedure will presumably be completed within a few months. SECO will coordinate with other offices as necessary to clarify all aspects related to the risks considered by the authorization process, such as any dependency between Switzerland and the target.

If the agencies involved disagree or unanimously agree that the transaction should not be authorized, the Federal Council will decide the outcome. Additional processing time may be required if the case has a political dimension. A conditional authorization is possible.

OUTCOME

We await March 2022 for more details on the new authorization regime.

United Kingdom

The National Security and Investment Act introduces a mandatory obligation to secure clearance for certain types of transactions

By Marc Israel and Kate Kelliher

On January 4, 2021, the long-anticipated National Security and Investment Act 2021 (NSIA) entered into force in the UK. The NSIA creates, for the first time in the UK, a mandatory obligation to secure clearance for certain types of transactions before they can be completed.

NSIA: KEY FEATURES

The NSIA takes a sector-based approach to assessing potential national security risks related to investment in (or acquisition of) businesses with activities in the UK, requiring notifications from investors acquiring stakes in entities active in "sensitive sectors" in the UK.

The NSIA defines 17 sensitive sectors:

- Advanced materials
- Artificial intelligence
- Autonomous robots
- Civil nuclear
- Communications
- Computing hardware
- Critical suppliers to government
- Critical suppliers to the Emergency Services
- Cryptographic authentication
- Data infrastructure
- Defense
- Energy
- Engineering biology
- Military and dual-use technologies
- Quantum technologies
- Satellite and space technologies
- Transportation

Within these sensitive sectors are specific qualifying criteria. For example, under communications, there is a target turnover threshold of at least £50 million. All of the headings specify precisely in which activities within each sector the target will need to be engaged to trigger the notification obligation. Certain types of transactions within each of the sensitive sectors will require mandatory notification, but the government can investigate transactions in the sensitive sectors that are not subject to mandatory notification requirements.

WHO MUST NOTIFY

Unusually for such regimes, the NSIA is not limited to foreign investors, nor do target entities need to be UK-registered in order to be notifiable. Even UK-on-UK investments require a notification if the NSIA mandatory notification criteria are satisfied. The obligation to notify lies with the prospective investor. Qualifying acquisitions are those that involve:

- An acquisition wherein an investor's shares or voting rights will exceed 25 percent, 50 percent or 75 percent. A minority stake taking an investor from 24 percent to 26 percent, for example, would satisfy this test, whereas an increase from 80 percent to 90 percent would not do so
- An acquisition wherein the investor acquires sufficient voting rights to secure or prevent the passage of any class of resolution governing the affairs of the target
- An acquisition wherein the transaction will enable the investor to materially influence the policy of the target. This is the same standard used in the UK in the context of the merger control regime. The reference to an investor's ability to materially influence target policy includes the management of its business, ability to control the target's strategic direction, and ability to define and achieve its commercial objectives

The NSIA is not limited to foreign investors, nor do target entities need to be UK-registered in order to be notifiable.

REVIEW PROCESS AND TIMELINE

Notifications must be submitted to the Investment Screening Unit (ISU) at the Department of Business, Energy and Industrial Strategy (BEIS) via an online notification service.

Once a notification is accepted, its consideration can be divided into two parts:

- The review period, applicable to all notifications
- The assessment period, applicable only if a transaction is "called-in"

BEIS's working assumption is that the most notifications will be cleared during the initial review period. Once a notification is confirmed as complete, this period lasts for 30 working days. During this period, the ISU can issue information notices (to request further detail to assist with completing the assessment) and attendance notices (requiring attendance at a meeting with the authorities).

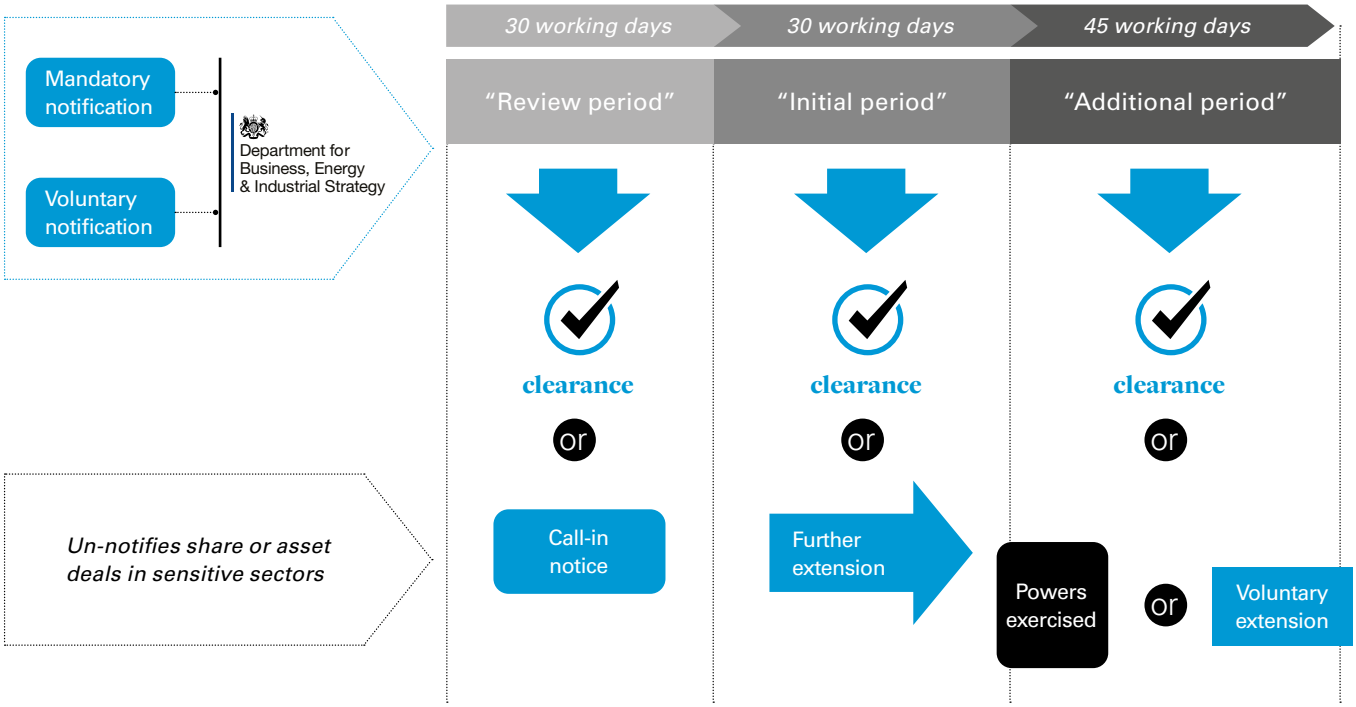
Information/attendance notices issued during the review period do not stop the clock on the 30-working-day timescale. At the end of that period, the authorities will either clear the transaction or issue a "call-in notice."

If the authorities determine that the transaction may pose a risk to national security, then a call-in notice will be issued; the call-in notice brings the deal into the "assessment review" phase, which is initially set to 30 working days, although it can be extended by a further 45 working days. Information or attendance notices issued during the assessment review period, however, will stop the clock and so could push timelines further out.

During the assessment review period, authorities will assess whether the deal could pose a national security risk in the UK. BEIS has indicated that it will consider three factors in making this determination, although ultimately all reviews will be conducted on a case-by-case basis:

- Target risk, where the entity or asset in question could be used to undermine national security. BEIS has given the example of targets that are close to sensitive sites, but ultimately any target falling within the defined sensitive sectors will be considered more likely to raise target risks
- Acquirer risk, where the investor has characteristics that suggest there is a risk to national security from the investor gaining control of the target. Such characteristics would include sectors of activity, technological capabilities and links to entities that are considered a risk to the UK. This assessment will involve consideration of the acquirer's ultimate controller. On the positive side, a history of passive or long-term investments can be considered indicative of lower acquirer risk

The total timescale for review; information or attendance notices issued during the assessment period stop the clock



– Control risk: The higher the level of control that is being acquired, the greater the control risk, in the eyes of the BEIS

One of the more novel features of the NSIA regime is the potential for retrospective review.

