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

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

This guide reflects the laws and practice as of October 2019. This guide is for reference only, and it should not be considered a substitute for legal advice.
UNITED STATES: In November 2018, the U.S. introduced, for the first time, a filing obligation for certain types of foreign investment transactions involving critical technology. Moreover, certain types of transactions now fall within CFIUS’s jurisdiction even if they could not result in control by a foreign person over a U.S. business. More generally, concerns about Chinese and Russian investment in the United States have become more pronounced, and there is a perception that CFIUS tends to be more aggressive today in finding national security concerns and impeding foreign investment. As a consequence, CFIUS screening proceedings tend to take substantially longer today than they did as little as two years ago.

UNITED KINGDOM: In July 2018, the UK Government passed a White Paper, which, once implemented, will introduce further legislation for foreign investments related to national security and remove this from the scope of UK merger control. The proposal includes the possibility of voluntary notifications for certain acquisitions that may raise national security concerns, including where more than 25% of shares or votes, or significant influence or control, are being acquired in a UK entity.

FRANCE: Various amendments to the French foreign investment control regime have recently been adopted (Decree n°2018-1057 and Loi Pacte). The revised regime now includes an extended list of strategic sectors (the new sectors are: cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors and data hosting). Also, the powers vested with the French Minister of Economy in reviewing foreign investments have been reinforced and new provisions aiming at achieving greater transparency have been introduced. Certain provisions relating to shares held by the French State in public companies have also been added.

ITALY: In 2017 and 2019, Italy’s foreign investment regulation was strengthened. The government’s powers to review foreign investments were extended to certain key sectors, namely: critical infrastructures (e.g., data collection, management systems, financial infrastructures) and critical technology (e.g., 5G, artificial intelligence, robotics, semiconductors, dual-use technology, cybersecurity). Although the government enjoys a high degree of (technical and political) discretion when it makes use of its power to intervene against a particular foreign investment, it shall still apply objective, proportionate and non-discriminatory criteria, and its decisions may be reviewed by the administrative courts.
**JAPAN:**
The rules related to the Japanese Foreign Exchange and Foreign Trade Act were recently amended to give more focus on cybersecurity and to tighten the scrutiny of investments in businesses active in information processing. If a foreign investor seeks to invest in a Japanese company engaged in such activities on or after August 31, 2019, the investment may require a prior notification and may need to undergo a review by the authorities before being carried out.

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

**CHINA:**
China’s new Foreign Investment Law was adopted on March 15, 2019 and will become effective on January 1, 2020, which will replace the existing laws regulating foreign investments, i.e. the Wholly Foreign-Owned Enterprise Law, the Sino-Foreign Equity Joint Venture Enterprise Law, and the Sino-Foreign Cooperative Joint Venture Enterprise Law and the regulations and rules promulgated thereunder. The new law provides a unified framework for foreign investment, reemphasizes the national treatment plus negative list approach, and focuses on the protection of intellectual properties. However, the new law only contains principles and general rules for foreign investment and uncertainties and ambiguities remain to be clarified by implementation rules in the future.

**EUROPEAN UNION:**
In March 2019, Regulation (EU) 2019/452 was adopted, which establishes a framework for the screening of foreign direct investments into the EU. The Regulation provides a mechanism for EU-wide cooperation and information sharing to allow the EU member states to make informed decisions taking into account all relevant risks and protect pan-European interests. This new screening mechanism will apply from 11 October 2020.
RELEVANT LAWS AND AUTHORITIES

1. **What are the main laws regulating foreign investments?**

The main laws regulating foreign investments currently in effect include Wholly Foreign-Owned Enterprise Law, the Sino-Foreign Equity Joint Venture Enterprise Law, and the Sino-Foreign Cooperative Joint Venture Enterprise Law ("Existing Foreign Investment Laws") and the regulations and rules promulgated thereunder as listed in question 3 below.

The Foreign Investment Law adopted by the People’s Congress on March 15, 2019, will become effective on January 1, 2020. By then the Existing Foreign Investment Laws will be repealed while the new law offers a five-year transition period within which the existing foreign-invested enterprises ("FIEs") may maintain their organizational forms under the Existing Foreign Investment Laws.

2. **Which authorities are charged with applying those laws?**

The Ministry of Commerce ("MOFCOM") and the National Development and Reform Commission ("NDRC") and their local branches are the main authorities applying the laws relating to foreign investment.
What other legislation is relevant for foreign investments?

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

- Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-Invested Enterprises ("FIE Filing Measures");
- Special Administrative Measures (Negative List) for the Access of Foreign Investment ("Negative List");
- Administrative Measures for Approval and Filing of Foreign-Funded Projects ("Projects Measures");
- Catalogue of Investment Projects Subject to Government Verification and Approval ("Projects Catalogue");
- Catalogue of Industries for Guiding Foreign Investment (2017 Revision) ("Industries Catalogue").

TRANSACTIONS SUBJECT TO REVIEW

Which types of transactions are caught?

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

(i) FIE Approval / Filing

China implements a national treatment plus “negative list” approach for access of foreign investment to China, which means

- Filing through MOFCOM’s online system is needed for establishment of FIEs or acquisition of domestic enterprises by foreign investors where the industry of the FIE / target is not included in the Negative List.
- The Negative List contains areas in which foreign investments are either prohibited or restricted. Where restricted, foreign investments—including establishment of FIEs and acquisitions of domestic companies by foreign investors—are subject to approval from MOFCOM or its local branches.

(ii) Security Review

The following transactions are subject to foreign investment security review by MOFCOM:

- Foreign investors’ acquisition of military industrial enterprises or related supporting enterprises, enterprises located near key and sensitive military facilities, and other entities relating to national defense; and
- Foreign investors’ acquisition of “key domestic enterprises” in areas such as agriculture, energy and natural resources, infrastructure, transport, technology, equipment manufacturing, etc., whereby the foreign investors might acquire control thereof. However, the thresholds for “key domestic enterprises” are not clearly defined in the law.

(iii) Project Review

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

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

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

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

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

6 Are minority interests caught?
Yes. Under the Existing Foreign Investment Laws, foreign shareholders should customarily contribute no less than 25% in FIEs while the Foreign Investment Law is silent on this aspect.

7 Are there sector-specific rules?
Yes.

- **Industries Catalogue.** This catalogue contains, among other things, sectors where foreign investments are encouraged.
- **Negative List.** Foreign investments in the listed sectors are either prohibited or restricted and subject to approval (the restrictions may include limitations on the percentage of the foreign shareholding or a prohibition of foreign-invested partnerships).
- **Projects Catalogue.** Foreign investments in projects that fall into the scope of the catalogue are subject to NDRC approval; other foreign-invested fixed-asset projects are subject to NDRC filing.

8 Is there any kind of de minimis threshold?
No.

9 Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?
No.

10 Can comfort letters be obtained from the authorities confirming that a transaction is not subject to review?
No. However, under the Security Review Provisions, before filing a formal application for security review, an applicant may request a consultation with MOFCOM on the procedural issues concerning its acquisition of a domestic enterprise. The consultation is not a prerequisite for submitting the formal application, and the consultation result is not binding.

PROCEDURE

11 Is a filing required (mandatory) or possible (voluntary)?
When applicable, filing is mandatory.

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

(i) FIE Approval / Filing

- For non-Negative List sectors, a filing with MOFCOM should be made when the parties handle registration with the local administration for market regulation (“AMR”). This should happen when a new FIE is incorporated (for greenfield investment) or within 30 days after the relevant resolution of the domestic company that is to be invested by a foreign
investor (for M&A). China is promoting a “Single Window” approach for FIE filing, i.e., applicants could conduct registration with AMR and filing with MOFCOM through a consolidated submission, though it may take time for local authorities to fully implement this approach.

- For the restricted sectors in the Negative List, approval from MOFCOM or its local branch should be obtained before AMR registration.

- Considering that the transaction documents need to be provided for MOFCOM approval / filing and AMR registration, the applications should be made after signing. Where MOFCOM filing is applicable, the filing could be made after closing as it is a mere formality; where MOFCOM approval is applicable, submitting the application after signing (as a closing condition) would be more advisable.

(ii) Security Review

Where security review is applicable, the filing should be made after signing and the parties should not proceed to closing until the review is completed.

(iii) Project Review

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

Which party is responsible for making the notification?

- **FIE Approval / Filing.** The representative or agent delegated by all the investors (or the board of directors of the FIE) should be responsible for making the filing.

- **Security Review.** Foreign investors should be responsible for making the filing.

- **Project Review.** All parties are equally responsible though, in practice, usually the Chinese party mainly takes charge of the filing because of its relationship with the local government.

Which information is required for the filing?

(i) **FIE Approval / Filing**

The following documents are required if filing is applicable (i.e., for non-Negative List sectors):

- The FIE’s name pre-approval document (for incorporation), or its business license (for investment in an existing enterprise);

- A standard form commitment letter signed by all investors (for incorporation) or by the FIE’s legal representative (for investment in an existing enterprise);

- Power of attorneys (where applicable);

- Identification or registration certificates of all investors;

- Identity document of the FIE’s legal representative (if involving change of the legal representative);

- Ownership structure chart of FIE’s ultimate actual controller (if involving change of control);

- Where overseas companies’ shares are used as consideration, the Certificate of Overseas Investment should be provided.

