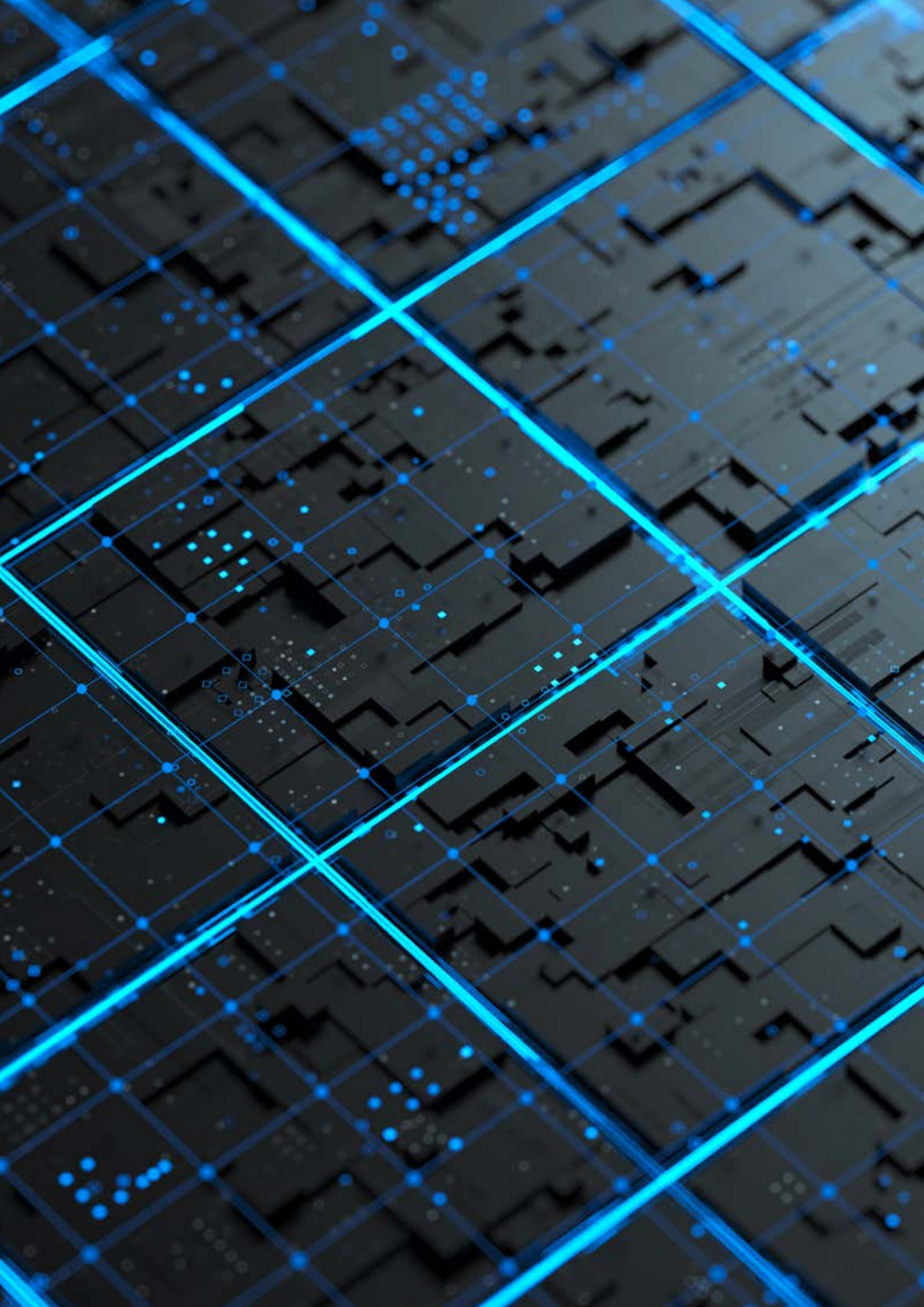


Foreign direct investment reviews 2020: A global perspective

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





Navigating foreign direct investment reviews worldwide



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Now in its fifth year of annual publication, White & Case's *Foreign Direct Investment Reviews* provides a comprehensive look into the evolving foreign direct investment (FDI) laws and regulations in a number of key jurisdictions around the world. In this edition, we have added four new jurisdictions—India, Mexico, Spain and Sweden—to the ones covered in prior editions. We have also expanded the section dedicated to the European Union, with essential information related to European FDI developments at the macro level and in various jurisdictions.

Once the exclusive domain of sectors traditionally associated with national security, FDI reviews worldwide are extending their reach into transactions in healthcare, high-tech, real estate and a growing list of other sectors. FDI considerations now reside among the top-five major issues in any cross-border M&A transaction.

Within Europe, Germany, Italy, Spain, France and others have increased their FDI control measures this year, while still more are set to do likewise. Even as its Member States expand their individual FDI regimes, the EU has continuously refined its FDI direction throughout 2020, with a March guidance paper and a June white paper building atop the Screening Regulation that came into full effect on October 11. The EU aims to enact a "strong EU-wide approach to foreign investments screening in a time of public health crisis and related economic vulnerability."

Meanwhile in the US, the Committee on Foreign Investment in the United States (CFIUS) has expanded its jurisdiction to reach certain pure real estate transactions, as well as certain non-controlling but non-passive investments in sensitive companies referred to as "TID US businesses." Some investments in TID US businesses are even subject to mandatory filing requirements.

Then there is COVID-19. The pandemic has brought FDI restrictions into sharper focus, and accelerated regulatory movement across the US, Europe and elsewhere. For the duration of the pandemic, and surely for years afterward, parties to cross-border transactions will need to redouble their due diligence in assessing whether their transactions will require (and pass) an FDI review, either voluntary or mandatory.

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

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United States

Most deals are approved, but new rules covering more types of transactions and requiring mandatory filings in certain cases have changed the landscape

By Farhad Jalinous, Karalyn Mildorf and Keith Schomig

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

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) significantly overhauled the CFIUS process, including by adding new types of transactions subject to CFIUS review and, for the first time ever, mandating notification to CFIUS in certain cases.

Final regulations fully implementing FIRRMA's reforms took effect on February 13, 2020. Since then, CFIUS has made additional changes, including imposing filing fees for CFIUS notices and issuing a new rule that changes the mandatory filing requirements for transactions in which the target US business is involved with critical technologies, such as certain items, technology and services subject to US export controls.

TYPES OF DEALS REVIEWED

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

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

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

CFIUS

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

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

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

CFIUS has also started pursuing non-notified transactions of interest more aggressively, while also ramping up compliance and enforcement efforts related to mitigation agreements. If CFIUS officials reach out with questions regarding a non-notified transaction or about mitigation compliance matters, it is advisable to engage CFIUS counsel right away.

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

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

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

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

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

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

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

WHO FILES

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

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

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

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

The critical technology mandatory filing requirement focusing on the export-control treatment of the target’s critical technology with respect to the foreign investor and its substantial owners took effect on October 15, 2020, and replaced the prior standard that considered whether a TID US business’s critical technologies were utilized in connection with identified industries. Transactions for which certain actions occurred prior to October 15, 2020 (such as execution of a binding transaction agreement) would be subject to the prior industry standard.

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

The new regulations also introduce a concept of “excepted investors,” which are not subject to CFIUS’s expanded jurisdiction for covered investments or real estate transactions and are exempt from mandatory filing requirements. Excepted investors and their parents must meet relatively strict nationality-related criteria related to “excepted foreign states,” which are currently Australia, Canada, and the US (though this list can change). Excepted investors are not exempt from CFIUS’s general jurisdiction, only from CFIUS’s expanded authorities under FIRRMA.

SCOPE OF THE REVIEW

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

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

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

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

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

REVIEW PROCESS AND TIMELINE

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

Following the initial submission, the declaration process typically takes approximately five to six weeks and the notice process typically takes up to three to five months. Following its assessment of a declaration, CFIUS may request the parties file a notice, so in those cases the total process for a transaction notified by declaration will take longer. For complex transactions, deals expected to be

more sensitive from a national security standpoint, or in cases where parties want to be assured the certainty of CFIUS clearance, it may be advisable for the parties to start with a notice.

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

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

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

An investigation may be extended for one 15-calendar-day period in “extraordinary circumstances.” If a transaction is referred to the president, the president has 15 calendar days to decide whether to prohibit the transaction. In some cases, CFIUS will need additional time to complete its process, as when negotiating mitigation measures with the parties. In such circumstances, CFIUS may encourage the parties to withdraw and resubmit the filing,

which restarts the initial 45-day review period. Most transactions are cleared in one CFIUS cycle.

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

TRENDS IN THE CFIUS PROCESS

Many of CFIUS’s concerns—including those addressed in FIRRMA—relate to Chinese and Chinese-connected investments in the US. Despite the substantial decline in Chinese investment in the US, China continues to be a substantial focus of CFIUS. Beyond new Chinese investments, this includes potential Chinese ties to FDI from other countries, as well as non-notified transactions that were previously closed, sometimes several years prior. Based on our experience, including experience under the CFIUS Pilot Program and more since the new FIRRMA regulations took effect in February 2020, we also note the following other key trends related to CFIUS.

Increased CFIUS authorities change the equation

Now that there are mandatory CFIUS filing requirements—with potential penalties for non-compliance up to the value of the transaction—parties need to consider CFIUS issues much more carefully in connection with potential cross-border transactions. The jurisdictional analysis under FIRRMA has also grown increasingly complex, particularly for non-controlling transactions. Parties are considering these issues and often incorporating CFIUS-related provisions into

transaction agreements even where no CFIUS filing is being made to provide themselves with additional protection regarding potential CFIUS compliance obligations.

Declarations are proving to be a valuable tool

In 2019, declarations were available only for transactions subject to the CFIUS Pilot Program, which mandated filings for transactions meeting specified criteria of heightened CFIUS sensitivity. The CFIUS Annual Report for 2019 revealed that under the Pilot Program, just over 70 percent of cases notified by declaration were either cleared on the basis of the declaration (approximately 37 percent) or received the “shrug” (approximately 34 percent). CFIUS requesting a notice was actually the least common CFIUS outcome, happening only 28 percent of the time. Now that declarations are a notification option for all covered transactions, in our experience clients have been availing themselves of this option and have often found it to be effective for transactions that do not seem likely to present substantial national security concerns.

Threats and vulnerabilities are evolving

CFIUS’s risk-based analysis has also evolved to include new types of potential “threats” and “vulnerabilities.” CFIUS now routinely reviews all transactions for “third-country threats”—channels through which China and other deemed strategic competitors might cause harm through the foreign investor (even if the foreign investor itself is not from such a country). On the vulnerability side, FIRRMA identified key areas of potential substantive sensitivity with its expanded authorities over investments in TID US businesses and its new real estate jurisdiction. This does not, however, mean that critical technologies, critical infrastructure, sensitive personal

data, and close proximity are the only areas of concern to CFIUS. The concept of national security remains broad, and CFIUS has shown interest in transactions covering a range of industries. External events can also affect national security sensitivities, such as an increased focus on health and supply chain security issues in light of the COVID-19 pandemic.