The Secretary of State is empowered to issue a call-in notice for any deal closed from November 12, 2020. This general power to issue call-in notices is restricted to six months from the day the Secretary of State became aware of the transaction, or five years from the date of the acquisition. This limitation of the prospective period of issue of call-in notices, from five years to six months, is one of the reasons investors may wish to consider a voluntary notification.

POST-REVIEW POWERS AND PENALTIES

If the Secretary of State concludes that a transaction does pose a national security risk, the deal can be unwound or blocked, or subject to appropriate conditions. These conditions could include targeted divestments, undertakings with respect to management and key staff, or sensitive information ring-fencing, although ultimately conditions will be determined on a case-by-case basis.

Closing a notifiable transaction without approval is an offense that can carry both criminal and civil penalties. Potential fines for breach of the obligation to secure clearance before closing are set at the higher of 5 percent of total turnover (both in and outside the UK) and £10 million. A notifiable transaction completed without Secretary of State approval is also rendered void under the NSIA.

Other penalties can be imposed for failure to comply with interim or final orders, failing to comply with information or attendance notices or breaching the disclosure of information provisions.

INTERACTION WITH THE ENTERPRISE ACT

Prior to the NSIA's entry into force, the UK government's powers to intervene were restricted to transactions that raised certain "public interest" considerations under the Enterprise Act 2002 (EA02).

The EA02 regime empowered the Secretary of State to issue a "public interest intervention notice" (PIIN) for transactions that might concern national security, media plurality, the stability of the UK's financial system and, in the wake of the COVID-19 pandemic, the capacity of the UK to combat a public health emergency. PIIN cases to date have focused significantly on national security, with roughly a quarter of cases focusing on media plurality and a small number on financial stability.

The "national security" heading has fallen away from the EA02 regime in favor of the NSIA, although it continues to apply to cases in the other three categories. The EA02 public interest regime will now be confined to transactions related to media plurality, financial stability and public health emergencies. Under the EA02 system, there is no obligation, nor indeed any option, for parties to pre-notify transactions for approval; it is up to the government to choose to intervene.

In terms of the interaction of the two regimes, the retrospective call-in review power will be inapplicable to transactions that have already been subject to a national security intervention under the EA02. In practice, that is unlikely to occur.

LESSONS LEARNED

- Potential issues should be considered as early in the planning process as possible. The NSIA is very broad, and certainly extends beyond the scope of classic "defense" deals. The better-prepared investors are, the easier the process will be
- Throughout 2020, investors in sensitive sectors have been pre-engaging with the ISU to get an indication of whether their transactions may be subject to the retrospective call-in review power. For deals that have received such indications but not closed by January 4, 2022, a formal notification will still be required when the notification criteria are met, even if BEIS indicated the deal was unlikely to pose a national security threat
- Investors not strictly required to notify because, for example, they are planning an asset acquisition rather than a share acquisition, might still benefit from a voluntary notification to eliminate the risk of post-closing call-in review
- If a prospective deal is caught by the mandatory notification regime under NSIA, it will no longer be possible to sign and close deals simultaneously

Australia

Australia requires a wide variety of investments by foreign businesses to be reviewed and approved

By John Tivey, Nirangjan Nagarajah, Stephen Carlton and Jessie Huynh

The decision to approve or deny a foreign direct investment (FDI) application is ultimately made by the Treasurer of Australia, based on an assessment of whether the investment would be contrary to the national interest and national security.

When making its decision, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals, consults with other relevant Australian government agencies as required, and advises on the national interest and national security implications.

Australia's foreign investment policy framework comprises the Foreign Acquisitions and Takeovers Act 1975 (Cth) (the "Act") and its related regulations, the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 ("Cth") and its related regulations ("Fees Regime"), Australia's Foreign Investment Policy (the "Policy") and a number of guidance notes.

WHO FILES

A foreign person or entity making an acquisition that requires approval under the Act must apply to FIRB for a notification that the Treasurer has no objection to the acquisition before completion of the acquisition, and any agreement to make the acquisition must be conditional upon, and subject to, receipt of FIRB approval by the acquirer.

An application includes a filing fee that varies according to the type of deal and the deal value. As of January 1, 2021, amendments to the Fees Regime changed the way that fees are calculated for applications.

An application for FIRB can be mandatory or voluntary, subject to the type of the transaction and the sectors involved. A voluntary filing may preclude post-acquisition orders being made by the Treasurer on the basis of national security concerns.

TYPES OF DEALS REVIEWED

FIRB approval is required for a range of acquisitions by foreign persons, including:

- A "substantial interest" in an Australian entity: An acquisition of an interest of 20 percent or more in an Australian entity valued at more than AUD 281 million (approximately US$209 million)
- A "direct interest" in a national security business: An acquisition of an interest of 10 percent or more in an Australian national security business (for example, a business that holds critical gas, water or port assets, a telecommunications carrier, or is involved in the supply chain for military and defense goods and services). There is a US$0 threshold for these acquisitions
- An interest in national security land (for example, a defense premises or land in which the Australian intelligence community has an interest). There is a US$0 threshold for these acquisitions
- Australian land and land-rich entities: Various acquisitions of interests in Australian land are regulated with varying monetary thresholds, including in respect of residential land, vacant commercial land, developed commercial land and an entity where the value of its interests in Australian land exceeds 50 percent of the value of its total assets
- Agricultural land and agribusinesses: Acquisitions of interests in agricultural land and agribusinesses are regulated separately in the Act. In addition, a register of foreign ownership of agricultural land is maintained by the Australian taxation authority

Certain types of investors receive differing treatment for their deals:

- Free trade agreement investors: Consistent with Australia's free trade agreement (FTA) commitments, higher monetary thresholds apply to certain acquisitions made by investors from Chile, Japan, South Korea, China, Singapore, New Zealand, the US and countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is in force. For example, an acquisition of an Australian entity by an FTA country investor will only require FIRB approval if the entity is valued at more than AUD 1.2 billion (approximately US$899 million),

The Treasurer has wide divestiture powers, and criminal prosecution and civil penalties can apply for serious breaches.

unless the investment relates to a "national security business" or a "sensitive business," such as media, telecommunications, transport, defense and military-related industries (to which a lower or US$0 threshold applies) or the investor is a foreign government investor

- Foreign government investors: Stricter rules apply to foreign government investors, which can include domestic or offshore entities where a foreign government and its associates hold a direct or upstream interest of 20 percent or more, or foreign governments of more than one foreign country and their associates hold an aggregate interest of 40 percent or more. In general, unless an exemption applies (for example, the de minimus exemption for offshore acquisitions), a foreign government investor must obtain FIRB approval before acquiring a direct interest (generally, at least a 10 percent holding or the ability to influence, participate in or control) in any Australian asset or entity; starting a new business; or acquiring mining, production or exploration interests

SCOPE OF THE REVIEW

The Treasurer may prohibit an investment if he or she believes it would be contrary to the national interest or national security. In making this decision, while the concept of "national interest" is not defined in the legislation, the Treasurer will broadly consider:

- The impact on national security (being the extent to which investments affect Australia's ability to protect its strategic and security interests)
- The impact on competition (being whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia)
- The effects of other Australian government laws and policies (including tax and revenue laws and the impact of the investment on Australian tax revenues)
- The impact of the investment on the Australian economy and the community
- The character of the investor (including the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision, as well as the corporate governance practices of the investor)

The "national security test" requires the Treasurer to assess a given investment from a national security perspective, and whether such investment will affect Australia's ability to protect its strategic and security interests. In making this assessment, the Treasurer relies on advice from the relevant national security agencies for assessments as to whether an investment raises national security issues (e.g,. through foreign intrusion or espionage).