If approval is applicable (i.e., for restricted sectors in the Negative List), in addition to the above, the following documents are required:

- Written application for establishment of the FIE;

- Feasibility study report;

- The articles of association and the joint venture agreement (in case of a joint venture) of the FIE;

- Name list of the legal representative and the directors of the board of the FIE;

- Credit certificate of the foreign investor;

- Other documents required by the approval authority.
(ii) Security Review

Following documents should be submitted when filing a formal application with MOFCOM for security review:

- Written application for security review and a statement describing the M&A transaction;
- The foreign investor’s identification or registration certificate and credit certificate, which have been legally notarized or certified; authorization letter issued by the foreign investor and the authorized person’s identification document;
- A statement on the information pertaining to the foreign investor and its associated enterprises, and a statement on its relationship with the government of relevant country;
- A statement on information about the target, its articles of association, business license, audited financial statement for the previous year, organizational structure charts prior to and after the M&A, and a statement on enterprises invested by the target and photocopies of their business licenses;
- Articles of association, joint venture contract, or partnership agreement of the FIE to be established after the M&A, and the name list of the board of directors and senior executives;
- For equity deal, equity transfer, or subscription agreement, shareholders’ resolutions and asset evaluation report;
- For asset deal, resolution of the domestic seller, assets purchase agreement, statement on the information of each party, and asset evaluation report;
- A statement on the impact of the foreign investor’s voting rights after the M&A on the target and other situations that may result in the foreign investor acquiring control over the target’s business decision-making, financial matters, human resources, technologies, etc., and the relevant documents relevant; and
- Other documents required by MOFCOM.

(iii) Project Review

Where approval is applicable:

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

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

15
Are there any filing fees?

There are no filing fees.
16
Must the parties suspend the transaction until the review is completed?

(i) FIE Approval / Filing

- Where filing is applicable, the parties do not need to suspend the transaction unless a national security issue arises, in which case the filing authority will inform the investors to submit a security review application to MOFCOM and suspend the filing procedure.

- Where approval is applicable, it is advisable to suspend closing of the transaction until approval is obtained.

(ii) Security Review

The parties shall not proceed with the transaction until it is cleared by MOFCOM or deemed to be cleared because MOFCOM has not sent a notice to the applicant within 15 business days (“BDs”) after accepting the application.

(iii) Project Review

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

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

(i) FIE Approval / Filing

- For foreign investment in restricted sectors without approval or foreign investment in prohibited sectors, in addition to the above sanctions, MOFCOM or its local branches shall also have the power to unwind the transaction though we have not seen such reported cases.

(ii) Security Review

Where the foreign investor fails to notify while the relevant departments under the State Council, national industrial associations, or enterprises in the same or related industry believe security review is necessary, they may make proposals to MOFCOM on conducting the review. MOFCOM may initiate the review based on such proposals or if it identifies national security concern during FIE approval / filing procedures. MOFCOM has the power to suspend or unwind transactions that have an impact on national security, though we have not seen such reported cases.

(iii) Project Review

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

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

As mentioned in the response to question 17 above, MOFCOM may initiate security review on its own initiative or other parties’ proposals.
What is the timeline of the review process? Are fast-track options available?

There are no fast-track options.

(i) FIE Approval / Filing

- FIE filings normally complete within three BDs if all the necessary documents are provided.
- Where approval is applicable, the authority should complete the review within three months and we have seen some local authorities that are able to or promise to complete the review in a shorter period than the three-month statutory time limit.

(ii) Security Review

See the Security Review Flow Chart.

(iii) Project Review

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

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

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

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

The authorities for FIE approval / filing and project review do not expect pre-filing communication; however, they are generally open to pre-filing discussions.

The Security Review Provisions offer a pre-filing consultation procedure, but it is not a prerequisite procedure before submitting the formal application, and the consultation result has no binding power and shall not serve as the basis for the formal application.
Are third parties (complainants) involved in the review? What rights and/or standing do they have?

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

For a foreign investor’s acquisition of a domestic enterprise, if relevant departments under the State Council, national industrial associations, or enterprises in the same or related industry believe security review is necessary, they may make proposals to MOFCOM on conducting the review.

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

- **FIE Approval / Filing.** MOFCOM and related authorities may disclose information on credibility of FIEs or foreign investors on MOFCOM’s publicity system or share such information with other departments. Such information so disclosed or shared shall not contain any personal privacy or trade secrets of FIEs or their investors or any state secrets.

- **Security Review.** The authorities, relevant entities, and personnel participating in the security review shall keep confidential the state secrets, trade secrets, and other confidential information involved in the review.

- **Project Review.** The law does not specify safeguards to protect confidential information.

SUBSTANTIVE ASSESSMENT

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

(i) **FIE Approval / Filing**

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

For FIE approvals, the transaction shall not be approved if involving any of the following circumstances:

- Damage to China’s sovereignty, national security, or social public interest;
- Violation of the laws or regulations of China;
- Incompatibility with the needs of China’s economic development;
- Being likely to cause environmental pollution; or
- Obvious unfairness in the concluded agreement, contract, or articles of association, thereby harming the rights and interests of one party (in case of a foreign-invested joint venture).

(ii) **Security Review**

Whether a foreign investor’s M&A of a domestic enterprise should be subject to security review shall be determined by the substance and actual influence of the transaction. No foreign investor can substantially circumvent the review through structuring mechanisms, including trust, multi-level reinvestment, leasing, loans, variable interest entities, or offshore structure, etc.

During the review, MOFCOM shall consider impact of the transaction on national security, stable operation of national economy, the basic societal order and people’s living conditions; and R&D capacity for key technologies concerning national security.
(iii) Project Review

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

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

25

Does the nationality of the investor play a role?

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

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

- FIE Approval / Filing. For foreign investment in restricted sectors without approval or foreign investment in prohibited sectors, MOFCOM or its local branches have the power to unwind the transaction.
- Security Review. Where a transaction is likely to have an impact on national security and has not been implemented yet, the parties shall suspend the transaction. The applicant shall not submit another application or proceed with such transaction before appropriately restructuring the transaction and modifying the application documents;
- Where a closed deal has already caused, or is likely to cause, serious impact on national security, MOFCOM shall order the transaction to be unwound or notify the parties to spin off the relevant equity shareholding or assets or to adopt other effective measures to eliminate the influence of the transaction on national security.
- Project Review. NDRC or its competent local branches shall order the construction of the project to be suspended if such project fails to receive approval or be filed with the competent authority.

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

No cooperation or consultation is provided for by the law, but it is reported that China and the U.S. committed to exchanging views on issues regarding their respective national security review in the future.1 Such exchange of information or views may also exist between China and other countries.

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

- FIE Approval / Filing. If FIEs or their investors violate the obligations under the FIE Measures, they are obliged to make correction; if not, they would be imposed a penalty as mentioned in the response to question 17.
- Security Review. During the security review, the applicant may apply for modification of the transaction plan or cancellation of the transaction.
- To mitigate the possible impact of a proposed transaction on national security, parties should adjust and refile the transaction for approval.
- To mitigate the actual or possible impact of a closed deal on national security, parties should sell the relevant equities or assets or take other effective measures.
- Project Review. The law does not provide for any remedies.

1 https://china.usembassy-china.org.cn/pr-09262015/.
Can a negative decision be appealed?

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

EXAMPLES AND TRENDS

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

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

60,533 foreign investment companies were newly established in 2018, increased by 69.8% on a year-on-year basis.

In May 2018, following China’s opening plan for auto industry, Tesla established its wholly owned subsidiary in Shanghai.

Are there any relevant recent developments or trends?

The current Negative List promulgated in June 2018 is shortened and narrowed compared to the previous versions;

FIE filing procedures have been streamlined and simplified since 2018.

The Foreign Investment Law, which will become effective on January 1, 2020, provides a unified law for foreign investment, reemphasizes the national treatment plus negative list approach, and focuses on the protection of intellectual properties. However, the law only contains principles and general rules for foreign investment and uncertainties and ambiguities remain to be clarified by implementation rules in the future.

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EUROPEAN UNION

RELEVANT LAWS AND AUTHORITIES

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

To respond to such concerns, Regulation (EU) 2019/452 "establishing a framework for the screening of foreign direct investments into the Union" (the “Regulation”) was adopted by the EU’s Parliament and Council on 19 March 2019. The objective of the Regulation is not to harmonize the formal foreign investment mechanisms used in EU member states, or to replace them with a single EU mechanism. Rather, it provides a mechanism for EU-wide cooperation and information sharing to allow member states to make informed decisions taking into account all relevant risks and protect pan-European interests. The decision on whether to set up a review mechanism or to review a particular foreign investment remains the sole responsibility of the member states. The Regulation will apply—after a transitional period of one and a half years—from 11 October 2020.
Under the Regulation, the competent authorities of the EU member states remain in charge of screening foreign direct investments under the applicable national laws. The role of the European Commission is to facilitate coordination and to advise member states where it considers that an investment would likely affect security or public order in one or more member states.

TRANSACTIONS SUBJECT TO REVIEW

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

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

PROCEDURE

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

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

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

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

They currently include:

- European GNSS programs (Galileo & EGNOS);
- Copernicus;
- Horizon 2020;
- Trans-European Networks for Transport (TEN-T);
- Trans-European Networks for Energy (TEN-E);
- Trans-European Networks for Telecommunications;
- European Defence Industrial Development Programme;
- Permanent structured cooperation (PESCO).

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

- National rules and procedures must be transparent and not discriminate between third countries.
- Member states must set out the circumstances triggering a screening, the grounds for screening and the applicable detailed procedural rules.
- Member States must apply timeframes that allow them to take into account the comments of other member states and the opinions of the Commission under the coordination mechanism.
- Confidential information must be protected.
- Foreign investors and the undertakings concerned must have the possibility to seek recourse against screening decisions of the national authorities.
- National screening mechanism must include measures necessary to identify and prevent circumvention.