CFIUS steps up pursuit of non-notified transactions

FIRRMA provided additional resources for CFIUS to identify and review non-notified transactions of interest. CFIUS officials have emphasized their focus on this area, and we have seen a substantial increase in CFIUS outreach to parties regarding non-notified transactions, including for transactions that closed years ago. So far, as would be expected, the outreach on past transactions has largely seemed aimed at deals involving Chinese and Russian investors. CFIUS remains largely a voluntary process, but given expanded resources and CFIUS personnel dedicated to finding non-notified transactions, it appears that the risk of not filing a transaction with a nexus to national security has generally increased.

Emphasis on compliance and enforcement is rising

FIRRMA also provided additional resources for compliance and enforcement, and CFIUS officials have indicated that they will be looking closely at compliance with existing mitigation agreements. CFIUS issued its first penalty in 2018, which was for US\$1 million for repeated violations of a mitigation agreement. CFIUS also issued another penalty in 2019 for US\$750,000 for violations of an interim CFIUS order. CFIUS officials are currently working on promulgating enforcement guidelines. Parties under existing mitigation agreements, or parties entering into new ones, should focus on compliance to avoid potential CFIUS enforcement action.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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

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

2020 UPDATE HIGHLIGHTS

- The number of CFIUS reviews continues to remain high, and more parties seem to be notifying CFIUS via declarations. So far, declarations have often proved an attractive and useful option for parties, particularly for transactions that are not expected to present substantial national security concerns
- It is important to analyze potential CFIUS issues early in the deal process—including assessing whether mandatory filing requirements apply—and, where relevant, incorporate CFIUS-related terms into transaction agreements
- FIRRMA has been fully implemented as of February 2020 (though CFIUS is continuing to make changes), significantly expanding CFIUS's jurisdiction, mandating filings for certain transactions, adding the expedited declaration filing option, and making other changes to the CFIUS process
- The recent substantial decline in Chinese investment in the US correlated with a notable decrease in transactions being stopped by CFIUS. China, however, remains a key focus of CFIUS—including assessment of Chinese-related risks for transactions involving non-Chinese investors

- CFIUS has substantially increased its pursuit of non-notified transactions of interest, including for transactions that closed several years ago. CFIUS is also ramping up its compliance and enforcement efforts with respect to mitigation requirements
- The same legislation that contained FIRRMA also included the Export Control Reform Act of 2018, which requires the Department of Commerce to establish export controls on “emerging and foundational technologies, such as sensitive technologies not currently captured under the export control regime.” A few controls of “emerging technologies” have been released, and more are expected to be issued on a regular basis in the near future. These are important developments to monitor as they are directly relevant to CFIUS's mandatory filing requirements and expanded authorities for investments in businesses involved with critical technologies

OUTCOMES

- CFIUS continues to approve most notified transactions without mitigation measures
- Notwithstanding mandatory filing requirements, CFIUS remains predominantly a voluntary process
- Declarations—short-form CFIUS filings that are reviewed on an expedited basis—are proving a valuable tool for parties in transactions that do not present national security concerns
- Where CFIUS has national security concerns, it can impose mitigation conditions that can have significant implications on the foreign investor's involvement with the US business. It remains critical for investors to consider mitigation risks at the outset and negotiate protections into the transaction agreement
- The decrease in Chinese investment in the US has correlated with a decline in transactions being stopped by CFIUS, though China remains a key CFIUS focus even in non-Chinese transactions



Canada

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

By Oliver Borgers¹

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

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

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

Since the pandemic, the Canadian government announced a new policy that would subject certain investments by non-Canadians to enhanced national security review. This policy applies to investments "related to public health or involved in the supply of critical goods and services to Canadians or to the government." The policy does not

define what businesses are subject to this policy, as it is intentionally meant to apply broadly. The policy also sets out enhanced measures applicable to investments made by state-owned enterprises or investors working under the influence or direction of a foreign (non-Canadian) government.

WHO FILES

The ICA is a statute of general application that applies to any acquisition of control² of a Canadian business by a foreign investor. If the relevant financial threshold under the ICA is exceeded, the statute provides for a process of pre-merger review and approval of foreign investments to determine if they are of "net benefit" to Canada.

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

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

for 45 days after receipt of such a filing to order a national security review if there are concerns.

The entry point for national security review screening will usually be the obligatory filing under the ICA (either an application for review if the financial threshold is exceeded, or a simple administrative notification form if the threshold is not exceeded). The government also has the power to subject non-controlling minority investments to a national security review, although we are not aware of any instances of such a review to date.

TYPES OF DEALS REVIEWED

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

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

The types of transactions that have been the subject of formal review under the national security lens include those relating to satellite technology, telecommunications, fiber-

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² Generally, an acquisition of greater than 50 percent of the equity or voting interests of an entity, though in certain cases an acquisition of greater than one-third of the equity or voting interests of a corporation, will be considered an acquisition of control.

laser technology and critical infrastructure, as well as where a non-Canadian investor proposed to build a factory located in close proximity to Canadian Space Agency facilities. Investors subject to Canadian national security reviews have included American companies, as well as investors from emerging markets, but particular scrutiny can be expected for state-owned investors, especially since the announcement of the COVID-19 policy.

SCOPE OF THE REVIEW

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

Review can occur before or after closing. Transactions that run the risk of raising national security concerns can seek clearance by making any ICA filings well before the proposed time of closing (at least 45 days, although because of the pandemic, government review times are taking longer and 90 days would be more prudent). The Canadian government may deny the investment, ask for undertakings and/or provide terms or conditions for the investment (similar to mitigation requirements in the US), or, where the investment has already been made, require divestment.

TRENDS IN THE REVIEW PROCESS

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

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

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

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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



Investments by foreign state-owned enterprises or by private investors 'assessed as being closely tied to or subject to direction from foreign governments' will be subject to enhanced scrutiny.

government encourages non-Canadian investors to contact the Investment Review Division at the earliest stage of the development of their investment projects to discuss their investment.

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

REVIEW PROCESS TIMELINE

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

2020 UPDATE HIGHLIGHTS

The 2020 Investment Canada Act Annual Report is overdue, no doubt because of the unprecedented challenges posed by the pandemic.

In 2019, for the first time, the Canadian government released details regarding transactions that were scrutinized on national security grounds reflecting the new mandatory reporting requirements on national security.

OUTCOMES

In its Investment Canada Act Annual Report (March 1, 2019), the Canadian government reported that 15 national security reviews were ordered from April 2012 to March 2018 and, in all cases, the proposed investment was either blocked, abandoned or subject to conditions. These 15 investments involved the following industries: pharmaceutical and medical manufacturing; civil engineering construction; telecommunications, including telecom equipment manufacturing; ship and boat building; electrical equipment and manufacturing; rail transportation; computer and related services; and crude oil and natural gas.

The majority of the 15 national security reviews involved investors from China and Russia. Also for these transactions, examples of mitigation measures that were considered or imposed on investments were disclosed by the government for the first time.

- Formal national security reviews have been ordered by the Cabinet 15 times since the national security review process was introduced from March 2009 to March 2018 (the date on which IRD has released statistics)
- Many more transactions have been the subject of informal national security review by the IRD, most often resulting in successful pre-clearance. Only a small fraction of the thousands of notifications and applications for review filed with the IRD have attracted national security scrutiny
- The outcomes of the 15 instances where formal national security reviews were ordered include: the investment was authorized with conditions that mitigated the identified national security risks (four cases); the investor was ordered to divest control of the Canadian business (five cases); the investor was directed to not implement the proposed investment (four cases); and the investor withdrew its application prior to a final order being made (two cases)



Mexico

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

By Henri Capin-Gally Santos and Germán Ricardo Macías Salas

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

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

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

RESTRICTED INVESTMENTS

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

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

CAPPED FOREIGN INVESTMENTS

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

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

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



Any FDI in connection with capped investments undertaken without the prior authorization from the CNIE will nullify all the legal acts executed to perform the investment.

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

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

AUTHORIZATION PROCESS

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

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

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

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

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

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

European Union

In a regime undergoing rapid change, investment screening is currently “light,” with red tape increasing for European inbound investment

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

While there is still no standalone foreign direct investment (FDI) screening at the EU level, the EU continues to push for a coordinated approach toward foreign direct investments into the EU. The key instrument is the EU Screening Regulation, which has entered into force on October 11, 2020. Other legislative ideas have already been floated, including the introduction of new tools to control the acquisitions and activities of foreign-subsidized companies in the EU.

In addition, the EU has stepped up to ensure a coordinated approach towards investments into health-critical EU assets during the COVID-19 pandemic.

PART 1: EU DEVELOPMENTS EU SCREENING REGULATION

The EU Screening Regulation (refer to the EU chapter in *Foreign Direct Investment Reviews 2019* for details) falls short of delegating any veto or enforcement rights to the EU, which means that Member States remain in the driver’s seat for FDI controls. While the EU Screening Regulation also does not oblige EU Member States to introduce a national FDI review process, we expect additional Member States to do so, such as the Netherlands, Sweden, Denmark and Ireland, which currently contemplate the adoption of FDI regimes.

Certain countries have also recently adopted FDI regimes, such as Hungary and Norway. However, the EU Screening

Regulation is primarily a means of harmonizing and coordinating the widely differing review mechanisms in place at the Member State level throughout the EU.

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

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



Sensitive sectors are now expanding to biotechnologies, hi-tech, new critical technologies such as artificial intelligence, or 3D printings and data-driven activities.

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

In the same vein, despite the fact that the status quo of Member States being responsible for any enforcement actions post-FDI screening still stands, the implementation of the EU Screening Regulation will likely create an impetus for Member States to align themselves better with the EU Screening Regulation. This alignment may prompt Member States to consider establishing a new national security review regime (where one does not already exist), or amend

their current regimes to comply with the Regulation. In particular, the EU Screening Regulation sets out the following cornerstones that an FDI regime should reflect:

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

The most immediate effects of the EU Screening Regulation, however, will be largely procedural. In particular, the new role of the EC and the other Member States will add an additional layer of complexity to the investment screening review process. In any event, the involvement of more

players is expected to result in more “red tape” and inevitably longer review processes.

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

The EC confirmed that during the transition period (until December 31, 2020), UK investments into the EU should be considered “intra-EU investments.” As such, UK investments should not be subject to screening of foreign investments or any assessment under the EU cooperation mechanism. In addition, on the basis of the specific derogations provided in the withdrawal agreement between the UK and the EU, the EC considers the UK not a part of the cooperation mechanism on FDI Screening.

WHITE PAPER ON FOREIGN-SUBSIDIZED COMPANIES

While the EU Screening Regulation has just entered into force, the EU is already floating ideas on the introduction of new tools to control the acquisitions and activities of foreign-subsidized companies in the EU. In June 2020, the EC released its “White Paper on levelling the playing field as regards foreign subsidiaries.”

With its white paper, the EC is seeking views on three tools to



The white paper is extremely far-reaching and—if adopted into legislation—would be a significant change for foreign investors into the EU.

control the acquisitions and activities of foreign-subsidized companies in the EU. In particular, the white paper contemplates the following tools:

- A general ex post control mechanism to review distortions of competition through foreign subsidiaries
- A mandatory ex ante notification mechanism that would allow the EC to review foreign-subsidized acquisitions, including certain minority investments
- The possibility to exclude bidders that have received distortive foreign subsidies from public contracts tendered by the EU and Member State authorities

These proposed tools would sit somewhere in between merger control/antitrust, trade law and FDI control. The EC considers the tools to close a perceived enforcement gap in case of foreign subsidies, and to be complementary to the existing instruments.