This test is generally applied in circumstances where an investment involves a "national security business," "national security land" or falls within one of the sectors of interest for the Treasurer, as set out in Guidance Note 8 on National Security.

TRENDS IN THE REVIEW PROCESS

Historically, there have been few rejections by the Treasurer on the grounds of national interest. From 2018 through 2019, only one non-residential land application was formally rejected, and in 2019 – 2020, there were three rejections among 8,224 applications. In 2018 – 2019, 670 applications (approximately 85 percent of which related to residential land acquisitions) were withdrawn before a decision was made. The reasons for withdrawal are not publicized.

If the Treasurer intends to make a rejection, he or she will usually notify the applicant in advance and the applicant may withdraw their application. These figures are not determinative of the true number of applications that receive negative outcomes.

However, some significant investment proposals have been rejected on national security grounds since 2020, including:

- A US$20 million investment by Chinese state-owned steel producer Baogang Group Investment (Australia) Pty Ltd. (BGIA) into Northern Minerals Ltd.
- A US$14.1 million investment by Chinese lithium chemical producer Yibin Tianyi Lithium Industry (Yibin Tianyi) into AVZ Minerals
- A US$600 million sale of Lion Diary by Japanese beverage company Kirin to China Mengniu Dairy Company Ltd.
- A US$300 million sale of Australia-based and South Africa–owned Probuild to China State Construction Engineering Corporation

The publicized grounds upon which these acquisitions were rejected included the importance of the relevant sector to the Australian economy and society, antitrust concerns, potential access to construction of sensitive buildings or critical infrastructure, and an investor's connections to the Chinese defense industry.

Some significant investment proposals have been rejected on national security grounds since 2020.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign persons should file an application in advance of any transaction, and any transaction requiring mandatory FIRB approval must be conditional on FIRB approval. Such a transaction should not proceed to completion until the Treasurer advises on the outcome of his or her review.

For applications involving a sensitive or national security business or sector (for example, a transaction involving businesses engaged with the Australian defense force, public infrastructure, power, ports, water, telecommunications, banking or media sectors), foreign investors should consider the government's invitation in the Policy to engage with FIRB before filing an application for a significant investment.

Leading into the holiday period in December and January, and into an Australian Federal election (the next Federal election is anticipated in the first quarter of 2022), decision timeframes for FIRB applications are likely to be protracted. Foreign investors should be particularly cognizant of the need to engage with FIRB and Australian legal advisers early in a deal timeline.

These discussions may help foreign investors understand the complexity of their application, any national interest concerns the government may hold about a particular proposal, and the conditions the Treasurer may impose upon approvals.

These discussions can also help with structuring a transaction in order to reduce the likelihood of rejection. Such discussions should be held at an early stage in order to provide enough time to satisfy all FIRB queries. Where there is a competitive bid process for the acquisition, a foreign investor that does not actively engage with FIRB early in the bidding process may be placed at a competitive disadvantage to other bidders who do. Foreign investors should be prepared to discuss in detail any conditions and undertakings that may be requested by FIRB, especially for acquisitions that are likely to attract greater political or media scrutiny.

Investors should be aware of the sensitivity in relation to the investment structures used by foreign investors, profit shifting and payment of Australian tax. Early on, foreign investors should work with their tax advisors to ensure their investment structures do not fall outside the spectrum of what is acceptable to the Australian Tax Office (ATO), as the ATO is consulted in all approval processes. Investors should also work with their advisors to determine a level of transparency of upstream ownership, to avoid further enquiry from FIRB and possible delays later.

REVIEW PROCESS TIMELINE

Under the Act, the Treasurer has 30 days to consider an application and make a decision. However, in practice, the assessment process is in many cases extended and takes longer than this, more typically eight to 12 weeks from the time of application to the receipt of a no objections notification. As mentioned above, the holiday period and the impending Australian Federal election in 2022 will likely impact these timeframes for decisions.

The timeframe for making a decision will not start until the correct application fee has been paid in full. If the Treasurer requests further information from the investor, the review period will be on hold until the request has been satisfied.

2021 UPDATE HIGHLIGHTS AND REFORMS

- Compliance: The Australian government has increased its focus on compliance activities, enforcement and audits, particularly with respect to tax and data conditions imposed on FIRB approvals
- Reforms: As part of the Australian government's reforms to Australia's foreign investment regime (effective from January 1, 2021), the government's focus is firmly on national security and compliance. The reform package included:
  - A new "national security test" created for foreign investors proposing to acquire a direct interest in a "national security business" or "national security land." The Treasurer now also has the power to impose conditions or block any investment on national security grounds, regardless of value
  - A new voluntary notification regime in respect of "reviewable national security actions," i.e., acquisitions involving a foreign person proposing to acquire a direct interest in any entity or Australian business, or any interest in Australian land
  - A new "call in" power that allows the Treasurer to screen any investment that would not ordinarily require mandatory notification (i.e., a voluntary "reviewable national security action" noted above, which was not voluntarily filed at the time of acquisition), on national security grounds for a period of ten years following completion of the acquisition. In cases where the Treasurer determines the acquisition was contrary to national security, the Treasurer may make a

number of orders including, in extreme cases, disposal orders
- Updated sectoral guidance in FIRB Guidance Note 8 on national security, to include additional commentary for sectors such as health, critical minerals and technology, public infrastructure, energy, gas, electricity, transport and data
- Removal of the 40 percent threshold for foreign government investor test: Private equity investors are no longer treated as foreign government investors purely by virtue of passive upstream investors who are foreign government entities holding, in aggregate, >40 percent of the interests in that private equity investor (e.g., fund)
- Expansion of the exemption certificate regime with ability for the Treasurer to grant investor-specific exemption certificates
- Stronger and more flexible enforcement options, including powers to impose or vary conditions to approvals or, as a last resort, require divestment of previously approved investments where national security risks emerge (compliance with approval conditions is receiving more attention as the government has received criticism for failing to allocate sufficient resources to this area)
- Increased monitoring and investigative powers and materially higher civil and criminal penalties
- Introduction of the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Cth) and new way of calculating submission fees for FIRB applications
- Data: FIRB has increasingly emphasized that, as part of its national interest assessment, it will have particular regard to the protection of sensitive Australian data and foreign access/interference to such data. For example, this has been a particular focus with respect to proposed investments in Australian healthcare groups in the context of "patient data" and data centers
- Generally, the Treasurer approves the vast majority of applications
- FIRB has been increasingly willing to use conditions and undertakings as a mechanism to increase the government's oversight of more complex or sensitive investments. Undertakings required from FIRB may include matters relating to governance, location of senior management, listing requirements, market competition and pricing of goods and services (for example, that all off-take arrangements must be on arm's-length terms) and other industry-specific matters. FIRB has also issued a set of standard tax conditions that apply to those foreign investments that pose a risk to Australia's revenue and make clear the requirements and expectations for investors
- The Treasurer has wide divestiture powers, and criminal prosecution and civil penalties (including the issuance of infringement notices) can apply for serious breaches of Australia's foreign investment laws and for those facilitating such breaches, such as professional advisors. The standard practice is to seek approval where there is any doubt as to whether approval is required

OUTCOMES

Typically, if FIRB requires further time, it will request the applicant to voluntarily extend the approval deadline. As the Treasurer is also entitled to unilaterally impose a 90day extension under statute, applicants are generally incentivized to "voluntarily" request the proposed deadline extensions. This makes it difficult to specify with certainty how long a review process will take.