### Information Requirements

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

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

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

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FRANCE

RELEVANT LAWS AND AUTHORITIES

1

What are the main laws regulating foreign investments?

Rules regarding prior vetting of foreign direct investments in strategic sectors are enshrined in Articles L.151-1 and seq., Articles R.151-1 and seq. of the Financial and Monetary Code and a Ministerial Order dated 7 March 2003, as amended from time to time.

2

Which authorities are charged with applying those laws?

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

3

What other legislation is relevant for foreign investments?

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

4 Which types of transactions are caught?

Reportable transactions concern activities that are deemed strategic. Fourteen sectors are defined as such by the French legislation (Strategic Sectors). For EEA investors, the list of sectors concerned is more restricted.

Reportable transactions vary according to the country of origin of the investor. If the country of origin is a non-EU / non-EEA country, transactions concerned are:

- the acquisition of control within the meaning of Article L.233-3 of the French Commercial Code (defining control for French Company Law);
- the acquisition of the business (in part or in full) of an undertaking having its corporate seat in France;
- the acquisition of 33.33% or more of the voting rights or of the capital of an undertaking having its corporate seat in France (NB: this 33.33% threshold applies in case of increase of an existing minority shareholding).

If the country of origin is an EU/EEA country, transactions concerned are:

- the acquisition of control within Article L.233-3 of the French Commercial Code;
- the acquisition of the business (in part or in full) of an undertaking having its corporate seat in France.

Where the direct investor is an undertaking that has its corporate seat in France but is controlled by a foreign investor, the transactions concerned are, in principle, only the acquisitions of the business (in part or in full) of an undertaking having its corporate seat in France. However, this definition of “foreign investment” for French-based companies controlled by foreign investors cannot be fully relied upon by foreign groups to escape foreign investment control.

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

Foreign investors comprise (i) any natural person who is not a French national or who is a French national but is domiciled abroad, (ii) any legal person having its corporate seat outside France.

6 Are minority interests caught?

Yes. See question 4 above.

7 Are there sector-specific rules?

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

Strategic Sectors

1. Gambling.
2. Private security.
3. R&D and manufacturing relating to pathogen or toxic agents or prevention activities thereof.
4. Interception or remote detection of conversations or informatics data.
5. Services relating to evaluation and certification of the security of IT products and systems.
6. Security IT services for regulated bodies or companies.
7. Dual-use products and technology.
10. R&D and manufacturing of ammunition, weapons, etc.
11. Provisions of direct or indirect services to the Ministry of Defense.
12. Strategic activities in the fields of energy, water, transportation, space, electronic communications, specific electronic and computer systems necessary for the national police, the national gendarmerie, the civil security services or customs, protected sites/facilities/information systems, and public health.
13. R&D activities relating to sectors 4, 8, 9, or 12 or to cybersecurity, AI, robotics, additive manufacturing, semiconductors, or dual-use technology.
14. Data hosting activities, the compromise or disclosure of which is likely to harm the exercise of activities or interests falling within the scope of sectors 11 to 13.
8. Is there any kind of *de minimis* threshold?

No.

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

No.

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

Yes, comfort letters can be obtained from the Treasury by foreign investors or potential targets. Those letters are administrative decisions which are enforceable against the administration.

PROCEDURE

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

When applicable, filing is mandatory.

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

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

13. Which party is responsible for making the notification?

The duty to notify lies with the foreign investor.

14. Which information is required for the filing?

Information required for the filing pertains to the investor (direct investor, ultimate controlling entity/natural person (as the case may be) and chain of control between the direct investor and the ultimate controlling entity), the envisaged transaction/investment, the target and the financial terms of the investment.

15. Are there any filing fees?

No.

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

Yes. There is no derogation to this standstill obligation.

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

Yes. There are both administrative (up to 10% of the global turnover of the foreign investor) and criminal sanctions. Besides, transactions closed in violation of the duty to prior notify or get prior approval are deemed null and void.

The Minister has also the power to unwind a transaction and request the parties to restore the situation ex ante and impose injunctions.

Sanctions are not made public. As foreign investments in France are attracting more and more public attention, one cannot exclude that authorities may decide to adopt a tougher stance in the future (considering also the recent legislation relating to the growth and transformation of companies *(Loi Pacte)*, see question 31 below).
18
**Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?**

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

19
**What is the timeline of the review process? Are fast-track options available?**

The waiting period is two months from the date of receipt of a complete filing. If the Minister of Economy does not respond within these two months, the transaction is deemed tacitly approved. There are no fast-track options available. In exceptional circumstances, the transaction may be cleared after a shorter review period.

20
**Do other authorities or government bodies participate in the review process? How does process relate to other types of review, e.g., merger control by the competition authorities?**

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

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

21
**To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?**

No pre-filing communication is expected from the parties. Yet, it is usual that the French Treasury requests additional information from the foreign investor to complete the filing. In the event where commitments (from the foreign investor) are contemplated, meetings may take place with the authorities/governmental bodies.

22
**Are third parties (complainants) involved in the review? What rights and/or standing do they have?**

There is no specific provision relating to third parties’ rights under the French foreign investment control regime. Their rights derive from the general regime of rights recognized to third parties in relation to administrative acts. As the review process is confidential and decisions rendered by the Minister of Economy are not made public, it is yet difficult for third parties to assert their rights.

On another hand, increased transparency is expected once the EU screening mechanism comes into force and since the adoption of the Loi Pacte.

23
**Are there safeguards in place to protect confidential information of the parties?**

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

**SUBSTANTIVE ASSESSMENT**

24
**What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?**

Criteria for an intervention are those triggering foreign investment control. Yet, the French Treasury and the other services which are participating in the instruction enjoy a wide margin of maneuver to determine what activity falls within the ambit of strategic activities given the vague definition of the so-called strategic sectors and the lack of specific guidance thereof.
25
Does the nationality of the investor play a role?

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

26
What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The French Minister can prohibit a transaction or make his/her prior approval subject to commitments undertaken by the foreign investors.

27
Do the authorities cooperate or consult with authorities in other countries?

Without prejudice to the future EU legislation relating to foreign investments control, no specific cooperation or consultation mechanism is indeed provided for by the law. General international cooperation can however be used by the competent services. Also, informal cooperation or consultation may also exist, of which foreign investors may not be informed.

28
Can remedies be offered by the parties? Are remedies suggested by the authorities?

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

29
Can a negative decision be appealed?

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

30
Are there any recent cases that reflect how the relevant laws and policies are applied?

Recent cases have shown that authorities generally apply the texts with some pragmatism. In 2014, the list of sectors was considerably broadened by the introduction of a 12th category of sectors (energy, water, transportation, electronic communications, protected sites/facilities, and public health). Given the rather vague wording of the text, this could have led to a great increase in the number of reportable transactions. However, in most sectors, the French authorities have followed a rather moderate approach.

31
Are there any relevant recent developments or trends?

The recent law relating to the growth and transformation of companies (Loi Pacte) has implemented various amendments to the actual foreign investment control regime:

Firstly, it has reinforced the powers vested with the French Minister of Economy in the framework of this control.

In the event of a violation of the duty to prior-notify or to get prior approval before closing, the latter now has the power to order, subject to a penalty payment, specific measures to the foreign investor concerned (order to: submit a request for prior approval (filing), restore the situation ex-ante, amend the investment). Additional measures comprise suspension of the exercise of the voting rights attached to the shares acquired in violation of the law, ban or limitation on dividends, suspension/restriction of or temporary ban on the right to divest whole or part of the assets pertaining to the strategic activities), designation of a trustee, within the strategic company (at the foreign investor’s expenses), who is entrusted with the protection of public interests and enjoys the right to oppose any board decision that may adversely affect public interests.

In case of violation of commitments, withdrawal of the authorization may be decided or injunctions be ordered.
The administrative fine incurred in relation to a breach of the duty to prior-notify or to get prior approval or a violation of the commitment has been revised: the maximum amount of fine is the greater of: twice the amount of the investment or 10% of the turnover of the strategic company or EUR five million for legal persons or EUR one million for natural persons.

Secondly, greater transparency has been implemented. Anonymized statistics relating to the enforcement of the foreign investment control rules will now be published on a yearly basis. In addition, an annual report shall be prepared by the Government and sent to the Parliament. The Chairmen of the Economic Affairs Committees and the General Rapporteurs of the Finance Committees of each Parliamentary Assembly have been vested powers to (i) hear competent ministers and services on elements allowing the identification of natural or legal persons subject to the procedure for prior authorization of foreign investments and (ii) carry out all investigations, on documents and on the spot, of the Government’s action in terms of protecting and promoting the Nation’s economic, industrial, and scientific interests, as well as in terms of controlling foreign investment in France.

Thirdly, amendments have been brought to the legal provisions relating to “specific shares” (rules governing the conversion from ordinary to specific shares, rights attached to specific shares, etc.) held by the French State in companies with public shareholding.

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GERMANY

RELEVANT LAWS AND AUTHORITIES

1 What are the main laws regulating foreign investments?

- Foreign Trade and Payments Act (Außenwirtschaftsgesetz, “AWG”), which is an act of parliament and the statutory basis for investment reviews.

- Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung, “AWV”), which is a legislative decree of the Federal Government implementing the AWG. It can be amended quickly, and often is, to take account of political developments. The AWV was amended most recently in December 2018 to lower the relevant shareholding threshold for some acquisitions from 25% to 10%. See question 31 below.

2 Which authorities are charged with applying those laws?

The Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie, “BMWi”) is responsible for reviewing foreign investments. It cooperates closely with other parts of the government, such as the Ministry of Defense, the Foreign Office, and the Federal Chancellery. In most cases, a prohibition or an order imposing remedies needs to be approved by the entire Federal Government.
3
What other legislation is relevant for foreign investments?