The second tool—a mandatory ex ante notification mechanism of foreign-subsidized investments at the EU level—could in particular result in procedural overlaps with EU or national merger control and national FDI reviews. Where FDI constitutes an acquisition that is facilitated by a foreign subsidy, while also raising concerns with regard to security and public order, the new tool would result in parallel procedures. Such a foreign-backed acquisition would have to be notified to several relevant public authorities under both the

FDI screening mechanisms and the possible new tool, considerably adding to the administrative burden. Foreign investors should anticipate the additional administrative burden of this additional mandatory notification combined with a potential merger control filing at the EU or Member State level.

Overall, the white paper is extremely far-reaching and—if adopted into legislation—would be a significant change for foreign investors into the EU. For the time being, these are just “ideas” on the horizon, and would likely be the subject of significant debate during the legislative process between the European Parliament and the Council. However, the proposal is another manifestation of growing protectionism, whether for national security or wider economic or geo-political reasons.

EU GUIDANCE ON PROTECTING STRATEGIC INTERESTS

In the meantime, the EC has resorted to “soft law” in an attempt to align investment screening throughout the EU. On March 25, 2020, the EC issued a Guidance Paper focusing on the protection of health-related assets in the face of the COVID-19 pandemic.

In particular, the EC warned the Member States of an “increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance, developing vaccines) via foreign direct investment.” The Guidance Paper called on the Member States to make full use of any existing FDI screening mechanism, or to set up a full-fledged regime, capable of addressing risks to critical health infrastructures and supply of critical inputs.

While not binding for the Member States, the EC’s guidance has not gone unnoticed. For example, within months of the Guidance Paper, specific activities in the

medical sector have been added to the list of critical activities to undergo an FDI screening, notably in Germany, France, Italy, Spain, Austria, Hungary, Poland and Slovenia.

While the COVID-19 pandemic is a very particular situation calling for effective responses, the successful use of the Guidance Paper may serve as a blueprint for future concerted reactions to the investment climate—even without a standalone FDI review at the EU level.

PART 2: FDI AT THE MEMBER STATE LEVEL

Only about half of EU Member States have a screening regime. The regimes differ widely in terms of:

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

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

OVERVIEW OF REGIMES WITH/WITHOUT STANDSTILL OBLIGATION

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

If these thresholds are not met, the government may still intervene, and investors may make voluntary filings, under certain circumstances. (At a minimum, there needs to be a direct or indirect acquisition of at least 25 percent of the voting rights of a German company by non-EU/EFTA-based investors.) The regime provides effectively for a standstill obligation where filings are mandatory.

COVERAGE OF INVESTMENTS BY NON-EU INVESTORS ONLY?

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

The French regime captures acquisitions of control by any non-French investors, but minority acquisitions only if the investor is non-EU/EEA-based (as of 25 percent of voting rights for all kinds of entities and, until the end of 2020, as of 10 percent of voting rights with respect to listed companies).



INDUSTRIES SUBJECT TO SCRUTINY

We are seeing an increased convergence in views across the US, Europe and elsewhere that so-called “sensitive” sectors need to be protected in a more or less coherent way from what is being described in the US as “adversarial capital.” This trend is displayed through both the lowering of thresholds that trigger FDI reviews and an expansion of what qualifies as a sensitive sector for purposes of FDI reviews, export controls and international trade compliance.

Sensitive sectors are no longer limited to the traditional sectors associated with national security at a macro level (defense, energy or telecom). They are now expanding to biotechnologies, hi-tech, new critical

technologies such as artificial intelligence or 3D printings, and data-driven activities.

Moreover, the COVID-19 pandemic brought FDI into sharper focus and accelerated movement on a national level across Europe and elsewhere around the world. Governments were concerned about foreign investors taking opportunistic advantage of European companies being in distress, and of course, the crisis led the governments to add the healthcare sector to the sensitive industries.

Finally, 5G technology has become a source of concern for certain Member States that had issued specific rules to ensure FDI screening in relation to 5G

networks/equipment. In Italy, the government’s “Golden Power” pre-clearance process is mandatory for contracts or agreements with non-EU persons relating to the supply of 5G technology infrastructure, components and services. France introduced a specific ad hoc authorization process for operating 5G technology in French territory.

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

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

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

**On the basis of a bill currently under discussion



FILING THRESHOLDS

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

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

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

- Diagnostic and therapeutic laboratories as of 1.5 million orders/year

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

INTERVENTIONS OUTSIDE THE FORMAL SCOPE

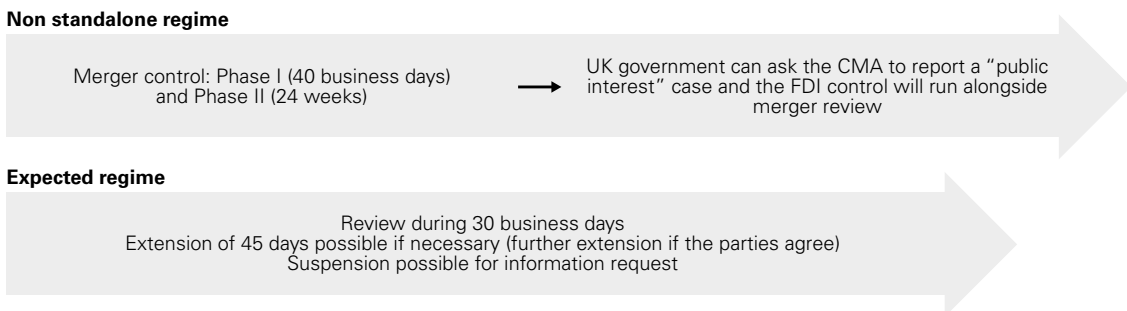
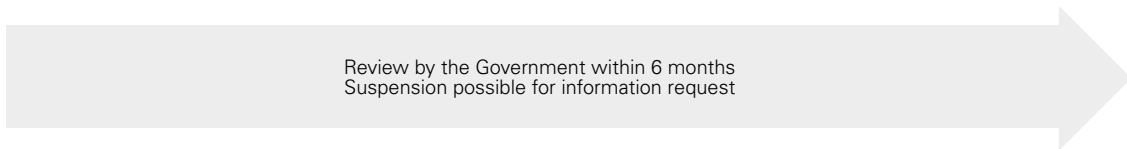
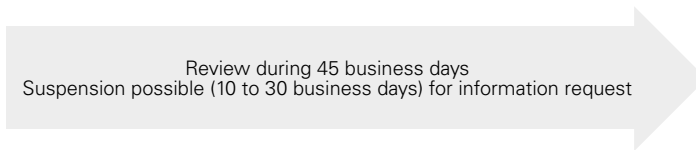
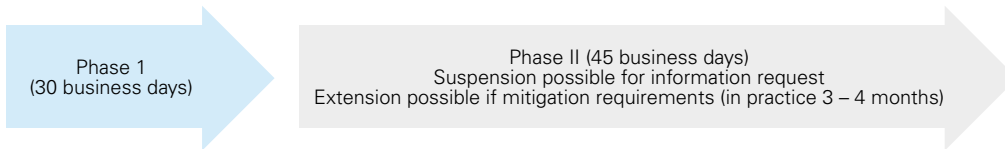
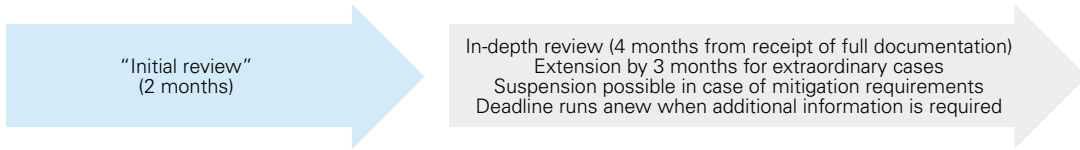
Triggered by the COVID-19 pandemic, the German Federal Ministry for Economic Affairs and Energy announced in June 2020 that the state-owned Kreditanstalt für Wiederaufbau (KfW) will acquire a 23 percent interest in CureVac, a biopharmaceutical company whose focus is on developing vaccines for infectious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

Similarly, in July 2018, the German Federal Government had decided to prevent the acquisition of a 20 percent stake in the power grid operator 50Hertz by a Chinese investor by arranging for

an investment by KfW (because it did not have jurisdiction to block the deal under the then-pertinent FDI regime). The German Federal Government officially confirmed that the acquisition by KfW was aimed at protecting critical infrastructure for energy supply in Germany.

DURATION OF PROCEEDINGS (INCLUDING SCOPE FOR EXTENSIONS)

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



POSSIBLE OUTCOMES OF PROCEEDINGS

Blocking decisions on the grounds of national security concerns remains an exception in most Member States. Issuing a formal veto to a potential foreign investor may leave the target business without a new investor as illustrated by the recent Photonis transaction in France. In March 2020, the French Minister of the Economy issued an informal objection to US company Teledyne Technologies Inc.'s contemplated investment in Photonis, a French

producer and supplier of light intensifier tubes using digital technology with military applications. Teledyne has finally decided to withdraw its offer.

Clearance with "remedies" (mitigation agreements) is becoming customary in an increasing number of Member States. Remedies generally include maintaining sufficient local resources related to the sensitive activities, restrictions on the use of intellectual property rights or on the governance of the target

company, mandatory continuation of sensitive contracts to ensure continued services, appointing an authorized security officer within the target company and reporting obligations, etc. In extreme cases, national authorities may also impose mandatory disposal of sensitive activities to an approved acquirer.



Finland

Deals are generally not blocked in Finland, and are reviewed mostly when in the defense and dual-use sectors

By Janko Lindros

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

The objective of the Finnish Act on Monitoring Foreign Ownership (172/2012, as amended, the “Monitoring Act”)¹, is to assess foreign investments for their potential impact on national interests. When doing so is deemed necessary to protect national defense and safeguard public order and security, the government may restrict the transfer of influence to foreigners, foreign organizations and foundations.

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

FILING OBLIGATIONS AND CONSEQUENCES IN THE EVENT OF BREACH

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

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

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

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

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

¹ New amendments to the Monitoring Act entered into force on October 11, 2020. This review includes the planned amendments as we expect that the Finnish Parliament will not make any significant changes to the Finnish Government proposal.

REVIEW PROCESS

The review process starts when an investor submits an application to the Ministry. There are no formal requirements for the layout of the application, but the Ministry has published instructions for preparing one. It is critical that the application be made by the potential foreign owner, not a Finnish holding company already set up by the potential new owner.

After receipt of the application, the Ministry asks for input from other authorities and, if necessary, the Ministry may disclose confidential documents and information to these authorities. The Ministry may also decide not to review a submitted application for prior approval if it determines that the acquisition does not fall within the scope of the Monitoring Act. Where it is apparent that the purpose of an acquisition or an equivalent measure is to circumvent

the provisions of the Monitoring Act, the Ministry has the right to examine the acquisition at its request.