LESSONS LEARNED

- Exemptions under the Act now include an additional limb that carves out acquisitions in sensitive sectors and/or of national security concern. Exemptions that previously applied to certain transactions (for example, the de minimus exemption for offshore transactions) will now also need to be assessed against the new national security framework under the Act
- An assessment as to whether an entity is a "national security business" or holds an interest in "national security land" will require extensive due diligence, which generally extends beyond searching publicly available information. Given national security actions attract mandatory filings and are now carved out from most exemptions under the Act, it is important to fully diligence the target and its business from this perspective
- FIRB will require the identities of any upstream investor (and their upstream investors) that will hold more than 5 percent interest in the target (on a look-through basis) following the acquisition. We recommend including this information upfront in the application to avoid a protracted consultation process with FIRB
- While the "statutory deadline" for FIRB applications is 30 days under the Act, this is generally not the decision period for a given application. Whether mandatory or voluntary, the decision period for an application will depend on a number of factors:
  - Tthe identity of the investors, their country of origin and whether there is any upstream foreign government ownership
  - Whether the transaction involves a national security action
  - The number of consult partners FIRB engages with while assessing the application—these can include the Australian tax authority, competition regulator and Department of Defence
  - The complexity of the application
  - Australia's political landscape, its relations with the investor's country of origin and whether there is an impending election/holiday period in Australia


中国外运

China

China continued to strengthen its national security regulatory regime by introducing the new Data Security Law in 2021

By Z. Alex Zhang, Chunlei Pang

In 2020, China escalated the national security review (NSR) system from a set of circulars issued by the State Council and the Ministry of Commerce (MOFCOM) to the national law level. China expanded the scope of NSR to capture transactions between two foreign parties involving a Chinese company or Chinese interests ("Transactions with China Interests") with the promulgation of the PRC Foreign Investment Law (FIL) and its implementation regulations.

In December 2020, China's National Development and Reform Commission (NDRC) and MOFCOM jointly released the Measures for Security Review of Foreign Investments. While these new FISR measures expand the scope of NSR compared to previous NSR-related rules, they continue to describe targeted sectors in broad strokes, leaving substantial room for interpretation and clarification.

In addition to the NSR system, MOFCOM promulgated the Provisions on the Unreliable Entity List (UEL) in September 2020, under which foreign individuals and entities who are on the UEL may be restricted or prohibited from investing in China. The detailed implementation rules and the proposed list of the unreliable entities have yet to be released.

In 2021, China further strengthened its legislation on data security in view of the popularity of cross-border transactions of Chinese internet-based companies. In particular, China promulgated the PRC Data Security Law (DSL) at the national law level on June 10, 2021, under which China established a data security review system under the NSR regulatory regime.

In response to the DSL, the Cyberspace Administration of China (CAC) released the Draft Amended Measures for Cyber Security Review (for public comment) in July 2021 to include more triggering events of cybersecurity review and expand the reviewing scope. Since the amended measures are, at this writing, still in draft form, the implementation of such rules are subject to further clarification and guidance from the relevant regulatory authorities.

LEGISLATIVE HISTORY

In 2011, a ministerial NSR panel was established by MOFCOM and NDRC pursuant to a set of rules issued by the State Council in the same year. The panel is responsible for conducting NSR of foreign investments in Chinese domestic enterprises. In furtherance of the 2011 NSR Rules, China's State Council issued additional rules in April 2015, expanding the NSR process to foreign investments in various free trade zones in China.

On July 1, 2015, China promulgated the PRC National Security Law (NSL), which is China's most comprehensive national security legislation at the national law level. However, the NSL's provisions do not detail how the security review processes and measures will be implemented by the relevant regulatory authorities.

On January 1, 2020, the FIL came into effect and reiterated, albeit briefly, that China will establish a security review system for foreign investments. On December 19, 2020, NDRC and MOFCOM jointly released the new FISR measures to amend and reiterate the existing NSR-related rules, pursuant to which a working office to be jointly led by NDRC and MOFCOM becomes the authority conducting foreign investment security review (the FISR Office).

"China has further strengthened its legislation on data security in view of the popularity of cross-border transactions of Chinese internet-based companies.

SCOPE OF NATIONAL SECURITY REVIEW

According to the new FISR measures, a foreign investment transaction is subject to security review when either of the following is true:

- The transaction is in sectors related to national defense and security, such as arms and arms-related industries or in geographic locations in close proximity to military facilities or defense-related industries facilities (the Military Defense Test)
- The transaction involves critical sectors significant for national security, such as critical agricultural products, critical energy and resources, critical equipment manufacturing, critical infrastructure, critical transportation services, critical cultural products and services,

critical information technology and internet products and services, critical financial services and key technologies, and will result in foreign investors' obtaining actual control of the invested enterprise (the Sensitive Sector Test)

Consistent with the FIL, the new FISR measures define "foreign investments" as direct or indirect investment activities conducted by foreign investors, including investments to initiate a new project or establish a new enterprise in China, either independently or jointly with other investors; acquisition of equity interest or assets of an enterprise in China; and investments through other structures in China.

In practice, the NDRC has already started monitoring Transactions with China Interests from an NSR perspective. For example, MOFCOM might notify NDRC during the antitrust filing process of any transactions (including for Transactions with China Interests) with potential national security concerns, and NDRC will request the relevant parties to provide relevant information and initiate the NSR process if it confirms there is a national security concern.

REVIEW PROCESS AND TIMELINE

The new FISR measures have provided the typical timeline and process for the security review of a foreign investment transaction. The stages are as follows:

- Preliminary review. Upon receipt of an application for foreign investment security review, the FISR Office will make a preliminary decision on whether the transaction is subject to general review within 15 working days, and inform the applicants of its decision in writing
- General review. If the FISR Office decides that the transaction should be subject to general review at the conclusion of the preliminary review, it will conduct and complete the general review within 30 working days after the date on which its preliminary review decision is made. Upon completion of the general review, the FISR Office will provide written notice to the applicants whether the proposed transaction is approved or subject to special review if it affects or may affect national security
- Special review. If the FISR Office determines that a proposed transaction should be subject to special review at the conclusion of the general review, the FISR Office will conduct and complete the special review within 60 days after its commencement. Under special circumstances, the FISR Office may extend the special review at its own discretion and notify the applicants of its decision of the extension in writing. The FISR Office will issue its final decision to applicants after the completion of the special review

During FISR Office's review, foreign investors are prohibited from making the proposed investment. The review of a foreign investment transaction must be completed prior to the closing of a foreign investment transaction that is subject to a review.

The NDRC has already started monitoring Transactions with China Interests from a national security reviews perspective.

OUTCOMES

Generally, the outcomes of a foreign investment security review can be any of the following:

- If a foreign investment transaction will not affect national security, the FISR Office will approve the transaction
- If a foreign investment transaction will or may impact national security, but the impact can be eliminated and the relevant parties accept mitigation measures, the FISR Office may approve the transaction with mitigation measures
- If a foreign investment transaction fails the security review, the FISR Office will reject the transaction

The decision of security review is final. A decision made by the FISR Office may not be administratively reconsidered or contested in court.

UNRELIABLE ENTITY LIST

In September 2020, MOFCOM promulgated the Provisions on the UEL, under which foreign individuals and entities listed on the UEL may be restricted or prohibited from investing in China. As of this writing, MOFCOM has not yet released the UEL.