The Act on Satellite Data Security (Satelliten-datensicherheitsgesetz, “SatDSiG”) lays down special rules for the acquisition of companies operating a high-grade earth-remote-sensing system. It should be noted that the general review under Section 55 AWV may be applied in addition to the SatDSiG.

TRANSACTIONS SUBJECT TO REVIEW

4
Which types of transactions are caught?

The BMWi has the power to review the direct and indirect acquisition by a foreign acquirer of the shares in, or assets of, a German business above specified thresholds. The definition of “foreign acquirer” and the shareholding thresholds depend on the sector in which the German target company is active (→ Overview of Foreign Investment Reviews in Germany, p. 27):

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

- The general review of Sections 55–59 AWV applies to all companies, regardless of their sizes and activities. However, the applicable shareholding threshold is dependent on the sector of the target company. In case the German company operates a critical infrastructure, is a media company, or is active in one of the other sensitive sectors listed in

OVERVIEW OF FOREIGN INVESTMENT REVIEWS IN GERMANY
Section 55(1) AWV, the review applies if (i) the acquirer is from a non-EU country; and (ii) the share of voting rights in the German business that the foreign acquirer will hold directly or indirectly after the acquisition reaches or exceeds 10%.

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

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

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

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

Foreign investors are non-German or non-EU persons, depending on the sector in which the German target company is active (see question 4 above).

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

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

6 Are minority interests caught?

Yes. Any direct or indirect acquisition of voting rights in a German company is caught provided the thresholds of 10% or 25% are met (➡ Overview of Foreign Investment Reviews in Germany, p. 27).

7 Are there sectors-specific rules?

Yes. Acquisitions of shares in companies active in the sensitive sectors listed in Sections 60 and 55(1) AWV are subject to more restrictive rules (➡ Overview of Foreign Investment Reviews in Germany, p. 27).

8 Is there any kind of de minimis threshold?

Acquisition below the thresholds of 10% or 25% are not subject to review. See question 4 above.

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

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

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

The BMWi is generally willing to discuss contemplated acquisitions before a filing. However, the only way to obtain legal certainty on whether or not an acquisition is subject to review and/or whether it may be prohibited is to apply for a clearance certificate.
PROCEDURE

11
Is a filing required (mandatory) or possible (voluntary)?

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

- Section 60 AWV: certain defense and IT security companies; or
- Section 55(1) AWV: critical infrastructure, media and other similarly sensitive sectors.

Where there is no filing, the BMWi may initiate a review on its own initiative (ex officio) when it learns about the acquisition (e.g., from media reports or other authorities). An ex officio review can be initiated up to five years after the signing of the purchase agreement (Timeline, p. 30). To obtain legal certainty earlier, the acquirer may also elect to make a voluntary filing by applying for a clearance certificate from the BMWi.

12
At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

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

- Where a notification is mandatory under Section 60 AWV, it should be done before closing because all legal acts implementing the acquisition are invalid unless and until the acquisition is cleared by the BMWi. Without such clearance, the acquirer cannot, under German law, obtain ownership of the shares or the assets that are the object of the acquisition.
- For target companies active in the sectors listed in Section 55(1) AWV, the obligation to notify comes into existence with the signing of the purchase agreement.

Recommended Information for Mandatory and Voluntary Filings

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

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

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

13
Which party is responsible for making the notification?

In general, the (direct) acquirer is responsible for making any mandatory or voluntary filings.
14 Which information is required for the filing?

Mandatory and voluntary filings need to provide information about the acquirer, the German target company and the basic features of the acquisition (Recommended Information for Mandatory and Voluntary Filings). Filings must be made in German.

15 Are there any filing fees?

No.

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

No. However, within the scope of Section 60 AWV, all legal acts implementing the acquisition are invalid unless and until the acquisition is cleared by the BMWi.

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

No, except for the invalidity of legal acts. See question 16 above.

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

Yes.

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

The timeline depends on whether or not Section 55 or Section 60 AWV applies and whether or not the acquirer notifies the acquisition to the BMWi (Timeline). A prohibition or an imposition of orders is possible only within the statutory review periods; if the review periods expire without a decision from the BMWi, the acquisition is deemed cleared. There are no fast-track options.

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**TIMELINE**

[Diagram showing the timeline of the review process with annotations for each step:

1. Applies to both voluntary and mandatory filings.
2. The period commences upon the BMWi becoming aware of the acquisition. A review may be initiated up to five years after the signing of the purchase agreement.
3. The period commences upon the BMWi receiving all requested documents. The period is suspended if and as long as the BMWi negotiates commitments with the parties.]
Do other authorities or government bodies participate in the review process? How does process relate to other types of review, e.g., merger control by the competition authorities?

The BMWi cooperates closely with other parts of the government during the review. In particular, the Ministry of Defense, the Foreign Office and the Federal Chancellery are involved. The latter is in charge of coordinating the work of the federal intelligence services. In most cases, a prohibition or an order imposing remedies needs to be approved by the entire Federal Government.

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

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

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

The BMWi does not expect pre-filing communications; however, it is generally open to pre-filing discussions.

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

No, complainants do not play a role.

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

Yes. The BMWi and other authorities involved in the review are required to protect confidential information, including personal data and business secrets.

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

• For a review under Section 55 AWV, the relevant criteria are “public policy or public security” of the Federal Republic of Germany. These criteria need to be interpreted in line with the EU guarantees on the free movement of capital, goods, services and labor. An intervention requires a genuine and sufficiently serious threat affecting “one of the fundamental interests of society”.

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

In practice, the BMWi has broad discretion in applying these criteria.

Does the nationality of the investor play a role?

In general, yes. State-owned or state-controlled acquirers and, in particular, acquirers from China or Russia are more likely to raise concerns than acquirers from NATO member states.
26
What powers do the authorities have to prohibit or otherwise interfere with a transaction?

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

Where the BMWi prohibits an acquisition, the parties may no longer close the purchase agreement. In case the transaction has already been closed, the BMWi may appoint a trustee to unwind the transaction and it may prohibit or restrict the exercise of voting rights in the target company. In the case of a review under Section 55 AWV, the purchase agreement becomes void and unenforceable. In the case of a review under Section 60 AWV, any legal acts to implement the purchase agreement are void, i.e., the acquirer has not become the legal owner of the shares or assets of the target company.

27
Do the authorities cooperate or consult with authorities in other countries?

This may happen. According to press reports, the BMWi has in the past used information from foreign governments in its reviews.

28
Can remedies be offered by the parties? Are remedies suggested by the authorities?

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

29
Can a negative decision be appealed?

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

EXAMPLES AND TRENDS

30
Are there any recent cases that reflect how the relevant laws and policies are applied?

To date, the BMWi has never prohibited an acquisition. However, there have been numerous cases where the parties either entered into commitments to avert a prohibition or abandoned the transaction altogether when they faced opposition from the BMWi. An example is the attempted takeover of Aixtron, a manufacturer of equipment for the semiconductor industry, by a Chinese investment fund. The deal was abandoned after it was prohibited in the U.S. and met with concerns in Berlin.

31
Are there any relevant recent developments or trends?

The Federal Government amended the AWV in 2017 and 2018 in order to facilitate interventions against foreign investments. The 2018 amendment, which lowered the shareholding threshold for some acquisitions from 25% to 10%, was justified with the need to intensify the control of “state directed or state financed strategic investments”.

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

The reform of 2017 led to a significant increase in the number of Section 55 AWV reviews (Number of Reviews under Section 55 AWV). It can be expected that this trend will continue with the 2018 amendment.
In addition, the Federal government has proposed the creation of a state-owned investment fund that could buy stakes in strategic companies to fend off unwelcome takeovers by Chinese and other foreign investors. At the time of the publication of this guide, plans for the new fund were still at an early stage. However, early ideas include that the fund would make acquisitions together with private investors and/or that the fund would sell on its stake as soon as possible to private investors. In any event, investments would be limited to companies of strategic importance, stakes would be bought for a restricted period only, and the fund would keep out of daily business decisions. The key sectors, where the fund could operate, will probably include: steel and aluminum, chemicals, machine and plant engineering, optics, cars, medical equipment, green technologies, defense, aerospace, and 3D printing. It is expected that the legislation necessary to create the fund will be passed by the end of 2019 and that the fund will be operational in 2020.

**TOTAL NUMBER OF FDI REVIEWS IN GERMANY**

![Graph showing the total number of FDI reviews in Germany from 2009 to 2018.](image)

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ITALY

RELEVANT LAWS AND AUTHORITIES

1 What are the main laws regulating foreign investments?

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

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

Italy’s new approach entails renouncing the adoption of company law tools—such as clauses conferring special powers upon the government and inserted in company bylaws—and placing the government as an external regulator acting on the basis of sectors and activities rather than specific companies, i.e., from a subjective plan to an objective one.

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

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

Such development is highly relevant: Italy is the first state in Europe to extend FDI regulation to the financial sector, whereas the United States has regarded such sector as strategic for more than 60 years, i.e., since the Bank Holding Act of 1956.
2

Which authorities are charged with applying those laws?

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

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

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

3

What other legislation is relevant for foreign investments?