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

All applications are urgently processed by the Ministry. The Monitoring Act states that a transaction is deemed to have been approved if the Ministry does not make a decision on an

in-depth review within six weeks, or if the application has not been transferred to the government's plenary session within three months dating from the day when all necessary materials were received. In practice, the process usually takes six to eight weeks.



Deals not related to defense or security may also be covered by the Monitoring Act if the company being acquired is considered critical for securing vital functions of society.

France

The French Foreign Investments Control regime has recently been reinforced following a reform of 2019, and other measures have been adopted in view of the COVID-19 pandemic

By Nathalie Nègre-Eveillard and Orion Berg

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

Subsequently, No. 2019-1590 of December 31, 2019 and the Ministerial Order of December 31, 2019 relating to foreign investments in France, which entered into force on April 1, 2020, amended the regime to grasp new strategic sectors, refine certain concepts and provide a clearer review framework for foreign investors. The regime has then been updated in the context of the COVID-19 health and economic crisis.

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

WHO FILES

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



In view of the COVID-19 crisis, a decree of July 22, 2020 lowered the voting rights threshold from 25 percent to 10 percent for listed companies.

TYPES OF DEALS REVIEWED

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

- Acquisition by a foreign investor of a direct or indirect controlling interest in a French entity
- Acquisition by a foreign investor of all or part of a branch of activity of a French entity
- For non-EU/EEA investors only, the acquisition of more than 25 percent of voting rights of a French entity whether made, directly or indirectly, by a sole investor or by several investors acting in concert (instead of the 33 percent threshold of the share capital or voting rights under the former regime)

In view of the COVID-19 crisis, a decree of July 22, 2020 lowered the voting rights threshold from 25 percent to 10 percent for listed companies. This measure is temporary and should be in place until December 31, 2020 only.

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

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

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

Since the Decree of 2019, the screening obligations also cover print and digital press as well as activities relating to the production, transformation or distribution of agricultural products enumerated at Annex I of the Treaty on the Functioning of the European Union (TFUE) when they contribute to food security objectives, such as ensuring access to safe, healthy, diversified food, protecting and developing agricultural lands, and promoting France's food independence.

SCOPE OF THE REVIEW

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

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

In addition, the PACTE law of 2019 modified the sanctions mechanism in case of infringement to the prior approval obligation. As such, if a transaction has been implemented without prior authorization, the MoE may enjoin the investor to file for prior authorization (this

measure is not only punitive, but may also be used by the MoE to give the foreign investor the possibility to cure the situation), unwind the transaction at his own expense or amend the transaction.

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

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

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

TRENDS IN THE REVIEW PROCESS

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

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

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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

The seller's cooperation in the preparation and review of the filing

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

REVIEW PROCESS TIMELINE

Under the new framework, the MoE has 30 business days to indicate whether a transaction falls outside the scope of the review, is cleared unconditionally or requires a further analysis. Where further analysis is required and mitigating conditions are necessary, the MoE has an additional period of 45 business days to provide the investor with its final decision, refusal of the investment or

clearance with commitments. In practice, longer periods, such as three or four months, should be anticipated if the MoE requests supplemental information and considers imposing conditions to clear the case.

2020 UPDATE HIGHLIGHTS

The amended Foreign Investment Control regime entered into force on April 1, 2020. The MoE indicated orally that the new regime will provide more flexibility in the follow-up and the revision of the conditions imposed on foreign investors.

According to the MoE, no substantive reform will be adopted in coming years. The MoE is currently working on guidelines clarifying the rules, notably from a sectorial standpoint.

The French government adopted two measures to circumvent the effects of the COVID-19 crisis on the buyout

of French strategic companies. A ministerial order of April 27, 2020 included the biotechnologies in the list of critical technologies likely to be subject to screening, and a decree of July 22, 2020 lowering the voting rights threshold from 25 percent to 10 percent for listed companies and only for non-EU/EEA investors. This second measure is temporary and should be in place only until December 31, 2020.

OUTCOMES

Once the review is completed, the MoE may:

- Authorize the transaction without condition (a rather rare outcome)
- Authorize the transaction subject to mitigating conditions/undertakings aimed at ensuring that the transaction will not adversely affect public order, public safety or national security (most of the cases when the MoE decides to review the investment)
- Refuse to authorize the transaction if adverse effects cannot be remedied (also a very rare outcome)

Mitigating conditions/undertakings may pertain to the investor's preservation of the continuity of the target's activities and the security of its supply of products or services; for example, maintaining existing contracts with public entities, or maintaining R&D capabilities and production in France. They may also include corporate requirements such as ensuring that sensitive activities are carried out by a French legal entity, and/or imposing information-access/governance requirements involving French authorities.

The MoE review is a mandatory process. Contractual agreements in breach of the mandatory process are deemed null and void. The PACTE law amended the sanctions mechanism in case of breach of the notification requirement and granted the MoE additional powers in that regard.



Germany

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

By Dr. Tobias Heinrich and Dr. Tilman Kuhn

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

Several transactions involving, in broad terms, critical infrastructure, telecommunication networks or the like have been cleared only after lengthy investigations, and are subject to strict compliance remedies. The other focus is the potential use of key technologies, e.g., in the semiconductor space or in military applications.

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

THE REGULATORY FRAMEWORK

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

- The competent authority is the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*—BMW*i*), which involves other ministries and government agencies depending on the target activities

- The German foreign direct investment regime is partly mandatory, and partly voluntary. In essence, the activities of the target and the “nationality” of the direct or indirect investor determine the process and whether there is a filing obligation
- For all foreign direct investments that are subject to the mandatory regime, the investment threshold is 10 percent (shares or assets), and the transaction is subject to a standstill obligation until clearance
- For all other foreign direct investments, the investment threshold allowing for a review is 25 percent, and there is generally no equivalent standstill obligation
- The review timeline includes an initial review period of two months and, to the extent the BMW*i* decides to initiate a full review, a subsequent in-depth review of four months from the full documentation (subject to suspensions and extensions)
- The material review criterion to be applied by the BMW*i* is whether the foreign direct investment results in a probable impediment to the public order or security (*öffentliche Ordnung oder Sicherheit*) of the Federal Republic of Germany



According to the BMW*i*, almost all of the cases in which security concerns were identified in 2019 and 2020 were resolved through contractual arrangements.

SCOPE OF REVIEW AND TYPES OF DEALS REVIEWED

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

Regarding certain highly sensitive industries such as arms and military equipment, encryption technologies as well as other key defense technologies such as reconnaissance, sensor and protection technologies, investments of at least 10 percent (voting rights in an entity or assets constituting a business) by any foreign (i.e., non-German) investor are subject to a mandatory review (so-called sector-specific review).

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

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

- Operates "critical infrastructure" (as legally defined in great detail) or develops and modifies software specifically for such "critical infrastructure"
- Has been authorized to carry out organizational measures pursuant to the Telecommunications Act or produces or has produced the technical equipment used for implementing statutory measures to monitor telecommunications and has knowledge about this technology
- Provides cloud computing services and the infrastructure for cloud
- Holds a license for providing telematics infrastructure components or services
- Is a company of the media industry that contributes to the formation of public opinion via broadcasting, telemedia or printed products and is characterized by particular topicality and breadth of impact
- Provides services that are needed to ensure the trouble-free operation and functioning of state communication infrastructures
- Develops or manufactures personal protective equipment
- Develops, manufactures or markets essential medicines, including their precursors and active ingredients
- Develops or manufactures medicinal products within the meaning of medicinal product law that are intended for diagnosis, prevention, monitoring, predicting, forecasting, treating or alleviating life-threatening and highly infectious diseases
- Develops or manufacturers in vitro diagnostics, within the meaning of medicinal product law, that serve to supply information about physiological or pathological processes or conditions, or to stipulate or monitor therapeutic measures relating to life-threatening and highly infectious diseases

For any other type of target, a filing is voluntary, and the BMWi may initiate ex officio proceedings, where a non-EU/EFTA investor acquires 25 percent or more of a domestic target.

The BMWi is entitled to review all types of acquisitions, including share deals and asset deals. The calculation of voting rights held in the target company will take into account certain undertakings that may be attributed to the ultimate owner, such as an agreement on the joint exercise of voting rights.

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

PROCESS CONSIDERATIONS AND TIMELINE

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

All transactions that require filings are subject to a "standstill obligation." In particular, the following are prohibited: allowing the acquirer to directly or indirectly exercise voting rights; distributing profits to the acquirer; and granting the acquirer access to certain sensitive data before clearance has been or is deemed to be granted.

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

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

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

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

In the past, a key benefit of voluntarily applying for a non-objection certificate was that the acquirer could get legal certainty within two months, as opposed to the three-month period that the BMWi takes to initiate an ex officio review. Given that the initial review period has been reduced to two months for all notifiable cross-sectoral review cases, that benefit is gone, and other considerations will determine whether applying for a non-objection certificate is feasible.

POWERS AND SANCTIONS

In order to safeguard public order or security, the BMWi may—in accordance with a number of other ministries—prohibit transactions or issue “instructions” (taking the form of mitigation measures or “remedies”). Clearances subject to “remedies” (such as compliance commitments in the form of a trilateral agreement between the ultimate acquirer parent, target and the German Government) have become a common form of resolving issues. For acquisitions included in the cross-sectoral review procedure, the imposition of mitigating measures requires approval by the German Federal Government.

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

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

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

RECENT REVISIONS OF THE REGULATORY FRAMEWORK

Following the reduction of the investment threshold from 25 percent to 10 percent and the

expansion of the review to certain activities in the media sector in 2018/2019, the German regulatory framework has undergone severe revisions throughout 2020.

The most relevant developments are:

- Expansion of the review to a number of health-related activities (primarily triggered by the COVID-19 pandemic)
- Lowering of the assessment criterion from “threat” to “probable impediment” to public order and security
- Stronger scrutiny regarding structure, origin and past conduct of investors
- Clarification that the review also applies to asset deals
- Introduction of a standstill obligation for all notifiable transactions
- Introduction of criminal sanctions for breaches of a standstill obligation and administrative orders
- Harmonization of review timelines
- Establishment of a national contact point for European coordination

RECENT DEALS REVIEWED BY THE BMWI

Since 2016, the number of deals reviewed by the BMWi has continuously increased. From January 2016 to December 2018, 185 transactions have been subject to BMWi investment reviews, of which 75 acquisitions were attributed directly or indirectly to a Chinese acquirer. In 2018, 78 transactions were reviewed by the BMWi, almost double the 41 reviews of 2016. From 2018 to 2019, the numbers continued to rise significantly to 106 cases, with the complexity of the review cases also increasing.

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

Based on the recent and planned AWG and AWW revisions, the BMWi expects the numbers to rise by approximately 40 cases per year over the upcoming years. In addition, the BMWi expects an additional 130 cases per year from other European authorities based on the EU cooperation and notification scheme. The BMWi expects to have to issue written opinions in a significant number of these cases.

Only one veto by the BMWi has become public since 2018. According to some press sources, in July 2020, the German Government vetoed Chinese Vital Material Co.’s proposed acquisition of PPM Pure Metals GmbH, part of the French Recylex group and a manufacturer of certain metals used in semiconductors and infrared detectors, including for military applications. The BMWi decided to veto the deal despite the fact that PPM had filed for bankruptcy two months earlier.