The provisions state that the working group formed by various ministerial-level regulatory authorities, which is responsible for formulating the UEL, would consider various factors, such as the potential harm to state sovereignty, national security, national interests and Chinese entities/individuals in determining whether to include a foreign entity/individual in the UEL.

Implementation of the provisions on the UEL is primarily led by MOFCOM, which could also involve other relevant departments to form the working group that gives MOFCOM broad discretion in deciding whether to place a foreign entity on the list.

The consequence of being on the UEL is that foreign entities or individuals may face one or more of the following:

- Restriction or total ban on trading and investing in China
- Restriction or revocation of work permits or residence authorization
- Imposition of monetary fines according to the severity of the circumstances
- Other penalties or measures at the discretion of the working mechanism

MEASURES FOR CYBERSECURITY REVIEW

In the context of the increasingly active participation of domestic internet companies in cross-border activities, China promulgated the DSL at the national law level to further strengthen the regulation on data processing activities and safeguard the data security on June 10, 2021.

In particular, the DSL clearly states that China will establish a data security review system, and NSR will be conducted against data processing activities that affect or may affect the national security.

One month after the promulgation of the DSL, the CAC issued the draft amended Measures for Cyber Security Review for public comment. The draft CSR measures broaden the scope of cybersecurity review to capture data processing activities, and expands the regulatory and enforcement agencies to include the China Securities Regulatory Commission. In particular, the draft CSR measures require network operators that hold personal information of more than one million users to report to CAC before going public on foreign stock exchanges.

Based on recent cybersecurity enforcement activities, we expect that the final amended Measures for Cyber Security Review will be released soon. Foreign investors who have already invested or plan to make investments in China should pay close attention to the change of the legislative landscape with respect to data security.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

- Foreign investors should continue to be mindful of the NSL, FIL, DSL, UEL and other new NSR legislation, and pay special attention to transactions that might fall within the industries that are more likely to trigger national security concerns
- Foreign buyers should be cautious when completing transactions before obtaining national security approval, as they might be forced to divest the acquired assets if the transaction ultimately fails the security approval process
- Due to enforcement uncertainties and the broad scope of captured industries, foreign investors interested in sensitive industries may wish to conduct a comprehensive pre-transaction analysis, and to consider scheduling pre-application consultations with officials from the FISR Office to determine the NSR risk before commencing the formal application process

LESSONS LEARNED

- The promulgation of the DSL indicates that China has been making a continued effort to implement a more structured and comprehensive system to strengthen the review and enforcement on transactions that might have national security implications
- Although China has introduced much new legislation in recent years to establish a comprehensive NSR regime, the vague language of the new rules leaves substantial room for interpretation and clarification
- Although not explicitly stipulated under relevant NSR laws and regulations, it is likely that the reviewing authority may consider whether a foreign investor is, directly or indirectly, in connection with any foreign governments or any political parties of a foreign country when evaluating foreign investment transactions


GALLERY OF MODERN ART
MUMBAI

India

Government approval is required for all foreign investments from countries sharing a land border with India

By Sayak Maity

Non-residents investing in India are required to comply with India's Foreign Direct Investment Policy (FDI Policy) and other foreign investment and foreign exchange regulations, including the Foreign Exchange Management Act (FEMA) and the regulations and notifications thereunder.

The FDI Policy is issued and revised from time to time by the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry, Government of India (GOI).

REGULATORY FRAMEWORK

Non-resident investors do not require any prior licensing or registration for foreign direct investment (FDI) in India. India regulates FDI depending on the sector in which the investment is proposed to be made.

FDI is permitted in most sectors under two routes: the automatic route and the approval route.

- Under the automatic route, the investment may be made without any approval from any government agency. Examples of sectors under the automatic route include, among others, infrastructure, healthcare, manufacturing and renewable energy
- Under the approval route, prior government approval is required for FDI. Sectors under the approval route include, among others, multi-brand retail, broadcasting, banking, defense, mining, print media and biotechnology. FDI is prohibited in a limited number of sectors such as manufacturing of tobacco, trading in transferrable development rights, real estate business (subject to limited exceptions), and gambling and betting, including casinos

FDI in certain sectors permitted under either route is also subject to a specified cap and/or conditions. Where a cap is prescribed for a sector, the FDI in any entity in that sector cannot exceed the prescribed cap. The GOI revises the list of sectors under the automatic route, approval route and prohibited category, as well as any caps and other conditions applicable to FDI in any sectors, on a periodic basis.

On April 18, 2020, via new regulation dubbed Press Note 3, the GOI added all FDI by non-resident entities located in (or having "beneficial owners" in) countries that share a land border with India to the approval route, regardless of the quantum of investment or sector. Countries that share a border with India include Pakistan, Bangladesh, China, Nepal, Myanmar and Bhutan.

The term "beneficial owner" has not been defined in the context of Press Note 3. Several market participants have adopted the approach of using thresholds defined in other statutes as benchmarks for determining beneficial ownership in the context of Press Note 3.

WHO FILES

If FDI is permitted under the approval route, the target company resident in India is required to file the application for approval. The application requires detailed information and documentation about the proposed investment, including incorporation documents and financial documents of the investor, terms of the foreign investment, and other documents required to verify the identity and suitability of the investor and the risks involved in approving the proposed FDI.

If FDI is permitted under the approval route, the target company resident in India is required to file the application for approval.

The DPIIT processes the applications received under the approval route and coordinates with the relevant ministry or department of the GOI that has the primary responsibility for the relevant sector (the Competent Authority) to jointly review such applications.

TYPES OF DEALS REVIEWED

All investments in sectors under the approval route are reviewed. Proposed investments in certain sectors such as defense, broadcasting and telecommunication also go through an additional layer of security clearance from the Ministry of Home Affairs. And again, all investments from countries that share a land border with India are subject to review by the DPIIT and the Competent Authority.

FDI by Non-Resident Indians (NRIs) is regulated by separate regulations and this note does not cover such regulations.

SCOPE OF REVIEW

The criteria for review are broad, and all aspects of each application are considered part of the review. The government has wide discretion to grant or reject an approval. The DPIIT and Competent Authority consider the reputation of the foreign investor, its history of owning and operating similar investments, national security and the overall impact of the proposed investment on the national interest.

TRENDS IN THE REVIEW PROCESS

The approval process was revamped in 2017 to establish the Foreign Investment Facilitation Portal, which serves as a single window for prospective investors to communicate with the GOI. The DPIIT has been tasked with the responsibility of facilitating FDI. The DPIIT's concurrence is mandatory for a Competent Authority to reject an application or to impose any additional conditions not provided in the FDI Policy or applicable law.

The GOI has not laid out specific criteria for evaluation of investments, and appears to be mainly concerned with national security. With the heightened scrutiny, direct investments by Chinese investors and transactions with significant indirect participation of Chinese investors are being put on hold while awaiting more specific guidance from the GOI on Press Note 3. While a number of applications have been filed under Press Note 3, until date only a limited number of proposals have received approval.

REVIEW PROCESS TIMELINE

The DPIIT, along with the relevant Competent Authority, is required to make its decision within eight to 10 weeks after receiving an application. A single governmental department relevant to the sector (subject to security clearance, if applicable) identified by the DPIIT is required to take the lead in processing the application.

All applications under Press Note 3 require security clearance, which coupled with the increased scrutiny involved in such applications, almost always results in a significantly elongated approval timeline.

2021 UPDATE HIGHLIGHTS

The GOI is yet to issue any formal clarifications on the scope of Press Note 3 and the criteria for evaluation of applications for approval under Press Note 3.