- Decree of the President of the Republic No. 35, February 19, 2014 sets forth the procedures for the government’s special powers in cases of transactions concerning defense and national security;

- Decree of the President of the Council of Ministries No. 108, June 6, 2014 identifies the strategic activities for defense and national security, with such activities being in the domain of the Ministry of Defense and the Ministry of Interior;

- Decree of the President of the Republic No. 85, March 25, 2014 identifies the strategically relevant assets in the energy, transport and communications sectors;

- Decree of the President of the Republic No. 86, March 25, 2014 provides for the procedures for the government’s special powers in case transactions concerning energy, transport and communications;

- Law No. 172, December 4, 2017 extends the scope of the Foreign Investment Law to certain types of high-tech assets, including financial infrastructures as referred to above;

- Law No. 41, May 20, 2019 includes electronic telecommunication services based on 5G technology within the activities deemed strategic for the defense and national security system and provides that, when entering into agreements concerning such technology with non-EEA persons and entities, notification to the Office of the President of the Council of Ministers is mandatory in order to allow the exercise of the veto power or the application of specific provisions or conditions.

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

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

4 Which types of transactions are caught?

The Foreign Investment Law and the related legislation catches transactions in the sectors of defense and national security, energy, transport, communications and high-tech.

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

- Imposition of specific conditions—regarding the security of procurement and information, technology transfers and export controls—in case of purchase of an interest in a company performing strategic activities for the defense and national security system;
- Veto of the adoption of resolutions by the shareholders or by the board of directors of a company performing said activities relating to certain extraordinary transactions, such as merger, demerger, transfer of the undertaking and other relevant transactions listed in the Foreign Investment Law; and
- Opposition to the purchase by any person—whether directly or indirectly, individually or jointly—other than the Italian state or state-controlled entities, of an interest in the voting share capital of a company performing said activities that, due to its size, may prejudice defense and national security interests.

Government special powers are adapted to the specific sector: such powers are more vigorous in the defense and national security sectors than in the energy, transport, communications and high-tech sectors. In addition, the government foreign investment regulation applies to all non-Italian persons and entities—in the defense and national security sectors, whereas such regime applies “only” to non-EEA persons and entities in the energy, transport, communications and high-tech sectors.

The Foreign Investment Law includes a definition of “non-EEA investor”, namely: any individual or entity whose residence, usual domicile, registered office, headquarters, or center of main interest is located outside the EU or the EEA, or is not established therein.

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

(i) Activities deemed strategic for the defense and national security system, including electronic telecommunication services based on 5G technology;
(ii) Networks, plants, assets and relationships deemed strategic for the national interest in the sectors of energy, transportation and communications; and
(iii) Assets in the high-tech sector in order to verify a possible threat to national security and public order, including financial infrastructures, AI, robotics, semiconductors, dual-use technology, cybersecurity, space and nuclear technology, security of supply flows of critical inputs, access to sensitive information and capacity of control thereof.

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

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

The government’s foreign investment regulation applies to all non-Italian persons and entities—meaning both EEA persons and entities and non-EEA persons and entities—in the defense and national security sectors, whereas such regulation applies only to non-EEA actors in the energy, transport, communications and high-tech sectors (please see answer to question No. 4).
Are minority interests caught?

Yes, in principle, the acquisition of minority interests is caught provided the *de minimis* thresholds are met (⇒ please see answer to question No. 8).

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

Are there sector-specific rules?

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

Is there any kind of *de minimis* threshold?

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

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

No.

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

No.

PROCEDURE

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

When applicable, filing is mandatory.

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

The Foreign Investment Law mandates:

(i) Notification of a relevant resolution adopted, or transaction performed, by an Italian company exercising a strategic security activity or holding a strategic asset (including those in the fields of energy, transport, communications and high-tech) within 10 days and, in any event, prior to their implementation and

(ii) Notification of a purchase by a foreign investor of interests in an Italian company exercising a strategic security activity or holding a strategic asset within 10 days of the acquisition.
13
Which party is responsible for making the notification?

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

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

14
Which information is required for the filing?

In case of notification of a relevant resolution adopted, or transaction performed, by an Italian company exercising a strategic security activity or holding a strategic asset—including those in the fields of energy, transport, communications and high-tech—the notification shall include all documents concerning the proposed resolution or transaction, as well as any further information that may be necessary for the government to complete its assessment.

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

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

15
Are there any filing fees?

No.

16
Must the parties suspend the transaction until the review is completed?

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

17
Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

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

For example, in May 2018, the Italian government fined Telecom Italia EUR 74.3 million for failing to timely notify of the adoption of resolutions resulting in Vivendi to acquire control over Telecom Italia (please see answer to question No. 30). The government quantified the amount of the fine, taking into consideration Vivendi’s and Telecom Italia’s aggregate turnover with exclusive reference to the relevant strategic assets in the telecommunications sector instead of the entire turnover of both companies (EUR 74.3 million was said to correspond to the one percent overall turnover of said companies).

18
Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

As mentioned, the government may exercise its special powers under the Foreign Investment Law exclusively with respect to companies performing strategic security activities or holding strategic assets—including those in the sectors of energy, transport, communications and high-tech. Accordingly, as a rule, foreign investments in other sectors are not subject to such control, with the exception of the general principle of reciprocity and any applicable competition clearance.
With respect to the merger control, the Italian Antitrust Authority (AGCM) may review and challenge only reportable mergers (i.e., transactions that are subject to mandatory merger review before the ICA).

19
What is the timeline of the review process? Are fast-track options available?

The standstill period is 15 business days from the date of receipt of the notification, during which time the President of the Council of Ministers performs the review. If the government requests additional information, this term may be extended only once up to receipt of the information for an additional period of 10 business days. In case of incomplete notification, the 15 business days term runs from receipt of the missing information. Should the government fail to exercise its powers within the statutory time frame, the relevant transaction may be legitimately implemented.

As to the issue of fast-track options, as discussed, Article 8 of the Decree of the President of the Council of Ministers, August 6, 2014, provides for a simplified review procedure for intra-group transactions (⇒ please see answer to question No. 2).

20
Do other authorities or government bodies participate in the review process? How does process relate to other types of review, e.g., merger control by the competition authorities?

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

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

21
To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

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

22
Are third parties (complainants) involved in the review? What rights and/or standing do they have?

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

23
Are there safeguards in place to protect confidential information of the parties?

There is no specific provision relating to confidentiality of information; however, under general principles of good administration of (and cooperation between the parties involved in) administrative proceedings, the parties may require confidentiality of sensitive information whose disclosure may be prejudicial to their interests.
24

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

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

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

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

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

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

25

Does the nationality of the investor play a role?

Yes, as clarified under the Foreign Investment Law, a different regime applies to EEA or non-EEA persons or entities depending on the sector relevant for the transaction (please see answers to questions Nos. 4 and 5).

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

26

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

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

In the case of transactions relating to a strategic asset in the sectors of energy, transport and telecommunications—including high-tech and telecommunication services based on 5G technology—the government may veto the transaction or impose specific prescriptions or conditions.
27
Do the authorities cooperate or consult with authorities in other countries?

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

28
Can remedies be offered by the parties? Are remedies suggested by the authorities?

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

29
Can a negative decision be appealed?

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

EXAMPLES AND TRENDS

30
Are there any recent cases that reflect how the relevant laws and policies are applied?

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

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

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

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

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

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

31
Are there any relevant recent developments or trends?

Concern was voiced as to the weaknesses of the current regulation provided for by the Foreign Investment Law and a revision has been proposed and is under discussion, particularly with regard to the review process.

After the entry into force of Law No. 172, December 4, 2017, the government’s special powers have been extended to financial infrastructures, which therefore have become part of the most strategic sectors in Italy; and after entry into force of Law No. 41, May 20, 2019, the Government’s special powers can also be exercised after review of agreements with non-EEA persons and entities concerning certain transactions for activities based on 5G technology.

Moreover, the indication of specific and objective criteria for the exercise of the government’s special powers under the Foreign Investment Law—as opposed to the previous regime on foreign investments, condemned by the European Court of Justice for violation of the principle of proportionality (please see answer to question No. 24)—enhances the guarantees of the parties involved in the transaction by limiting the government’s degree of discretion in exercising said special powers.

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Federico qualified as an Italian lawyer in 2013 and in 2015 he earned his Ph.D. in International Law at the University of Milan, authoring a thesis entitled “Provisional Measures in International Investment Arbitration” under the supervision of Professor Luigi Fumagalli.

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JAPAN

RELEVANT LAWS AND AUTHORITIES

1. What are the main laws regulating foreign investments?

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

2. Which authorities are charged with applying those laws?

The Minister of Finance and the competent ministers for the applicable business ("Competent Ministers") are charged with applying FEFTA. The Competent Ministers are determined based on the business being conducted by the target company. For example, the Minister of Economy, Trade and Industry is in charge of energy production business and the Minister of Land, Infrastructure, Transport and Tourism is in charge of construction business.

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

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

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

TRANSACTIONS SUBJECT TO REVIEW

Which types of transactions are caught?

In principle, the following transactions, among others, conducted by a “Foreign Investor” (see question 5 below) are subject to FEFTA:

(i) Acquisition of any shares or membership interests (collectively, “Shares”) in an unlisted Japanese company (excluding a Specified Acquisition defined in (viii) below);

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

(iii) Acquisition resulting in a Foreign Investor holding at least 10 percent of the shares in a Japanese company listed on a Japanese stock exchange;

(iv) Consent to substantial change of the business purpose of a Japanese company (if the target company is a joint stock company (kabushiki kaisha), limited to a consent given by a Foreign Investor holding one third or more of voting rights);

(v) Establishment of a branch, factory or other business office in Japan (collectively, “Branch”) or substantial change of the type or business purpose of the Branch;

(vi) Advancement of loans exceeding certain thresholds with a tenure exceeding 1 year to a Japanese company;

(vii) Acquisition of private placement bonds exceeding certain thresholds with a tenure exceeding 1 year issued by a Japanese company (collectively with (i) through (vi), “Inward Direct Investment”); or

(viii) Acquisition of any issued Shares in an unlisted Japanese company from another Foreign Investor (“Specified Acquisition”).