Other noteworthy interventions include the following:

- In July 2018, the German Federal Government had decided to prevent the acquisition of a 20 percent stake in the power grid operator 50Hertz by a Chinese investor by arranging for an investment by the state-owned *Kreditanstalt für Wiederaufbau* (KfW), because it did not have jurisdiction to block the deal under the then pertinent FDI regime. The government officially confirmed that the acquisition by KfW was aimed at protecting critical infrastructure for the energy supply in Germany
- In August 2018, the BMWi—for the first time—had threatened to veto a Chinese inbound transaction. In the end, the Chinese investor dropped its attempt to acquire German toolmaker Leifeld ahead of the expected veto. This decision would have been the first prohibition of a transaction under the German investment control regime

In contrast, in February 2020, the BMWi cleared the acquisition of German locomotive manufacturer Vossloh by Chinese train manufacturer CRRC.

Triggered by the COVID-19 pandemic, the BMWi announced in June 2020 that the KfW will acquire 23 percent of CureVac, a biopharmaceutical company that develops vaccines for infectious diseases like COVID-19 and drugs to treat cancer and rare diseases, in order to avoid its potential acquisition by any foreign investor.

TRENDS IN THE REVIEW PROCESS

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

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

However, there is also a clear trend toward the use of "remedies" to mitigate security concerns. In the same vein, the German investment in CureVac may be seen as a first step toward more scrutiny in the healthcare sector. In fact, the BMWi justified the decision by citing German security interest.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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

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

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

OUTLOOK

- It remains unknown whether the implementation of the European screening mechanism, which came into force in October 2020, the overall number of deals approved shows the continuous openness of Germany towards foreign direct investments
- The German Federal Government announced that it will expand further the list of critical activities subject to notification obligation based on the EU Screening Regulation. The list will probably include companies active in the field of artificial intelligence, robotics, quantum technology and biotechnology, and may expand to other areas included in the EU Dual Use Regulation
- It remains unknown whether the implementation of the European screening mechanism, which will come into force in October 2020, will further extend the duration of investment control procedures in Germany, perhaps because of a coordination with other EU Member States or the European Commission. But with the expansion of the list of critical activities, a significant number of additional transactions need to be filed and reviewed. Staff at the BMWi has been beefed up insufficiently to meet the increased demand, which is expected to result in further delays of reviews conducted by the BMWi
- The German Federal Government understands that review duration is a problem, but (apart from a reduction of the initial review period to two months) has not done anything substantial about review duration yet

Italy

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

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

The Italian government, which is led by the President of the Chamber of Ministries, together with any relevant ministry (such as the Defense Ministry, the Ministry of Transport and the Ministry of Communications), reviews any transaction relating to Italian companies that carry out “strategic activities” in the defense and national security sector or hold “assets with strategic relevance” in certain specific sectors deemed strategic for the Republic of Italy. And to the extent that non-EU persons are involved, any agreement relating to the acquisition of assets or services relating to 5G technology infrastructures are also reviewed.

Italian law provisions on the so-called “golden power” procedure were adopted in March 2012 and were amended and supplemented by several law decrees, adopted also during 2020 in response to the COVID-19 pandemic (the Golden Power Law) and in furtherance of the EU Guidelines on the screening of foreign direct investments (FDI) in Europe issued by the EU Commission on March 25, 2020. The rules aim to protect national security, defense and public interest, as well as Italian companies’ technology and technical, industrial and commercial know-how.

In particular, in response to COVID-19 and in order to protect Italian strategic assets against potential predatory speculative transactions by foreign investors, which may take advantage of depressed valuations caused by the negative impact of the pandemic, in March 2020 the Italian government significantly expanded the scope of application of the Golden Power Law.

The government introduced a number of additional broadly defined sectors deemed of strategic importance for the purposes of the Golden Power Law, including critical infrastructure, such as water and health, energy, transport and communication in general (and no longer limited to grid/network infrastructure); critical technologies and dual-use items (including artificial intelligence, robotics and biotech); supply of critical inputs; agri-food business; steel business (the expansion into the agri-food and steel business is applicable only on a temporary basis until December 31, 2020); access to sensitive information (including personal data); media; and financial, credit and insurance (the “New Strategic Sectors”).

The government also expanded the scope of relevant transactions subject to screening, and introduced the power to trigger the Golden Power review independently and in the absence of a filing (an “ex officio review”). The Italian government is in the process of issuing a prime minister decree that will further detail the relevant strategic assets and businesses falling within the New Strategic Sectors. Pending approval of this prime minister decree, the scope of application will be rather broad.

FILING OBLIGATION AND CONSEQUENCES

Filing is mandatory, and the notification must be made by the company or by the seller/purchaser in relation to any relevant transaction or resolutions adopted by the target company, and any acquisition of interests in a target company by a foreign investor, to the extent that the target company exercises any strategic activity in the defense and national security sector, or holds any strategic asset in any other sector covered by the Golden Power Law, in each case to the extent that certain requirements and thresholds are met. The filing is also mandatory (by the relevant company) in connection with the execution of any agreement regarding any acquisition of assets or services pertaining to 5G network technology from any non-EU person.

Breach of the notification obligation can lead the purchaser to be held liable for a general monetary sanction equal to an amount of not less than 1 percent of the cumulative turnover realized by the companies involved in the transaction and up to twice the value of the transaction, or, solely with respect to 5G technology agreements, of not less than 25 percent up to 150 percent of the value of the transaction.

TYPES OF DEALS REVIEWED

The Italian national rules specify the industries and sectors with a national interest and the need to be protected from predatory acquisitions by foreign investors. In particular, the Italian government has jurisdiction to review any transaction in the defense and national security sectors, which may harm or constitute a material threat to the Italian government's essential interests in the defense and national security of Italy, and in any other strategic sector under the Golden Power Law, which may harm or constitute a material threat to the fundamental interests of Italy relating to the security and operation of networks and systems, to the continuity of supplies and to the preservation of high-tech know-how.

The government may also review the execution of any agreement with any non-EU person relating to the acquisition of assets or services relating to 5G technology infrastructure (or any 5G technology-related components). In this context, the types of transactions that the Italian government can review are various in nature and include deals structured as stock or asset purchases, mergers, and joint ventures in which the foreign partner is investing in an Italian business, as well as transactions or corporate actions that may have the effect of changing the target company's ownership structure or purpose, transfer of headquarters outside of

the Italian territory or winding up of the target company's business.

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

For companies in the other strategic sectors (including the New Strategic Sectors), a filing will be required in connection with transactions or resolutions adopted by a target company relating to energy, transport, communication and high-tech sector assets, and up to December 31, 2020, assets falling within the New Strategic Sectors, in both cases resulting in a change of ownership, control or availability of such assets. Up to December 31, 2020, filing will also be required for acquisitions by EU/EEA entities of controlling interests in companies operating in any of the strategic sectors covered by the Golden Power Law prior to entry into force of the post-COVID-19 measures, and such screening will be applied to EU/EEA entities only if the acquisition is related to defense and national security sectors, or any asset sale transaction (other than the acquisition of shareholding interests) in the energy, transport and communications sectors).

Filing is also required for acquisitions by any non-EU/EEA entity of any interest representing at least 10 percent of the corporate capital or otherwise entitling to at least 10 percent of the voting rights of the target, so long as

the investment value is equal to or exceeds €1 million (and any subsequent acquisition exceeding 15 percent, 20 percent, 25 percent and 50 percent thresholds), in all sectors covered by the Golden Power Law, including the New Strategic Sectors prior to entry into force of the post-COVID-19 measures—such screening applied only to acquisitions of a controlling interest by any non-EU/EEA entities.

From January 1, 2021, non-EU/EEA investors will continue to be subject to the obligation to notify the acquisition of a controlling interest in companies operating in any such strategic sector, including the New Strategic Sectors until further detailed in the prime minister decree (currently in the process of being approved) that will identify the relevant strategic assets included in the New Strategic Sectors.



To date, the Italian government has generally exercised its powers only to apply specific measures or conditions to the transactions, and only one known transaction has been vetoed.

SCOPE OF THE REVIEW

Based on the publicly known golden power reviews completed since the adoption of the Italian Golden Power Law, the Italian government mainly focused its attention on transactions leading to changes in governance and internal policies that could be capable of harming national interests; transfer of headquarters outside of the Italian territory and total or partial delocalization of the manufacturing and/or research and development activities; transfer of intellectual property rights and/or know-how outside of Italy and for the benefit of foreign investors; and maintenance of employment levels, mainly in relation to companies operating in the infrastructure (energy, transportation and TLCs) and high-tech sectors.

The Italian government enjoys broad power to impose restrictions (such as the power to veto the resolutions or impose special conditions); however, the main measures and special conditions that have so far been imposed by the Italian government have included:

- Control measures, in particular with reference to corporate governance and composition of the management bodies of the target companies
- Safety measures, such as the approval of safety contingency plans to monitor strategic assets and operations as well as the appointment of a Chief Safety Officer approved by the Italian government
- Monitoring measures, such as the establishment of independent committees tasked with the duty to monitor the target's compliance with the above measures imposed by the Italian government
- Other management, organizational and technical measures aimed at preserving the confidentiality of information and the technological know-how of the target

TRENDS IN THE REVIEW PROCESS

On the basis of public documentation made available by the Italian government, as well as of White & Case's direct experience in assisting companies with golden power reviews, since the adoption of the Golden Power Law a number of golden power reviews have been activated and completed before the Italian government.

Among these, the Italian government exercised its special powers only in relation to 26 known golden power procedures, in relation to the sectors of defense and national security, transport, communications and 5G networks technology, as well as in relation to the following New Strategic Sectors: biotechnology, financial and credit.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign investors willing to enter into a transaction in relation to any Italian company operating in the defense or national security sector or holding assets in any of the strategic sectors (including the New Strategic Sectors) or operating in the 5G technology sector should carefully evaluate the possibility that a golden power filing is required and should carry out the relevant analysis before entering into any transaction.

It is crucial for foreign investors to understand and consider the risk that, in the event that a transaction falls within the scope of the Golden Power Law, it may be possible that the Italian government will veto or impose certain measures or conditions to the completion of the transaction. Early contacts on an informal basis with the competent authorities should be initiated in order to efficiently plan the timetable and structure of the transaction.

REVIEW PROCESS TIMELINE

The filing must occur within 10 days after the acquisition (typically after signing) or adoption of the relevant resolution, as applicable. Upon receipt of the filing (to the extent complete), a standstill period of 45 business days (30 business days for agreements relating to 5G technologies) begins during which the Italian government carries out the review of the envisaged investment or resolution, and any voting rights attached to the acquired interests are frozen until the date on which the Italian government decides whether to exercise its powers.

In the event that the Italian government requests additional information, the 45-business-day term may be suspended by the Italian government only once and for a maximum period of ten additional business days if the Italian government requests additional information to the filing person, and 20 additional business days if the government requests additional information from a third party. With respect to agreements relating to 5G technologies, the review term is 30 business days and may be extended twice for a maximum period of 20 additional business days per each extension, if the case is particularly complex. In addition, in line with the regime applicable to the other sectors, the review term (as extended, if applicable) may be suspended only once and for a maximum period of ten additional business days if the Italian government requests additional information from the filing person, and 20 additional business days if the Italian government requests additional information from a third party.