However, the GOI did introduce several progressive changes to the FDI Policy. In particular:

- In a long-awaited move, the cap for FDI (under the automatic route) in insurance companies has been increased from 49 percent to 74 percent; non-investors will now be able to exercise a greater degree of control over Indian insurance companies, although the increase in FDI limits has been accompanied by certain additional conditions (including, among others, the requirement of a majority of the board of directors of an insurance company to be constituted of Indian resident individuals, inclusion of independent directors on boards of insurance companies and solvency-linked restrictions on dividend payments)
- The FDI cap in the telecom sector (under the automatic route) has been increased from 49 percent to 100 percent, to accompany other major structural and process reforms for the telecom sector, which are primarily aimed at increasing liquidity and reducing the regulatory burden of the telecom sector

The changes to the FDI Policy are expected to drive significant inbound investments in the strategically important sectors of insurance and telecom.

The criteria for review are broad, and all aspects of each application are considered part of the review.

Japan

Japan continues to tighten foreign direct investment reviews but also offers a prior notification exemption

By Jun Usami, Nels Hansen, Shino Asayama, Marina Tatsumi and Mizuki Hyuga

Japan's Ministry of Finance (MOF) and its ministries with jurisdiction over the target entity's business review foreign direct investments under the Foreign Exchange and Foreign Trade Act (FEFTA).

Japan enacted an amendment to the FEFTA on November 29, 2019. When the amendment came into force on June 7, 2020, it expanded the scope of foreign direct investment review, lowered the threshold for screening the purchase of listed companies' shares to acquisitions at 1 percent or more, and introduced a new prior notification exemption scheme for share acquisitions.

WHO FILES

Depending on the type of business in which the target entity is engaged or the nationality of the foreign investor, FEFTA requires a "foreign investor" to submit a prior notification and/or a post-transaction filing through the Bank of Japan to the MOF and relevant ministries. Foreign investors include:

- Individuals who do not reside in Japan, termed "non-residents"
- Entities or other groups established under laws or regulations of, or having their principal offices in, foreign countries
- Entities in which an individual or entity described above holds 50 percent or more of the total voting rights
- Partnerships operating in the investment business of which 50 percent or more of the total capital has been contributed by foreign entities, foreign groups or non-residents, or the majority of general partners are non-residents
- Entities in which the majority of directors or representative directors are non-residents

TYPES OF DEALS AND ACTS REVIEWED

The MOF and Japan's ministries with jurisdiction over the target entity's business review two types of transactions: designated acquisitions and inward direct investments.

A designated acquisition is a transaction wherein a foreign investor acquires shares of a non-listed company from other foreign investors.

An inward direct investment occurs when a foreign investor:

- Acquires a listed target entity's shares, after which the foreign investor "beneficially owns" 1 percent or more of the listed target entity's outstanding shares. (The 2020 FEFTA Amendment reduced the threshold from 10 percent to 1 percent.) "Beneficial ownership" means the possession of voting rights by the foreign investor, collectively with its "special related persons," through shares held directly by any such persons, shares that any such person has been granted authority to manage on a discretionary basis and shares with respect to which any such person has been granted a voting proxy.
- "Special related persons" means that certain direct and indirect subsidiaries and certain direct and indirect parent companies of the foreign investor, the officers and directors of the foreign investor and those direct and indirect subsidiary and parent entities to which this definition applies, entities of which the officers and directors of clause constitute a majority of the officers and directors where the foreign investor is an individual, the foreign investor's spouse and direct blood relatives; where the foreign investor is a government, administrative body, public body or the like, governments, administrative bodies and public bodies and the like of the same country or region as the foreign investor; and where other non-residents who have agreed to exercise voting rights together with the foreign investor and the "special related persons" of such other non-residents.
- The direct and indirect subsidiary and parent entities to which this applies are defined as entities in which the foreign investor directly holds 50 percent or more of the voting rights, entities that the entities of (1) directly hold 50 percent or more of the voting rights in; (2) entities that directly hold 50 percent or more of the voting rights in the foreign investor; (3) entities that directly hold less than 50 percent of the voting rights in the foreign investor individually but, in the aggregate with the direct holdings of entities that such entity directly holds 50 percent or more of the voting rights in, directly hold

"The introduction of the exemptions for prior notification of share acquisitions will reduce the burden on foreign investors.

50 percent or more of the voting rights in the foreign investor; (4) entities that directly hold 50 percent or more of the voting rights of entities described in (2) or (3); (5) entities that the entities described in (5) directly hold 50 percent or more of the voting rights of; (6) entities that the entities of (5) or (6) directly hold 50 percent or more of the voting rights of; (7) entities that the entities of (3) directly hold 50 percent or more of the voting rights of; and (8) entities that the entities of (3) or (8) directly hold 50 percent or more of the voting rights of.

- Acquires voting rights of a listed target entity, after which the foreign investor beneficially owns 1 percent or more of the listed target entity's total voting rights. (This threshold will be less than 1 percent of outstanding shares to the extent that there are shareholders holding odd lots.)
- Acquires shares of an unlisted target entity, including at incorporation, from resident shareholders
- Consents to material changes to the business purposes of an unlisted target company at any beneficial ownership level, or a listed target company where the foreign investor's beneficial ownership accounts for one-third or more of the target company's total voting rights
- Consents to shareholder meeting proposals that are defined to have a material impact on the target Japanese company's business in the regulations, specifically including (among other things) the appointment of a foreign investor or a foreign investor's "closely related person" as a director or an audit & supervisory board member; the transfer or disposal of the entirety of the business; a merger in which the target Japanese company is not the surviving company; or dissolution of the company for an unlisted target company at any beneficial ownership level, or for a listed target entity, where the foreign investor's beneficial ownership accounts for 1 percent or more of the total voting rights of the target company
- Obtains proxy voting authority wherein the target company is publicly listed and the aggregate voting rights beneficially owned by the foreign investor after obtaining such proxies equals or exceeds 10 percent of the total voting rights, or the target company is not publicly listed. This applies only where the proxy is not held by the target company or any of its officers or directors; the agenda items with respect to which proxy voting authority is granted may grant the proxy holder control over the management of the target company or material influence over the management of the target company; and the proxyholder solicited the proxy
- Acquires the right to cause voting rights to be exercised with respect to listed companies, after which acquisition such foreign investor's total voting rights beneficially owned equals or exceeds 1 percent of the total voting rights
- Obtains the agreement of other foreign investors to jointly exercise their respective beneficially owned voting rights of a publicly listed company, where the aggregate beneficially owned voting rights across all relevant foreign investors account for 10 percent or more of the total voting rights of the publicly listed company
- Lends to a Japanese company where both the amount owed to the foreign investor exceeds JPY 100 million and the aggregate amounts owed including corporate bonds held by the foreign investor exceed 50 percent of the target company's debt
- Purchases corporate bonds that meet all of the following criteria: The bonds are issued to the specific foreign investor; the redemption date is more than one year in the future; the balance due on the bonds exceeds JPY 100 million; and the aggregate of the balance due on the bonds and under other loans made by the foreign investor accounts for more than 50 percent of the target company's debt

VOTES IN FAVOR OF AGENDA ITEMS

"Designated industries" are those for which transactions may affect national security, public order or the public safety of Japan, or may have a significant adverse effect on the Japanese economy, such as airplanes, weapons, nuclear power, agriculture, forestry and fisheries, and the oil industry.