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

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

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

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

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

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

Yes, see question 4 above.

7 Are there sector-specific rules?

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

The Prior Notification Business Type for a Specified Acquisition consists of businesses that are highly likely to cause a situation that impairs national security.5 If the target company’s business does not fall under the Prior Notification Business Type, filing of only a post facto report is required for an Inward Direct Investment unless filing a prior notification is required based on the Foreign Investor’s nationality (see question 25) and no filing is required for a Specified Acquisition.

1 E.g., manufacture of weapons, aircraft, goods related to nuclear power or space development or goods that are likely to be used for military purposes, manufacture of devices and parts related to information processing, software manufacture for information processing, and information communication services.
2 E.g., electricity, gas, heat supply, water supply, information and communication, broadcasting, railway transport or passenger transport.
3 E.g., biological preparations (production of vaccines) or security services.
4 E.g., agriculture, forestry and fishery, oil, manufacture of leather and leather products, air transport or marine transport.
5 Same business types mentioned in Footnote 1 as well as electricity business (limited to ownership of nuclear power plants).
6 E.g., when the relevant Foreign Investor in question directly or indirectly holds 50% or more of voting rights in the other Foreign Investor, or when the other Foreign Investor directly or indirectly holds 50% or more of voting rights in the relevant Foreign Investor.
At what point in time should or must a filing be made (before or after signing or closing of the transaction)? Is there a mandatory deadline?

A prior notification relating to an Inward Direct Investment or a Specified Acquisition must be filed within 6 months prior to the closing of the planned transaction. When considering the timing of the filing, a Foreign Investor should note that the planned transaction must be suspended until the waiting period has expired as explained in questions 16 and 19 below.

A Foreign Investor who has filed a prior notification must file an implementation report within 30 days after implementation of certain transactions relating to the prior notification (⇒ Filing of Implementation Reports).

A post facto report for Inward Direct Investment must be filed by the 15th day of the month following the month in which the planned transaction is consummated.

Which party is responsible for making the notification?

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

Which information is required for the filing?

The following information is required for the filing:

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

Are there any filing fees?

No.

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

As to transactions subject to a prior notification, yes, as explained under question 19 below. As to transactions subject to a post facto report, no.
Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

Failure to file a prior notification could result in criminal penalties and administrative penalties. The criminal penalties include imprisonment for up to three years and/or fine of 3 times the value of the Inward Direct Investment or the Specified Acquisition that was made in violation of FEFTA, as applicable, or 1 million yen, whichever is higher. Failure to file a post facto report or an implementation report after related prior notification could result in criminal penalties including imprisonment for up to six months or fine of 0.5 million yen.

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

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

No.

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

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

Normally, this waiting period is shortened to 2 weeks. Moreover, the Minister of Finance and other Competent Ministers are required to make efforts to shorten the waiting period to 5 business days for so-called “Green Field Investment Transactions”, “Roll Over Transactions” and “Passive Investment Transactions”.

However, if the Minister of Finance and other Competent Ministers find it necessary to examine whether the Inward Direct Investment subject to the prior notification is likely to impair national security, disturb the maintenance of public order or hinder the protection of public safety or significantly adversely affect the smooth management of Japanese economy or whether the Specified Acquisition subject to the prior notification is highly likely to cause a situation that impairs national security (those criteria, collectively, “National Security”), the waiting period may be extended up to 5 months.

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

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

The process does not relate to other types of review.

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7 Inward Direct Investments involving a Foreign Investor’s 100% subsidiary or a Branch.
8 Acquisition of Shares in a Japanese company by a Foreign Investor who files a similar prior notification for acquisition of Shares within 6 months of the previous filing.
21
To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

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

22
Are third parties (complainants) involved in the review? What rights and/or standing do they have?

No. They do not have any rights or standing.

23
Are there safeguards in place to protect confidential information of the parties?

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

SUBSTANTIVE ASSESSMENT

24
What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?

The Minister of Finance and other Competent Ministers have broad discretion in assessing whether the transaction is likely to harm National Security.

To improve transparency, they have disclosed the factors to be considered in such assessment:

(i) Inward Direct Investment

a. Maintenance of the production bases and technological bases of Japan’s security-related industries (arms, aircraft, space development and nuclear power);

b. Prevention of the leakage of sensitive technology significant to security;

c. Maintenance of public operations during peace and emergency;

d. Maintenance of public safety;

e. With respect to industries subject to a reservation lodged by Japan pursuant to the provisions Article 2b of the OECD Code, stable supply of food, fuel, etc., sufficient stockpiling, national land conservation and securing of production activities and continuity of domestic business operators for smooth operation of the Japanese economy;

f. Attributes, financial plans, past investment behavior and its results, etc. of foreign investors and their affiliate companies;

g. Other factors that should be considered in the assessment.

(ii) Specified Acquisition

Same as a, b, f and g in (i) above.

25
Does the nationality of the investor play a role?

Yes, from the perspective of reciprocity, Inward Direct Investments by a Foreign Investor in countries with no treaties or other agreements with Japan are subject to a prior notification. Currently, there are about 160 countries with such reciprocity.

In addition, Inward Direct Investments related to acquisition of Shares by Iran-related parties (i.e., Iranian government, Iranian citizen, a company or other entity established pursuant to Iranian laws, etc.) in Japanese companies engaged in certain business are subject to a prior notification.
26
What powers do the authorities have to prohibit or otherwise interfere with a transaction?

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

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

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

(i) Failure to file a prior notification;
(ii) Consummation of a transaction during the waiting period;
(iii) False notification;
(iv) Failure to follow a recommendation that the Foreign Investor has accepted or violation of an order for change of the content of a transaction; or
(v) Failure to follow a recommendation that the Foreign Investor has accepted or violation of an order for discontinuance of a transaction.

27
Do the authorities cooperate or consult with authorities in other countries?

No, there is no publicly available information indicating that the authorities cooperate or consult with authorities in other countries in the review process.

28
Can remedies be offered by the parties? Are remedies suggested by the authorities?

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

29
Can a negative decision be appealed?

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

EXAMPLES AND TRENDS

30
Are there any recent cases that reflect how the relevant laws and policies are applied?

On May 13, 2008, for the first time, the Minister of Finance and the Minister of Economy, Trade and Industry, in accordance with FEFTA, ordered the Children’s Investment Master Fund (“TCI Fund”), based in the United Kingdom, to discontinue the acquisition of additional shares in Electric Power Development Co., Ltd. (“J-POWER”). This was because, if the TCI Fund additionally acquired J-POWER’s shares, it would have had an impact on the stable supply of electricity in Japan as well as nuclear power and nuclear fuel cycle policies, which would disturb the maintenance of public order. Since then no order has been issued to change the content of a transaction or discontinue the transaction.
Are there any relevant recent developments or trends?

Due to recent heightened cybersecurity concerns, Prior Notification Business Type has been amended to include certain businesses related to information processing. The amendment was made effective as of August 1, 2019, and investors that plan to conduct Inward Direct Investment in such relevant businesses on or after August 31, 2019 may be required to file a prior notification on or after August 1, 2019.

Further, in light of the increase and diversification of investment activity in Japan, the percentage of voting rights held by a Foreign Investor will become a basis for Inward Direct Investment in addition to the percentage of shares held. As a result of such amendment, the following transactions, among others, will constitute Inward Direct Investment:

(i) Acquisition resulting in a Foreign Investor holding at least 10 percent of the voting rights in a Japanese company listed on a Japanese stock exchange;

(ii) Receipt of proxy voting rights resulting in a Foreign Investor holding at least 10 percent of the voting rights (including the voting rights already held by the Foreign Investor) in a Japanese company listed on a Japanese stock exchange;

(iii) Receipt of proxy voting rights in an unlisted Japanese company by a Foreign Investor.

The amendment will become effective as of October 26, 2019, and investors that plan to acquire voting rights resulting in a transaction constituting an Inward Direct Investment, as newly defined, on or after October 26, 2019 may be required to file a prior notification or a post facto report, as applicable. Such investors may file the prior notification before October 26, 2019.

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10 But only with respect to proposals through which the Foreign Investor is likely to substantially control the management of the Japanese company or to have significant influence on the management of the Japanese company (e.g., appointment or removal of directors or dissolution of the company).

11 Same as above.
1. What are the main laws regulating foreign investments?

There is no specific statutory scheme in place that regulates general foreign investment. However, see question 3 below. It is also worth noting that there is no formal distinction between domestic and foreign investment under UK legislation.

2. Which authorities are charged with applying those laws?

The Competition and Markets Authority ("CMA") is the regulator charged with investigating and applying the legislation. To the extent that there are public interest interventions, the Secretary of State for the Department for Business, Energy & Industrial Strategy will also intervene. The Department for Culture, Media and Sport will intervene on media mergers. Sector-specific regulators may also be involved in the application of the laws.
What other legislation is relevant for foreign investments?

The Enterprise Act 2002 ("EA 2002") provides the UK Government with the power to intervene in foreign investments on "exceptional public interest grounds". These are national security (including public security), media plurality, and financial stability.

The UK Government passed a White Paper in July 2018, which, once implemented, will introduce further legislation for foreign investments related to national security.

TRANSACTIONS SUBJECT TO REVIEW

Which types of transactions are caught?

Transactions will be caught if they constitute a "relevant merger situation". The regime covers joint ventures, asset purchases, mergers, and acquisitions of minority shareholdings.