The EU has issued EU Regulation 452/2019 establishing a framework for the screening of foreign direct investments in the European Union, pursuant to which each Member State carrying out an FDI review process would need to notify the EU Commission and the other Member States so that they can submit any observation or comment or, in case of the EU Commission, an opinion. Starting from October 11, 2020 (when the EU Regulation entered into force), if another EU Member State or the EU Commission decides to review a transaction (independently or at the

request of the Italian government), the standstill period will pause until the observations or opinion of the relevant EU Member State or the EU Commission have been delivered, which may take up to 35 calendar days from receipt of the notification, unless further extended due to the request for additional information.

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

If the Italian government does not issue clearance, extend or suspend the review period, or exercise its powers to block or impose conditions before the end of the standstill period (as possibly extended), the transaction or the resolution or the agreement is deemed tacitly cleared and can be legitimately implemented.

OUTCOMES

The majority of publicly known notified deals have been approved:

- Since the adoption of the Golden Power Law (2012), to date the Italian government has generally exercised its powers only to apply specific measures or conditions to the transactions, and only one known transaction has been vetoed due to the nature of the business comprising activities in the defense and national security sector that were considered strategic to the national interest
- The review process by the Italian government can last up to a maximum of 75 business days from the filing (60 to 100 business days for 5G technology transactions, depending on the complexity), subject also to any pending observations or opinion of the relevant EU Member State or the EU Commission, as applicable
- The notification obligation applies to acquisitions of stakes in, or asset transactions or other extraordinary corporate transactions relating to, Italian companies carrying out “strategic activities” in the defense and national security sector or that hold “assets with strategic relevance” in a broad spectrum of strategic sectors, identified by the Italian government, as recently expanded in response to COVID-19 (including energy, transport, communications, health, finance, insurance, food security, biotech, nanotechnologies and AI, and other tech sectors), as well as to agreements relating to 5G, to the extent entered into with non-EU persons

Russian Federation

The Federal Antimonopoly Service strengthens enforcement of foreign investments legislation

By Igor Ostapets and Ksenia Tyunik

Established by the Russian government in 2008, the Government Commission on Control over Foreign Investments in the Russian Federation is responsible for the review of foreign direct investment applications. The Government Commission is headed by the Chairman of the Russian government and composed of the heads of certain ministries and other government bodies. Following the appointment of Mikhail Mishustin as the new Chairman of the government and formation of the new government in January 2020, the new composition of the Government Commission was approved in March 2020.

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

WHO FILES

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

To apply for consent, the acquirer must submit an application to FAS with attachments, which include corporate charter documents of the acquirer and the target, information on their groups' structures (including the whole chain of control over both the acquirer and the target), transaction documents and a business plan for the development of the target after closing.

TYPES OF DEALS REVIEWED

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

The list of activities of "strategic importance" comprises 47 activities that, if engaged in by the target, cause the target to be considered a Strategic Entity. The 47 activities encompass areas related to natural resources, defense, media and monopolies. The activities include not only those directly related to the state defense and security (such as operations with nuclear materials, production of weapons and military machines), but also certain other indirectly related activities (such as TV and radio broadcasting over certain territories, extraction of water bioresources and publishing activities).

The criteria for determining control are rather wide and are lower (25 percent) for a target that is involved in the exploration of "subsoil blocks of federal importance," such as oil fields with a certain size of reserves, uranium mines, and subsoil blocks



Foreign public investors are prohibited from obtaining control over Strategic Entities, or acquiring more than 25 percent of a Strategic Entity's property.

subject to exploration within a defense and security zone.

Foreign public investors are prohibited from obtaining control over Strategic Entities, or acquiring more than 25 percent of a Strategic Entity's property, and must obtain consent of the Government Commission for acquisitions of the reduced stakes in Strategic Entities.

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

Non-disclosing investors (those refusing to disclose to FAS information about their beneficiaries, beneficial owners and controlling persons) are subject to a special, stricter regime established for foreign public investors. In December 2018, the Russian government approved rules for disclosing this information,

according to which a foreign investor planning to enter into a transaction involving a Strategic Entity must make a prior disclosure of its controlling entities, beneficiaries and beneficial owners in order to avoid being treated as a “non-disclosing” investor and to ensure that the stricter regime established for foreign public investors does not apply to it. The disclosure must be made either in the form of an application for approval, if approval is required, or in the form of an informational letter filed with FAS 30 days before the transaction.

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

Amendments to Russia’s foreign investment laws introduced in 2017 gave the Chairman of the Government Commission the right to decide that prior approval is required with respect to any transaction by any foreign investor with regard to any Russian company, if this is needed for the purpose of ensuring national defense and state security. Upon receipt of such a decision from the Government Commission, FAS will notify the foreign investor about the need to receive approval for a prospective transaction. Any transaction made in breach of this requirement is void.

The structure of the types of transactions that could potentially fall under the requirements of this amendment is still being formed. FAS has confirmed that in practice this rule so far has been applied to very exclusive cases only. The recent

practice, however, shows that FAS has been using this procedure more frequently, primarily referring for the Prime Minister’s review those transactions that were filed as part of the regular merger procedure. Those transactions typically concerned acquisition of targets operating in sensitive spheres such as industrial gases and certain chemical products, including those for the pharmaceutical industry.

SCOPE OF THE REVIEW

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

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

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

TRENDS IN THE REVIEW PROCESS

In 2019, FAS considered 29 applications by foreign investors, of which the Government Commission approved 24 and rejected five. The total value of approved transactions was approximately US\$18.6 billion, of which the amount of foreign investments was approximately US\$14 billion.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Early in a transaction, a foreign investor should analyze whether the target company qualifies as a Strategic Entity and whether the planned transaction triggers a requirement for the Government Commission’s consent. In light of the recent amendments, acquirers should also analyze whether such consent would be needed in case the acquirer is qualified as a “non-disclosing” investor. Answering these questions will allow the investor to start filing preparations, and then to file its application sufficiently in advance to manage the filing’s impact on the timing of the transaction.

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

REVIEW PROCESS TIMELINE

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

2020 UPDATE HIGHLIGHTS

- Russia's foreign investment laws were amended in 2020. Pursuant to the amendments, the foreign investor is deemed to exercise control over the Strategic Entity even if voting rights in shares belonging to the investor have been temporarily transferred to other entities under the pledge or trust management agreement, or repo contract or a similar arrangement. According to FAS, the amendments are aimed at the exclusion of possible ways of circumventing the existing foreign investments control rules by way of temporary transfer of voting rights in the Strategic Entity's shares. However, the amendments raise many questions (including what is meant by "temporary," and the effect of transferring voting rights to another foreign investor), so their practical implementation has yet to be clarified.
- FAS has developed several other bills with suggested amendments to the foreign investments laws that have not yet been

submitted to parliament, most of which are still being discussed at various levels, including with the business community and with other governing authorities.

- FAS continues to follow the general trend for strengthening control in the foreign investments sphere. In 2020, FAS has been quite active in courts filing claims to apply the consequences of voidness of transactions effectuated in breach of the foreign investments legislation, and to deprive foreign investors of their voting rights in relation to Strategic Entities, in cases where it is impossible to apply the consequences of voidness (for example, if control is indirect and was acquired abroad). Notable also is FAS's continuation of the extensive interpretation of strategic activity dubbed "exploration of subsoil blocks of federal importance." Following the adoption of the regulation back in 2008, only companies having a license for

development of subsoil blocks of federal importance (oil fields with a certain size of reserves, uranium mines, and subsoil blocks subject to exploration within a defense and security zone) were considered Strategic Entities. Later on, while considering applications for approval of specific transactions, FAS established that drilling on subsoil blocks of federal importance, as well as provision of equipment for the purposes of exploration of subsoil blocks, are also considered "strategic" activities, so entities involved in these activities qualify as Strategic Entities. In one of the recent court cases, FAS established (and the Constitutional Court confirmed) that oilfield services in general, if provided on subsoil blocks of federal importance, are considered strategic activities, so entities providing such services to the entity holding the license for the development of the respective subsoil block are considered Strategic Entities.

OUTCOMES

- Most transactions submitted to the Government Commission for review are approved. Such approval contains the term within which the acquisition must be completed. The acquirer can subsequently apply to the Government Commission with a substantiated request to extend this term, if necessary
- The Government Commission can approve the transaction subject to certain obligations imposed on the foreign investor. Since 2016, the Strategic Investments Law allows the Government Commission to impose any type of obligation on the foreign investor. Those obligations may include the obligation to invest certain amounts of funds into activities of the Strategic Entity, or to process bioresources or natural resources extracted by the Strategic Entity on Russian territory



Spain

New measures enacted for the purpose of protecting the Spanish economy amid the COVID-19 crisis may persist longer than expected

By Juan Manuel de Remedios

The exceptional circumstances in the first and second quarters of 2020 brought about by the COVID-19 outbreak led the Spanish government to enact a number of urgent regulations establishing a new screening mechanism for certain foreign investments by virtue of Royal Decree Laws 8/2020 and 11/2020 (*Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19* and *Real Decreto-ley 11/2020, de 31 de marzo, por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19*).

The amended Law 19/2003 (*Ley 19/2003, de 4 de julio, sobre régimen jurídico de los movimientos de capitales y de las transacciones económicas con el exterior y sobre determinadas medidas de prevención del blanqueo de capitales*) incorporated—by virtue of these urgent regulations—new Article 7bis, suspending the liberal regime of foreign direct investments in Spain, particularly in relation to a number of critical industries.



Governmental authorities are likely to maintain a business-friendly approach to the review process, to the extent that investments do not significantly pose a threat to the national security, public health or public order.

FORMER REGIME AND THE 2020 NOVELTIES

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

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

a new screening mechanism for foreign investments, one that requires prior approval for investments in excess of €1 million.

Under the new regime, prior approval is now required for investments that result in a non-EU/EEA investor owning at least 10 percent of the share capital of a Spanish company (listed or unlisted), or which otherwise enable a non-EU/EEA investor to have effective participation in the management or control of a Spanish company—or if carried out by an EU/EEA resident, its beneficial owner is a non-EU/EEA resident—provided that the non-EU/EEA investor is a certain type of investor: one controlled by the government of a third party; an investor already invested or involved in security, public health or public policy in another EU Member State; or investors subject to judicial or administrative proceedings for engaging in illegal or criminal activities.

Prior approval is also required where the investment is made in a strategic sector, such as critical infrastructure, critical technologies, supply of critical inputs, food security, sectors with access to sensitive information, media and any other sector that may impact public health, safety or public order as determined by the Spanish government.