When the target company is in a designated industry, foreign investors who intend to take the following actions require advance approval in response to pre-action notice filings:

- Vote in favor of a shareholders' meeting proposal for the appointment of the relevant foreign investor or its closely related persons as a director or an audit & supervisory board member of the target entity. This requirement applies not to third-party foreign investors, but only to the foreign investor who is or whose closely related person is nominated. In this case, a prior notification is required regardless of whether the appointment is proposed by the foreign investor itself or a third party (including the target entity)
- Vote in favor of a shareholders' meeting proposal submitted by the foreign investor to transfer or dispose of the target entity's businesses in designated industries

If the resolution is proposed by a third party (not directly or indirectly proposed by the foreign investor), closely related persons include:

- The directors and officers (regardless of title, those with the power to execute business, and including the Japan representative) of the foreign investor and certain of its direct and indirect parent and subsidiary entities
- Members of the governing body with authority to make investment decisions, whether termed an investment committee,

management committee or otherwise, for the foreign investor or certain of its direct or indirect parent or subsidiary entities
- The foreign investor's spouse and direct blood relatives, if the foreign investor is an individual
- The directors, officers, agents and employees of the individual, entity or other organization that have agreed with the foreign investor to jointly exercise their voting rights, and such individual, entity or other organization's closely related persons

If the resolution is proposed directly or indirectly by the foreign investor, however, closely related persons include:
- Employees, agents, directors and officers of the foreign investor and certain of its direct and indirect parent and subsidiary entities
- Employees, agents, directors and officers of individuals or entities for whom the foreign investor is a major customer or supplier, or that are major customers or suppliers of the foreign investor
- Persons who have received large amounts of money or other assets from the foreign investor
- The foreign investor's spouse and direct blood relatives, if the foreign investor is an individual
- Individuals or entities who agreed with the foreign investor to jointly exercise their voting rights, and such individuals' or entities' closely related persons
- Persons who fell within any of the categories described in this list within the past year

FILING AND REVIEW PROCESS

A foreign investor is required to make a prior notification and/or a post-transaction filing through the Bank of Japan to the MOF and relevant ministries with respect to certain inward direct investments. Prior notification filings may be required depending on whether the target entity is engaged in designated industries or the characteristics—including nationality or location (including region) and whether the foreign investor qualifies for exemptive relief—of the foreign investor.

Transactions requiring prior notification filings are subject to review and approval by the MOF and the relevant ministries. Where required, foreign investors must make their prior notification filings within six months prior to the act of inward direct investment.

By default, transactions subject to a prior notification filing cannot be closed until the expiration of a 30- calendar-day waiting period from the date on which MOF and the ministry having jurisdiction over the transaction received the prior notification filing. However, the waiting period is usually shortened to two weeks. Nevertheless, the MOF and the relevant ministries can extend the waiting period up to five months if necessary for the review.

If the MOF and the ministry with jurisdiction over the transaction find the transaction under review problematic in terms of national security, they can recommend that the foreign investor change the content of the transaction or discontinue the transaction after hearing opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions. The foreign investor must notify the MOF and the relevant ministry of whether it will accept the recommendation within ten days after receiving such recommendation. If the foreign investor does not provide notice or refuses to accept the recommendation, the MOF and the relevant ministries may order a modification of the content of the transaction or its discontinuance before the expiration date of the waiting period.

A foreign investor who obtained a prior notification filing approval for certain inward direct investments is required to make a post-transaction filing of the completion of the inward direct investment within 45 days of the completion of the transaction or the act. Inward direct investments for which such a post-transaction filing is required include the acquisition or disposal of shares or voting rights, lending money or receipt of repayment, or the purchase of corporate bonds or redemption of the same. However, voting in favor of proposals at shareholders' meetings does not require a post-transaction filing.

A foreign investor is required to submit a prior notification filing with regard to a designated acquisition if the target company is engaged in designated industries. Post-transaction filings are not required for a designated acquisition unless the foreign investor claimed an exemption from prior notification filings for its stock acquisition.

EXEMPTION SCHEME FOR PRIOR NOTIFICATIONS

The 2020 FEFTA Amendment introduced exemptions from the prior notification filings otherwise required for stock purchases. Foreign investors are categorized into three types under the exemptions from the prior notification filings: foreign financial institutions; general investors; and non-qualified foreign investors.

All of the exemptions are subject to the requirement that the foreign investor comply with the following three exemption conditions:
- The foreign investor and its closely related persons will not serve on the board of the target company as directors or audit & supervisory board members
- The foreign investor will not make proposals at shareholders' meetings, whether directly or through third parties, to dispose of material businesses in designated industries
- The foreign investor will not access sensitive confidential technologies that are related to the target company's business in designated industries

The coverage of the exemption differs depending on the type of foreign investor involved. The chart below summarizes the exemptions from prior notification filing requirements for share acquisitions in listed companies. Foreign investors do not need to file to be eligible for the exemption.

For foreign financial institutions that comply with the exemption conditions, the applicability of the exemptions is simple: They are exempted from filing a prior notification without any cap on their investment so long as they comply with the exemption conditions.

For general investors, the scope of applicability of the exemptions depends on whether the target company's business listed under the designated industries is categorized as a "core" sector. The FEFTA classifies designated industries into "non-core sectors" and "core sectors."

Core sectors include weapons, airlines, space, nuclear facilities, dual-use technologies, cybersecurity, electricity, gas, telecommunications, water supply, railway services and oil. Where general investors acquire shares of a target company that conducts a core sector business, they will be exempted from making a prior notification until the investment reaches 10 percent, provided that they comply with not only the exemption conditions but also the additional conditions for core sector businesses, which require that foreign investors do not sit on the target company's executive board or committees that make important decisions in the core sector businesses, and that foreign investors do not make proposals, in written form, to the executive board or board members of the target company requiring their responses and/or actions by a specific deadline.

The MOF publishes a list of public companies showing the classification of their respective businesses to indicate whether such businesses fall within the categories of "non-core sectors," "core sectors," or "undesignated" sectors. The list is to be reviewed and updated periodically; the latest update as of this writing was in July 2021.

OUTCOMES

- Japan expanded the coverage of foreign investment review in line with global trends. At the same time, the introduction of the exemptions for prior notification of share acquisitions will reduce the burden on foreign investors who only have a passive, pure investment intention

- The 2020 FEFTA Amendment does not prevent foreign investors from engaging with target companies, but a foreign investor who may wish to nominate board members at the target company's shareholders' meeting with whom the foreign investor or its related parties has a connection or relationship should seek counsel early to evaluate whether the proposal—and share acquisitions in advance of the proposal—requires a prior notification filing to be made

- State-owned enterprises and sovereign wealth funds are non-qualified foreign investors, but if they receive accreditation from MOF, they can be treated in the same way as general investors

LESSONS LEARNED

- Investors such as investment funds who wish to make flexible and speedy investments in response to market trends should consider making a prior notification filing every six months for possible investments in a target company. If foreign investors are unsure of the exact number of shares and voting rights they may acquire within the next six months, they can specify the maximum numbers in which they could imagine investing in a relatively short time period.

- Even though the MOF and other relevant ministries can extend the 30-day waiting period for prior notifications, when ministries need more time for review, they usually ask filers to withdraw the original filing before the expiration of the 30-day period and resubmit later, when approval is about to be granted. Sometimes filers receive questions regarding their own business, intended transactions with the issuer and similar questions from the ministries, and may even be asked to make covenants in a filing relating to possible transactions (e.g., to not propose to sell a particular business or to not acquire confidential technical information of the target company). There is room to negotiate the language of the proposed covenants and filers can suggest changes to the ministries. After these negotiations, when the relevant ministries regard the contents of the filing to be sufficient to grant approval, filers may refile the prior notification with the agreed-upon covenants, and usually obtain clearance in less than 30 days.