Ordinarily a relevant merger situation will be created if two or more enterprises cease to be distinct by virtue of being brought under common ownership or control, where either (1) the UK turnover associated with the enterprise being acquired exceeds £70 million or (2) the transaction creates or enhances a 25% share of supply or purchases of any goods or services in the UK, or in a substantial part of it (this is known as the "share of supply test"). Legislation defines "enterprise" as the activities or part of the activities of a business. Consequently, an enterprise does not require a separate legal entity.

However, for certain "relevant enterprises" in specific sectors, lower thresholds have been introduced (see question 7).

Are minority interests caught?

Yes, minority interests are covered by the regime where the transaction constitutes a relevant merger situation or involves a relevant enterprise (see questions 4 and 7).

Are there sector-specific rules?

Lower thresholds have been introduced for "relevant enterprises" in certain sectors. A "relevant enterprise" is an enterprise that is involved in specified activities connected with (1) military or dual-use goods subject to export control, (2) computer processing units, or (3) quantum technology.

The thresholds in such cases require (1) the enterprise being acquired to have turnover in the UK of more than £1 million, (2) the meeting of the share-of-supply test, or (3) the relevant enterprise being targeted to have a share of supply or purchase of goods or services in the UK of 25% or more, made in connection with activities by virtue of which it is considered a relevant enterprise. Therefore, the threshold under the sector-specific rules does not require that a merger must lead to an increase in the merging parties’ share of supply to, or over, 25%.

The 2018 White Paper proposes radical changes to the legislation in respect of transactions that raise national security concerns (see question 31).

Is there any kind of de minimis threshold?

Acquisitions below the thresholds of UK turnover of less than £70 million or 25% for relevant merger situations, and UK turnover of less than £1 million or 25% for relevant enterprises are not subject to review. See questions 4 and 7 above.
Moreover, if a Phase 1 investigation takes place, the CMA can decide that the market is of insufficient importance and therefore de minimis. This is considered to apply where either:

- the annual value in the UK of the markets concerned is, in aggregate, less than £5 million, provided there is no clear-cut undertaking instead of a Phase 2 reference available; or
- the annual value in the UK, in aggregate, of the markets concerned is between £5 and £15 million and the expected customer harm resulting from the merger is not materially greater than the average public cost of a Phase 2 investigation that at present is around £400,000) having regard to the size of the market concerned, likelihood of a substantial lessening of competition, magnitude of any competition that would be lost, and duration of any substantial lessening of competition.

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

There are no specific rules.

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

It is possible for the parties to seek informal advice from the CMA on a confidential basis. Such informal advice is solely the view of the CMA staff, and therefore is not binding.

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

The merger control system within the UK is voluntary. However, the CMA does have the power to investigate any mergers that fall within its jurisdictional thresholds, even if they are not notified.

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

As filing is voluntary, there is no mandatory deadline. As outlined in question 16, there is no prohibition on completing a transaction without clearance from the CMA, although the CMA can require the transaction to be unwound.

13 Which party is responsible for making the notification?

Either party can notify; however, it is customary that the acquiring party will do so.

14 Which information is required for the filing?

Information required for the merger notice relates to the parties; the envisaged transaction and rationale; explanation of why the CMA has jurisdiction; a competition assessment; third-party contact details; and supporting documents.

15 Are there any filing fees?

Any merger that qualifies as a relevant merger situation or a public interest case will be subject to the usual merger fee. This ranges from between £40,000 and £160,000 depending on the type and size of merger. However, no such fees are payable in special public interest cases.

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

There is no obligation to suspend the transaction and no prohibition on completing a transaction without clearance from the CMA. However, the CMA does have the power to make an interim order to prevent integration or unwind preemptive integration of the merging parties.
17
Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?

Notification is voluntary; therefore, there are no fines for failure to notify or for closing the transaction without prior approval.

18
Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?

The UK system is voluntary, but the authorities can review completed transactions.

19
What is the timeline of the review process? Are fast-track options available?

Upon receipt of a complete merger notice, there is a 40-working-day statutory timetable for the CMA to consider the merger (Phase 1). At the end of Phase 1, a decision will be made for (a) unconditional clearance, (b) clearance subject to undertakings, or (c) reference to Phase 2.

Where the transaction is referred to a Phase 2 investigation, the CMA has a statutory period of 24 weeks to conduct its investigation and publish a report. The CMA has the discretion to extend this by up to eight weeks. Following a Phase 2 investigation, a decision will be made for (a) unconditional clearance, (b) conditional clearance subject to legally binding undertakings, or (c) prohibition.

Exceptionally, the CMA can accelerate the treatment of cases for referral for a Phase 2 investigation where this corresponds with the wishes of the parties and where the CMA’s statutory thresholds are met.

20
Do other authorities or government bodies participate in the review process? How does process relate to other types of review, e.g., merger control by the competition authorities?

The CMA may contact other governmental departments, regulators, industry associations, and consumer bodies to solicit their views where it is deemed appropriate.

21
To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?

The CMA encourages communication between themselves and the parties throughout the process. Parties will be required to provide information for any merger notice.

It is only possible to take advantage of the pre-notification process where the transaction is actual or contemplated rather than hypothetical. The CMA encourages pre-notification discussions, preferably at least two weeks before the intended date of notification.

22
Are third parties (complainants) involved in the review? What rights and/or standing do they have?

The CMA invites comments on any merger situation under review from interested third parties. During a Phase 2 investigation, third parties may make written submissions and, if their views are particularly important to the merger concerned, may be invited to attend oral hearings.
23 Are there safeguards in place to protect confidential information of the parties?

The CMA has a strict confidentiality policy. Generally, the CMA will insist on confidentiality in any pre-notification discussions. Therefore, the CMA will not publicly disclose confidential information unless it is required to do so by law. The CMA does publish certain types of information, which broadly covers statutory deadlines, invitations to comment, and decisions made by the CMA. Moreover, a party can specify that information is confidential.

SUBSTANTIVE ASSESSMENT

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

The criteria for intervention are the thresholds for relevant merger situations and relevant enterprises as laid out in questions 4 and 7 above.

The Secretary of State can only intervene in circumstances of “exceptional public interest” under Section 58 of the Enterprise Act 2002. The Secretary of State can issue a Public Interest Intervention Notice (“PIIN”), or a Special Public Interest Intervention Notice (“SPIIN”) on public interest grounds. SPIINs are quite rare and have only been issued in two cases.

25 Does the nationality of the investor play a role?

All nationalities are subject to the same requirements. However, foreign investors should be aware that there may be political and public perception considerations in relation to their proposed investments, especially in highly sensitive sectors such as national security.

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

See question 24.

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

The CMA can communicate or cooperate with other competition authorities where it deems it appropriate. This can take place through either formal multilateral arrangements (such as the ECN and ICN) or bilaterally.

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

The parties may offer Undertakings in Lieu (“UILs”) of reference. Any UILs accepted by the CMA must be for the purpose of remediying, mitigating, or preventing the substantial lessening of competition or adverse effects identified by the CMA (or Secretary of State in public interest cases).

The CMA can also suggest remedies, which can be structural or behavioral remedies. Structural remedies are considered more likely to address any substantial lessening of competition and are generally preferred to behavioral remedies.

29 Can a negative decision be appealed?

Yes, the merging parties and any interested third parties may apply to the Competition Appeal Tribunal (“CAT”) for review of a decision of the CMA or Secretary of State.

EXAMPLES AND TRENDS

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

The case of Hytera Communications Corporation Ltd/ Sepura plc related to the acquisition of a UK radio systems provider (“Sepura”) by a Chinese acquirer. The Secretary of State issued a PIIN on the grounds of national security. This was based upon the fact that Sepura supplied communications equipment systems to emergency services across the UK. The transaction was approved in May 2017 after the Secretary of
State accepted a series of undertakings by the parties. The undertakings included requirements for the parties to implement enhanced controls for the protection of sensitive information and technology and providing relevant agencies rights of access to premises and information for audit compliance.

In June 2018, a PIIN was issued in relation to the proposed acquisition of Northern Aerospace Limited by Gardner Aerospace Holdings Limited ("Gardner"). This was followed by an initial enforcement order preventing the integration of the two businesses. The regulatory scrutiny led to delays to the transaction and, when the parties failed to agree an extension to the timeline, the deal collapsed. However, the deal was revived once Gardner offered written assurances confirming that existing agreed protections would continue to apply, and the transaction was unconditionally cleared.

As noted in questions 3 and 7, the primary development in this area is the July 2018 White Paper which—once implemented—will introduce further legislation for foreign direct investments related to national security and remove this from the scope of UK merger control. This proposes voluntary notification for "trigger events" that may raise national security concerns:

- More than 25% of shares or votes are acquired in an entity;
- Significant influence or control over an entity is acquired;
- Further significant influence or control over an entity is acquired;
- More than 50% of an asset is acquired (including real assets, land, and intellectual property); or
- Significant influence or control over an asset is acquired.

Under the proposed legislation, a trigger event would mean that either or both of the transaction parties may make a voluntary notification to the government. The government then has up to 30 working days to "call in" the transaction for further review. If a trigger event has taken place but has not been notified, the government has up to six months to call in the transaction. The proposed process could take up to 105 working days, and potentially longer if the government elects to stop the clock.

In addition to potential timing implications, the new process is likely to lead to additional work and enhanced due diligence from transaction parties in order to identify whether a trigger event will occur.

31 Are there any relevant recent developments or trends?

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Founder of the Brussels Office, Douglas Lahnborg represents clients before the European Commission and the Competition and Markets Authority in all areas of competition law. He has acted for clients in a broad range of industries, including software, technology, telecommunications, manufacturing, consumer goods, energy, healthcare, defense, and national security.