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

FILING OBLIGATION AND CONSEQUENCES IN THE EVENT OF BREACH

For tax haven approval applications, a standard form must be filed electronically at least six months prior to the transaction. For the purposes of the 2020 regime and the new screening mechanism, filing for an authorization prior to conducting the investment is required in two cases:

- The investment exceeds €1 million but does not surpass €5 million. In this case, the transaction shall be dealt with through the interim simplified process provided for in the 2^o Transitory Provision (*Disposición Transitoria 2^a*) of the Royal Decree Law 11/2020. This provision specifies that requests shall address the public official in charge from the relevant directorate of the Spanish Government; i.e., the *Dirección General de Comercio Internacional e Inversiones*

- The investment exceeds €5 million. The general regime set forth in Article 7bis of the Law 19/2003 applies. This proceeding involves similar steps as in the case of the interim simplified process. The investor is required to file an authorization request with the directorate of the Spanish government, subject to final approval from the Spanish Council of Ministers

Investments less than €1 million are thus exempt from the filing obligation of the new screening mechanism, although the relevant Spanish regulations mention that this point may be subject to adjustment once further legislation is enacted. Investments that can be proved to have been agreed or for which a valid binding offer was put in place before the state of alarm in Spain may also be permitted to take advantage of the simplified process.

Negative administrative silence (*silencio administrativo negativo*) will apply under any of the aforementioned authorization processes. The absence of a response from the government six months after filing of the approval request will be interpreted as a denial.

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

TYPES OF DEALS REVIEWED

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

SCOPE OF THE REVIEW

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

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

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

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

REVIEW PROCESS TIMELINE

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

According to conversations with public officials from the relevant government's office, the review under the ordinary process may take up to three months, but generally, the review should not take more than two months.

OUTCOME

Although limitations have been imposed on FDI and these limitations may persist, it is uncertain whether the Spanish government may impose a hard-rule approach to these restrictions. Governmental authorities are likely to maintain a business-friendly approach to the review process, to the extent that investments do not significantly pose a threat to the national security, public health or public order in Spain.

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

Sweden

Increased awareness of safety concerns related to foreign direct investments has prompted a ramp-up toward the implementation of a general FDI screening regulation

By Jan Jensen and Louise Lundberg

As of this writing, Sweden does not have a general FDI screening mechanism, and the Swedish Government largely takes a positive view of foreign companies investing in Swedish companies, as investment contributes to higher growth and employment. However, concerns have been raised that foreign ownership of sensitive infrastructure and technology in Sweden could pose harm to national security—increasingly so as a result of COVID-19.

In light of the current economic and financial situation in Sweden following the effects of the pandemic, more companies find themselves in need of capital. The desire for fresh capital has focused attention on the risks of an increase in foreign actors making investments in specific Swedish business sectors and strategic infrastructure, and gaining access to valuable technology and information in a way that may threaten Swedish security interests.

Over the course of 2020, new regulations and inquiries have been proposed by the Swedish Government as measures to meet the new EU Regulation and gradually tighten the screening of foreign investments. Although Sweden remains generally positive toward investments from non-Swedish companies, investors and companies operating certain activities may need to pay further attention to FDI regulatory issues when doing business in Sweden.

To implement the EU FDI Regulation, a new Act on Supplementary Provisions to the EU Regulation on Foreign Direct



Following the EU FDI Regulation, Sweden may have to provide information on the relevant parties to a transaction to other Member States or the European Commission upon request.

Investments (Swe. *Kompletterande bestämmelser till EU:s förordning om utländska direktinvesteringar*) has been proposed to take effect on November 1, 2020.

Advancements toward the introduction of rules that will allow for screening and blocking of foreign investments into security-sensitive infrastructure and technologies has been proposed to take effect in 2021.

WHO FILES

As of today, the marginal supervision of FDI is limited to the provisions of the Protective Security Act (Sw. *Säkerhetsskyddslagen*) and the Protective Security Ordinance (Sw. *Säkerhetsskyddsförordningen*), together known as the Protective Security Regulation. The Protective Security Regulation protects “security-sensitive activities” —covering military, airport, energy, infrastructure and technology industries—of essential interest to national security. However, it is not an investment screening mechanism.

If an acquisition concerns a company operating a security-sensitive activity or handling security-sensitive information,

the Protective Security Regulation requires the seller of a security-sensitive business to notify the Swedish Security Service (Sw. *Säkerhetspolisen*) or the Swedish Armed Forces (Sw. *Försvarsmakten*) of the transaction before the acquisition is completed. Importantly, the Act does not contain provisions allowing the foreign investment to be screened or prohibited.

TRENDS IN THE REVIEW PROCESS

The new Act on Supplementary Provisions to the EU FDI Screening Regulation implements the requirements of the EU FDI Screening Regulation into the Swedish system. The Act is not a screening mechanism; it does not provide an obligation to notify; and it does not empower the Swedish government to prohibit an investment. Nevertheless, following the EU FDI Regulation, Sweden may have to provide information on the relevant parties to a transaction to other Member States or the European Commission (EC) upon request. The Act will take effect on November 1, 2020.

The ISP (the Inspectorate of Strategic Products, Sw. *Inspektionen för strategiska produkter*) is designated as the contact point to accommodate requests for information from the EC and other EU Member States, and to submit an annual report on all FDI in Sweden to the EC.

According to the proposal (Prop. 2019/20:193), the ISP will have the power to request that the foreign

investor, or the undertaking in which the foreign investment is planned or has been completed, provide a broad range of information, including the ownership structure, the value of the investment, business operations and funding. Information acquired by the ISP, although protected by the Secrecy Act (Sw. *Sekretesslagen*), may be forwarded to other Swedish authorities.

A request for information shall apply immediately and may be combined with a penalty of a fine for non-compliance (Sw. *vite*). A decision by the ISP to request information shall be subject to appeal to the administrative court (Sw. *Allmän förvaltningsdomstol*).

OUTCOMES

Two key initiatives were announced in late August 2020, giving a clear signal that the Swedish Government is now determined to introduce measures eventually leading to a general FDI screening mechanism.

- First, the Protective Security Act will be amended to allow for a screening of investments in security-sensitive activities that may harm Swedish security interests. According to the proposal, operators of security-sensitive activities subject to a transaction involving a foreign investment would be required, before the closing of the transaction, to conduct a security and suitability assessment and notify (“consult”) the designated authority. The designated authority will have the power to impose remedies on the parties and, ultimately, to prohibit the transaction. This amendment is proposed to enter into force on January 1, 2021
- Second, the Swedish government has appointed a Committee of Inquiry to investigate and present a proposal for a general FDI screening mechanism. The deadline for this proposal is the end of 2021. Consequently, any general screening mechanism will likely be introduced in 2022



United Kingdom

With a new piece of primary legislation, the UK government is expected to make more far-reaching changes to its powers of scrutiny over investments that may pose a risk to national security

By Marc Israel

Acquisitions in the UK in potentially sensitive industries do not require parties to seek approval from a regulator or the government. While merger control review in the United Kingdom is independent of government, the UK government has always retained the ability to intervene in cases concerning a specified “public interest” consideration under the Enterprise Act 2002 (EA02). Traditionally these concerned defense-related transactions under a “national security” gateway, but over the years this has expanded to also cover media plurality and, following the global financial crisis, the stability of the UK’s financial system.

In the same way that a new “public interest” consideration was added after the last major global crisis, a new public interest consideration, introduced in June 2020, has been added as a result of the COVID-19 crisis, and concerns maintaining a capability to combat a public health emergency.

Since 2017, the government has been considering major legislative changes (yet to be implemented) to the UK’s national security/foreign direct investment regime. The government issued a white paper, on which it consulted. Pending the introduction of any proposed changes (which may have been amended following the consultation), there have been a number of amendments to widen the scope of cases in which the government can intervene under the existing rules.

In particular, the thresholds at which the government can intervene in cases in specific industry sectors have been reduced to give the

government more flexibility in cases that might be most likely to raise national security concerns.

SHORT-TERM CHANGES

Over the past few years, the UK government adopted changes to fill a perceived gap in its powers, in advance of proposed legislative powers covering cases with the greatest potential to raise national security concerns.

In June 2018, amendments to the EA02 reduced the thresholds for interventions in cases involving a target active in one of three areas: the development or production of military or dual-use goods; the design and maintenance of computing hardware; and the development or production of quantum technology. In June 2020, further amendments were made expanding the list of sectors to which these lower thresholds applied to also include activities in three more sectors: artificial intelligence; advanced materials; and cryptographic authentication technology.



The thresholds at which the government can intervene in transactions in specific industry sectors have been reduced to give the government more flexibility in cases that might be most likely to raise national security concerns

If a target company is active in any of these specific areas, the government can intervene in an acquisition if the annual UK turnover of the target is £1 million or more, or if the target alone accounts for 25 percent or more of purchases or sales of any goods or services in the UK. Previously, the thresholds for all cases (except for government contractors) was that the target’s UK turnover was £70 million or more, or that the parties had to overlap such that there was an increment leading to a combined share of supply of 25 percent or more.

While those thresholds remain for all other cases, the lower thresholds apply where the target is active in any of these six specified sectors. This requirement no longer exists for cases in the identified sectors, and a deal can be caught even if there is no overlap with the purchaser.

However, not all recent changes have related solely to national security. In the wake of the COVID-19 crisis, the UK government further amended the EA02 adding a fourth “public interest” ground on which it can intervene in mergers. In addition to the existing grounds of national security, media plurality and financial stability, the government can now intervene if there are concerns relating to the “capability to combat, and to mitigate the effects of, public health emergencies.”

The intention is to protect key businesses in the health sector, which for any number of reasons including a liquidity crisis, may be susceptible to takeover by foreign investors. The integrity of these

businesses, such as those active in vaccine research and development or the manufacture of personal protective equipment, is seen as critical to ensuring that the UK can protect itself during the current and any future health crises.

COVID-19 has acted as a catalyst for the existing trend of stricter foreign direct investment (FDI) rules worldwide, as global supply chains have been compromised and countries have been forced to consider both the strengths and the limitations of their domestic capability. The recent changes seen in the UK show that the UK is no exception.

LONG-TERM CHANGES

The short term-changes are seen as interim measures prior to the government enacting more comprehensive reform. With a new piece of primary legislation, the National Security and Investment Bill (NSIB), the government is expected to make more far-reaching changes to its powers of scrutiny over investments that may pose a risk to national security.

Under the NSIB, which is expected to be laid before Parliament later in 2020, notification will likely remain voluntary, but parties will be encouraged to notify their transactions. As with the UK's general merger regime, transactions that are not notified may be subsequently investigated and remedies imposed if they are found to be problematic.

The government expects to intervene much more often once the new rules, if approved by Parliament, come into force. The government expects to receive approximately 200 notifications per year going forward and believes that approximately half will progress to a full assessment. Of those, the government estimates that 50 will result in a remedy of some sort, which could vary from implementing ring-fencing (of individuals and/or information) to outright prohibition. Since it was introduced, the existing

regime has seen, on average, fewer than one intervention per year.

Where parties choose not to notify, the government will have the ability to "call in" transactions that result from a "trigger event." A trigger event will include the acquisition of more than 25 percent of an entity's shares or votes, significant influence or control over an entity, or further acquisitions of significant influence or control over an entity beyond these thresholds.

Acquisitions of assets will also be covered, which is not always the case under the existing rules. The government's proposal was that the timescale for post-closing intervention in national security cases be increased from four months (as under the general merger control regime) to six months after the details of the transaction are made known or arrive in the public domain.