- In principle, the applicability of a designated industry is determined based on the issuer's actual business. In practice, a filer makes the classification judgment based on publicly available information, such as company websites and commercial registries, as well as input from the issuer, if possible. For investments in an issuer with certain licenses or registrations, prior notification may be required based on the type of license or registration, regardless of actual business activities. For example, if a company is a "broadcaster" that has registered under the Broadcasting Act, or is a "telecommunications carrier" that has registered under the Telecommunications Business Act, the company is considered to be engaged in those businesses and falls under the category of designated industries, even if the company does not actually conduct such business activities.

New Zealand

Recent legislative reforms have increased the New Zealand government's ability to take national interest considerations into account, but have also looked to exclude lower-risk transactions

By Joshua Jones[1]

The Overseas Investment Office (OIO) is the regulator responsible for the administration of the Overseas Investment Act 2005 (OIA), the statute that regulates investments in New Zealand assets by overseas investors.

The OIA sets out a consent regime in relation to investments that meet a value threshold or are in respect of certain types of land. In mid-2021, a national security and public order (NSPO) regime was introduced, applying to certain investments in strategically important businesses that don't otherwise require consent.

The OIO has delegated authority to determine most consent applications, based on an assessment of whether the investor meets an investor test and (for land acquisitions) the benefit to New Zealand test. For certain land acquisitions, or where a national interest assessment is required — including as part of the NSPO regime — ministerial approval is required.

In response to the pandemic, the New Zealand government introduced a separate notification pathway that applied to a broad range of transactions that did not already trigger a consent requirement. That regime subsequently has been discontinued, but still applies to transactions entered into before June 7, 2021.

WHO FILES

An overseas person making an acquisition that requires consent under the OIA's consent regime, or clearance under the NSPO regime, must apply to the OIO for consent or clearance (as applicable) before completion of the acquisition. Any agreement to make the acquisition must be subject to receiving consent or clearance.

A consent application includes a filing fee that varies according to the type of transaction and transaction value, and whether a national interest assessment is required. A notification under the NSPO regime does not require any filing fee.

TYPES OF DEALS REVIEWED

Consent under the OIA is required for a range of acquisitions by overseas persons, including an acquisition of a more than 25 percent ownership or control interest in a target entity (or an increase in an existing interest to or through 50 percent, 75 percent or 100 percent) where:

- The value of the applicable New Zealand assets, or consideration attributable to those assets, exceeds NZD 100 million
- The target owns or controls (directly or indirectly) an interest in sensitive land. The definition of sensitive land is very detailed and requires careful checking and analysis from qualified advisers. In particular, land may be "sensitive" if it adjoins certain types of land, or is "associated" with other land already controlled by an overseas person. It also includes all residential land
- The target owns or controls (directly or indirectly) an interest in fishing quotas

Consent requirements can be triggered for transactions occurring upstream of the New Zealand assets, as well as for direct acquisitions in New Zealand.

Certain types of investors receive differing treatment for their transactions:

- Australian investors: A higher monetary threshold applies to acquisitions by certain Australian investors. Currently, that higher threshold is NZD 552 million for Australian non-government investors and NZD 116 million for Australian government investors
- Free trade agreement investors: Consistent with New Zealand's free trade agreement (FTA) commitments, a higher monetary threshold of NZD 200 million applies to acquisitions made by certain non-government investors from South Korea, Taiwan, Hong Kong, China, Brunei, Chile and countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is in force
- Residential land: Consistent with New Zealand's treaty obligations, certain Australian and Singaporean investors are exempt from consent requirements for investments in residential land
- Foreign government investors: Further scrutiny is applied to investments by foreign government investors, in respect of which a national interest assessment is undertaken as part of the consent process

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Under the NSPO regime, certain investments in strategically important businesses (where a consent requirement is not already triggered) can, and in some cases must, be notified to the OIO for clearance by the relevant minister. Notification is mandatory for investments in critical direct suppliers to New Zealand's intelligence or security agencies and businesses involved in military or dual-use technology, but is otherwise optional. Non-notified transactions can be called in for review by the minister before or after completion of the transaction.

SCOPE OF THE REVIEW

Under the consent regime, each overseas investor and the individuals who control that investor are required to meet a bright-line investor test comprising a closed list of character and capability factors. Those factors include:

- Convictions resulting in imprisonment
- Corporate fines
- Prohibitions on being a director, promotor or manager of a company
- Penalties for tax avoidance or evasion
- Unpaid tax of NZD 5 million or more

For investments in land, the overseas investor must also satisfy the "benefit to New Zealand" test or, where the land is residential or forest land, an alternative set of criteria. The benefit test requires the investor to demonstrate the benefits that will be delivered by the transaction (compared to the position if the transaction did not occur) against a list of economic, environmental and other factors. This area of the law is currently in flux, with changes made in recent legislative amendments due to come into force some time before mid-May 2022.

In addition, a national interest assessment is applied to transactions involving strategically important businesses or being undertaken by foreign government investors. National interest assessments are supported by a cross-government standing committee that looks across the New Zealand government system to obtain and use a wide range of information. The minister has broad discretion to determine whether to block a transaction on the basis that it is contrary to New Zealand's national interests.

Under the NSPO regime, the minister will consider whether there are any national security or public order risks associated with the transaction. If there are such risks, the minister can impose conditions on the transaction, prohibit the transaction (if not yet completed) or require a disposal (if completion has occurred).

REVIEW PROCESS TIMELINE

Currently, there are no statutory timeframes that apply to the OIO or ministers' consideration of a consent application under the OIA, making it difficult to specify with certainty how long a consent process will take.

For a non-land application, a decision typically takes at least two to three months from the date the application is accepted for processing and payment of the fee is made. Depending on its complexity, a land application can take five to seven months, or even longer. From November 2021, statutory timeframes for consent applications will be phased in. The OIO has not yet published details of the applicable timeframes.

Under the NSPO regime, an initial review period of 15 working days applies, after which the OIO will inform the applicant whether the transaction has been cleared or is being subjected to a more detailed assessment. If a more detailed assessment is required, a further 40 working-day review period applies, which can be extended once by the minister for a further 30 working-day period up to a maximum overall period of 85 working days.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

In most circumstances, it is difficult to obtain consent under the OIA in advance of agreeing a transaction, as the consent regime operates to screen specific transactions rather than simply acting on the identity of the investor. An investor may apply on a standalone basis to be screened against the investor test, but this does not negate the need to seek consent for a relevant transaction (though in theory it would make that consent application easier and quicker).

Where consent under the OIA is required, or the investor is required or wishes to make a notification under the NSPO regime, the transaction should be conditional on receiving the relevant consent or clearance, and must not proceed to completion until such consent or clearance is received.

Given the relatively long review timeframes, investors should assess early in a transaction process whether consent or notification under the OIA will be required. In some (but not most) circumstances, a discussion with the OIO ahead of filing can be helpful to gauge the OIO's reaction to aspects of the transaction.

TRENDS IN THE REVIEW PROCESS

The New Zealand government had already commenced a reform program in relation to the OIA when the pandemic occurred. As a result of the pandemic, aspects of that reform process — particularly in relation to national interest considerations — were accelerated and an additional temporary screening regime was put in place to guard against potentially harmful or opportunistic foreign investments.

In mid-2021, that temporary screening regime was suspended (with the NSPO regime coming into force) around the same time as the reform process was completed. The commencement of a number

of the legislative amendments resulting from the reform process was delayed, to allow the OIO time to prepare for those changes.

While the recent reforms have resulted in a number of welcome changes to exclude lower-risk transactions from consent requirements, the New Zealand government has now given itself broader powers to intervene in transactions on national interest grounds. As those changes have only recently been implemented, there is not yet a meaningful track record of how the relevant ministers intend to wield those powers.

Historically, there have been few formal rejections by the OIO or ministers of consent applications. In part, that results from investors withdrawing applications before a decision was made.

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