Chambers recognizes Douglas as a leading antitrust and competition practitioner. He is also ranked as a leading competition lawyer in Legal 500 and GCR Who’s Who Legal: Competition 2018.
What are the main laws regulating foreign investments?


Which authorities are charged with applying those laws?

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

What other legislation is relevant for foreign investments?

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

4 Which types of transactions are caught?

Under Exon-Florio law, the President and CFIUS have jurisdiction over foreign investment that:

• could result in a foreign person having control over a U.S. business;

• even if it does not provide control, involves a U.S. business connected to “critical technology” if certain other factors obtain.

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

In general, the Exon-Florio law potentially covers an investment in a U.S. business by a “foreign person”—generally, an individual who is not a U.S. citizen, a non-U.S. government, or a legal entity that is controlled by non-U.S. citizens or governments.

6 Are minority interests caught?

Yes, they can be. See question 4 above.

7 Are there sector-specific rules?

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

8 Is there any kind of de minimis threshold?

No.

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**List of Industries**

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<thead>
<tr>
<th>INDUSTRY</th>
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<tbody>
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<td>Aircraft Engine and Engine Parts Manufacturing</td>
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</table>
9 Are there special rules for investments by foreign state-owned enterprises or sovereign wealth funds?

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

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

No. The only way to learn the U.S. government’s position on a transaction under the Exon-Florio law is to submit a full notice to CFIUS.

PROCEDURE

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

Under regulations promulgated in October 2018, for the first time some types of foreign investment transactions involving critical technology are the subject of a requirement to notify CFIUS.

Mandatory-filing transactions comprise some non-U.S. investments in U.S. businesses that

- are connected to “critical technology”—generally, equipment, software, or technical information the export of which commonly requires a license from the U.S. government; and

- use critical technology in or design critical technology for a specified industry (List of Industries).

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

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

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

If a filing requirement applies, the notification must be submitted before closing and, generally, closing cannot occur for 45 or more days following the submission.

13 Which party is responsible for making the notification?

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

14 Which information is required for the filing?

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

15 Are there any filing fees?

Not under current U.S. law. However, the Exon-Florio law, as amended by FIRRMA, authorizes CFIUS to establish filing fee requirements.

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

Generally, no. However, if a mandatory filing requirement applies the parties cannot close the transaction until there is a favorable disposition with CFIUS.
17  
**Are there fines or other sanctions for failure to notify or for closing the transaction without prior approval? If so, are there examples of such sanctions imposed in the past?**

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

18  
**Do the authorities have powers to review and challenge transactions that are not subject to a mandatory review?**

Yes.

19  
**What is the timeline of the review process? Are fast-track options available?**

The CFIUS screening process commonly takes around four months. It can take more or less time depending on a variety of factors.

20  
**Do other authorities or government bodies participate in the review process? How does process relate to other types of review, e.g., merger control by the competition authorities?**

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

CFIUS interaction with other parts of the U.S. government conducting other statutory proceedings with respect to a transaction do not ordinarily affect CFIUS outcomes.

21  
**To what extent are the parties involved in the review? Do the authorities expect pre-filing communication?**

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

CFIUS does expect pre-filing communications with the parties, including, at minimum, submission of a draft notice to CFIUS for CFIUS’s review and comment.

22  
**Are third parties (complainants) involved in the review? What rights and/or standing do they have?**

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

23  
**Are there safeguards in place to protect confidential information of the parties?**

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

**SUBSTANTIVE ASSESSMENT**

24  
**What are the criteria for an intervention? How much discretion do the relevant authorities have in applying those criteria?**

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

25  
**Does the nationality of the investor play a role?**

Often, yes. CFIUS is, for example, more likely to find national security concerns regarding a transaction if the planned investment is on the part of a Chinese or Russian company than if it is by a company based in an allied nation.
26
What powers do the authorities have to prohibit or otherwise interfere with a transaction?

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

27
Do the authorities cooperate or consult with authorities in other countries?

CFIUS sometimes does so and is doing so more and more often.

28
Can remedies be offered by the parties? Are remedies suggested by the authorities?

CFIUS commonly conditions clearance of a transaction on measures to which transaction parties commit that, in CFIUS’s view, adequately mitigate identified national security concerns. CFIUS will sometimes consider mitigation measures proposed by parties.

29
Can a negative decision be appealed?

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

SELECTED TRANSACTIONS INVOLVING CHINESE BUYERS 2018

<table>
<thead>
<tr>
<th>U.S. Business</th>
<th>Chinese Buyer</th>
<th>Industry</th>
<th>Transaction Value</th>
<th>Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>OriGene Technologies</td>
<td>Zhongyuan Union Cell</td>
<td>Biotechnology</td>
<td>N/A</td>
<td>Clearance</td>
</tr>
<tr>
<td>Anaren, Inc.</td>
<td>TTM Technologies</td>
<td>Radio frequency/microwave semiconductor devices for space, defense, and wireless infrastructure</td>
<td>$775 million</td>
<td>Clearance (TTM had established a Special Security arrangement in 2010 that denied the 9.6% Hong Kong owners any access to sensitive businesses involving classified information or contracts)</td>
</tr>
<tr>
<td>Waldo Genetics</td>
<td>Beijing Dabeinong Technology Group Co.</td>
<td>Biotechnology</td>
<td>$16.5 million</td>
<td>Abandoned following CFIUS security concerns</td>
</tr>
<tr>
<td>Xcerra Corp</td>
<td>Unic Capital Management Co.</td>
<td>Semiconductors; testing equipment used in the production of semiconductors</td>
<td>$580 million</td>
<td>Abandoned following CFIUS security concerns</td>
</tr>
<tr>
<td>Cogint, Inc.</td>
<td>BlueFocus International Limited</td>
<td>Technology services; network and data solutions</td>
<td>$100 million</td>
<td>Abandoned following CFIUS security concerns</td>
</tr>
<tr>
<td>Biotest (U.S. business of Germany-based group)</td>
<td>Creat Group Corporation</td>
<td>Biotechnology</td>
<td>$1,400 million</td>
<td>Clearance conditioned on divestment of the U.S. business</td>
</tr>
</tbody>
</table>
EXAMPLES AND TRENDS

30
Are there any recent cases that reflect how the relevant laws and policies are applied?

Examples of recent CFIUS transaction screening outcomes are shown in the table Selected Transactions Involving Chinese Buyers 2018 (p. 64).

31
Are there any relevant recent developments or trends?

- All else being equal, CFIUS tends to be more aggressive today in finding national security concerns and impeding foreign investment.

- Concerns about Chinese and Russian investment in the United States have become more and more pronounced.

- CFIUS screening proceedings tend to take substantially longer today than they did as little as two years ago.

- By statute and regulation, certain types of transactions now fall within CFIUS’s jurisdiction even if they could not result in control by a foreign person over a U.S. business (see question 4 above). CFIUS is interpreting its jurisdiction more broadly to capture a larger scope of foreign investment transaction types.

- By statute and regulation, for the first time beginning November 10, 2018, certain types of foreign investment transactions involving critical technology must be notified to CFIUS (see question 11 above).

- In September 2019, CFIUS issued regulatory proposals to expand the scope of foreign investment transactions that are within CFIUS’s jurisdiction and create a second category of transactions for which notice to CFIUS is legally mandatory. CFIUS is expected to finalize the regulations in February 2020.

THE AUTHOR

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Chair of Orrick’s International Trade & Compliance Group, Harry Clark advises major companies and industry associations on a variety of international trade and investment rules. He has deep experience in CFIUS/Exon-Florio examinations of foreign investment, military, and “dual use” export control regulations (ITAR/EAR), economic sanctions administered by the U.S. Treasury Department (OFAC), customs regulations, the Foreign Corrupt Practices Act, anti-money laundering rules, anti-boycott requirements, and defense industrial security requirements. He executes internal corporate investigations regarding trade and investment rules and advises on such rules in the context of corporate transactions, has extensive experience with government contracting matters, represents broad industry coalitions on major trade litigations and international negotiations and antidumping and countervailing duty litigation. He also pursues policy issues with congressional and executive branch officials and advises on international trade rules (e.g., GATT, WTO agreements, and NAFTA).
In the last 20 years, national regulation of international investment for national security and other reasons has become a major issue for international corporate transactions. Whether you are investing in an energy project in France, selling semiconductor equipment in China or doing business in countries that are newly subject to foreign investment and trade regulations, you need advisors who know their way around the global market and the numerous legal restraints and regulations on international trade and investment.

Structured as one team, our lawyers work seamlessly across key markets in the Americas, Europe, Asia and Africa. In recognition of the scope of our practice, we have been named to Law360’s Global 20 list eight times. We serve Latin America from our Houston office. We cover Southeast Asia from China. And we offer regulatory and enforcement advice from Washington, D.C., to Brussels to Beijing.

Our globally-recognized mergers & acquisitions, antitrust and competition and international trade teams play critical roles in advising clients on these complex, cross-border business deals. Major companies such as General Electric, Intel and Marathon Oil commonly rely on us to help them overcome the most challenging barriers they encounter in the course of these transactions.
<table>
<thead>
<tr>
<th>Region</th>
<th>Practices</th>
<th>Individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAMBERS GLOBAL</td>
<td>42</td>
<td>92</td>
</tr>
<tr>
<td>CHAMBERS EUROPE</td>
<td>22</td>
<td>48</td>
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<tr>
<td>CHAMBERS USA</td>
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</tr>
<tr>
<td>CHAMBERS ASIA</td>
<td>10</td>
<td>17</td>
</tr>
</tbody>
</table>

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