The government has indicated that it will consider three factors when determining whether a trigger event could lead to a national security risk:

- "Target risk," where the entity or asset in question could be used to undermine national security (for example, where the nature of the target's business could pose a potential risk)
- "Trigger event risk," where the acquisition itself gives someone the means to undermine national security (by affording greater opportunity for disruptive actions or espionage, for example)
- "Acquirer risk," where the acquirer itself has the potential to use its control over the target to undermine national security, as when acquisitions are carried out by entities controlled by hostile states or other hostile parties

The NSIB is expected to require that the government assess all national security considerations. The existing role of the Competition & Markets Authority (CMA, the UK's main antitrust agency), which investigates and reports to the government when an intervention

is made, will be removed. The NSIB will also introduce civil and criminal sanctions to deal with non-compliance with any remedies that might ultimately be imposed.

WHO FILES

As there are currently no specific requirements relating to deals that may raise potential national security issues, strictly speaking no person needs to file an application. Rather, if the UK government considers that a deal raises national security issues (or indeed any of the other three "public interest" considerations), the Secretary of State (SoS) may issue a public interest intervention notice (PIIN).

The procedures for the SoS to issue a PIIN, and—if considered appropriate—ultimately block a deal are set out in the EA02. If a PIIN is served, then the acquirer (and others as appropriate) is required to provide information.

TYPES OF DEALS REVIEWED

The EA02 currently allows the SoS to intervene when one of four specified public interest considerations arise: national security; media plurality; stability of the UK's financial system; and, since June 2020, the ability to combat and mitigate public health emergencies. These powers were bolstered by the amendments in 2018 and 2020 mentioned above, wherein the jurisdictional thresholds for intervention have been reduced, if the target is active in military or dual-use goods, computing hardware, quantum technologies, artificial intelligence, advanced materials or cryptographic authentication technologies.

Prior to the 2018 amendments, there was no guidance as to which industries were relevant to national security, although in all but one case, national security PIINs involved defense considerations. The lowering of thresholds for transactions in 2018 and 2020 indicates that a greater number of non-defense-related transactions can be scrutinized on national security grounds.

The first government intervention under the new (lower) thresholds was in the aerospace sector, with a target active in the manufacture of dual-use goods. That case—the proposed acquisition of Northern Aerospace Ltd. by Gardner Aerospace Holdings Ltd., which is owned by a Chinese company—was ultimately abandoned following the intervention.

The UK government has intervened in a merger on public interest grounds on a number of occasions since the original legislation came into force. However, no transaction has ever been blocked on national security or other public interest grounds. In some cases, concerns have been raised about the maintenance of strategic UK capabilities and the protection of classified information, including when the acquirers have been from the US or other NATO allies. In such cases, the deals have been approved following undertakings provided by the acquirer to address the concerns, often involving the ring-fencing of sensitive information, or maintaining certain UK capabilities.

SCOPE OF THE REVIEW

When a PIIN is issued, the CMA must investigate and report to the SoS on competition issues and also on the public interest considerations (except in media plurality cases when the sectoral regulator, Ofcom, advises the SoS on the media plurality issues). However, the legislative proposal is to remove the CMA from all national security reviews. Under the current system, the CMA's report to the SoS will summarize any representations received on national security matters specified in the PIIN (as well as addressing any competition issues).

The SoS will consider the CMA's report and decide whether the transaction should be subject to a more in-depth "Phase 2" review by the CMA, or whether to accept any undertakings the acquirer may have offered to address public interest concerns, or indeed—

which has never happened to date—whether the public interest concerns are not warranted or do not require any remedial action.

If there is an in-depth review by the CMA, it is required to report whether the transaction operates or may be expected to operate against the public interest, and make recommendations as to the action the SoS or others should take to remedy any adverse effects. The SoS will make the final decision on the public interest issues and any remedial steps to address the public interest issues.

RECENT CASES

The years 2019 and 2020 have seen a number of cases being reviewed by the CMA following a PIIN in light of potential national security concerns. Below are details of three recent transactions. Two of them—Mettis/Aerostar and Impcross/Gardner—involved Chinese buyers and were both abandoned by the parties after national security issues were raised. They serve as examples of the impact that the government's increasingly interventionist approach may have on foreign takeovers of UK businesses active in sensitive sectors.

Acquisition of Inmarsat plc by Connect Bidco Ltd.

In July 2019, the SoS intervened in the proposed acquisition by Connect Bidco of Inmarsat, which operates satellites that manage critical government communications for the UK (and other countries), particularly in emergency services, naval operations and border control.

In this case, the CMA announced the launch of its merger inquiry and brought it to the attention of the SoS, as the CMA thought the transaction may also raise public interest considerations.

The SoS issued a PIIN on grounds of national security. The CMA submitted its report to the SoS in mid-September 2019 and concluded that the transaction did not raise any competition concerns. As far as national security was concerned, the parties offered undertakings to provide assurances that sensitive information would be protected and enhanced security controls would be in place to ensure the continued supply of key services used by the Ministry of Defence.

Measures included a high standard of physical security in relation to company processes and premises, system security in relation to IT systems, and personnel security in relation to employees and management. Connect Bidco and Inmarsat also undertook to continue the provision of certain capabilities and to maintain a UK-registered company to ensure that services remained in the UK's jurisdiction, and agreed that the Ministry of Defence would be allowed to audit compliance with security measures.

In October 2019, the SoS accepted the parties' undertakings as sufficient to mitigate the national security risks.

Acquisition of Mettis Aerospace Ltd. by Aerostar

Aerostar is a Chinese entity and Mettis Aerospace is a UK-based company that provides precision-forged and machined components in titanium, aluminum and steel. The offer was unsolicited.

In December 2019, the SoS issued a PIIN on the ground of national security. Before the CMA produced its report (on February 13, 2020), the parties confirmed that they intended to abandon the transaction. As a result, the CMA concluded that there was no longer a relevant merger situation on which to report, but noted it would have to revisit this question if the transaction were to be revived.

Acquisition of Impcross Ltd. by Gardner Aerospace Holdings Ltd.

Both Impcross and Gardner Aerospace Holdings are manufacturers of parts for the aerospace industry. While Impcross is UK-based, Gardner is Chinese-owned, but operates in multiple jurisdictions, including the UK.

In December 2019, the SoS issued a PIIN on the public interest ground of national security, requiring the CMA to report on the transaction by March 2, 2020. The report concluded that the transaction “will not give rise to a realistic prospect of an SLC [a substantial lessening of competition],” and summarized the key representations made (including by the Ministry of Defence) on the national security issue.

On March 16, 2020, the SoS wrote to the parties stating his intention to refer the merger for a Phase 2 inquiry. As a result, on March 30, Gardner informed the SoS that it was abandoning the transaction, and offered undertakings in lieu of the Phase 2 inquiry. These included a confirmation that Gardner did not intend to proceed with the transaction and an undertaking to notify the SoS before commencing any discussions with Impcross within a specified period. Following this, the SoS issued a consultation to receive views on whether such undertakings were acceptable. Although the consultation closed

on July 2, at this writing a final decision is still yet to be made.

Although not a merger decision taken under the EA02, in July 2020, the UK government announced a ban on all new Huawei equipment in the UK’s 5G network after December 31, 2020, and requiring the removal of all existing Huawei equipment by the end of 2027.

This decision was taken following advice from the National Cyber Security Centre, which stated that recent sanctions imposed by the US would compromise the security of Huawei equipment in the UK. The decision demonstrates that the UK’s telecoms network is an area that the government considers one that could give rise to issues of national security, and may be subject to intervention to the extent that potential transactions in the sector may have an impact in the UK.

TRENDS IN THE REVIEW PROCESS

Recent reforms’ specific focus on military and dual-use technology, quantum technology, computing hardware, artificial intelligence, advanced materials and cryptographic authentication technology reflects the fact that national security risks are increasingly likely to arise in the technological and cyber spheres.

As Big Data dominates an increasing number of sectors, general concerns about cybersecurity and the control of

critical infrastructure networks will become more commonplace, with the ban on Huawei described above also reflective of this. Accordingly, it would not be surprising to see more SoS interventions in technology-related transactions on national security grounds.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Potential issues should be considered as early in the planning process as possible, and increasingly in any case—not just in defense-related deals—with consideration to how they might touch on national security. State-owned acquirers, or those with material links to (or financing by) foreign state-owned enterprises, should be particularly well prepared, and consider what undertakings they might be prepared to give, if concerns are raised.

To date, such undertakings have tended to relate to ensuring the protection of classified information and ensuring UK capabilities. Early engagement with the relevant government departments would also be sensible, especially if an auction process is likely, because the target will want to ensure that the acquirer is able to complete any proposed deal as quickly as possible. The collapse of the Gardner/Impcross deal may have been due, in part, to inadequate planning and preparation on the potential national security issues.

2020 UPDATE HIGHLIGHTS

- The NSIB is due to be introduced late in 2020. The revised regime will likely remain voluntary, meaning that there will be no obligation to notify deals that may affect national security. However, non-notified deals may be susceptible to review for up to six months after details become public
- COVID-19 has precipitated significant changes in this area. The crisis has highlighted the vulnerability of certain UK businesses and infrastructures, already resulting in an expansion of the public interest grounds for merger intervention. It now seems inevitable that future legislative changes, such as the introduction of the NSIB, will be influenced by the crisis

-While there is arguably now a tougher approach to transactions raising national security concerns as these deals are subject to more scrutiny, it is anticipated that, if issues are identified, the majority of cases will continue to be approved with undertakings. To date, there have been no prohibitions. However, the Gardener/ Impcross deal was abandoned, as the SoS indicated he was intending to refer the case to a detailed "Phase 2" review, so it is not known if suitable undertakings would have been offered or accepted in that case

OUTCOMES

- No deal has been blocked by the SoS on national security grounds
- All national security cases to date in which concerns have been identified have resulted in behavioral remedies (such as ring-fencing information and ensuring strict controls) in lieu of a detailed Phase 2 investigation. No divestments have been required, but recently two deals were aborted as a result of government intervention
- The wide-ranging changes proposed by the government to the rules for reviewing deals potentially affecting national security are likely to have a material impact on M&A and FDI in the future



Australia

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

By John Tivey, Nirangjan Nagarajah, Barnaby Matthews and Josh Butler

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

When making its decision, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals, consults with other relevant Australian Government agencies as required and advises on the national interest implications. Australia's foreign investment policy framework comprises the Foreign Acquisitions and Takeovers Act 1975 ("the Act"), the Act's related regulations, Australia's Foreign Investment Policy ("the Policy") and a number of guidance notes.

WHO FILES

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

An application includes a filing fee that varies according to the type of deal and the deal value.

TYPES OF DEALS REVIEWED

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

- A "substantial interest" in an Australian entity: An acquisition of an interest of 20 percent or more in an Australian entity valued at more than AUD 266 million (approximately US\$180 million). This monetary threshold has been temporarily removed as part of the COVID-19 interim measures (see further below)
- Australian land and land-rich entities: Various acquisitions of interests in Australian land are regulated with varying monetary thresholds, including in respect of residential land, vacant commercial land, developed commercial land and an entity where the value of its interests in Australian land exceeds 50 percent of the value of its total assets



Given the extended review timeframes arising from the COVID-19 interim measures, foreign persons should be particularly cognizant of the need to engage with FIRB early in a deal timeline.

- Agricultural land and agribusinesses: Acquisitions of interests in agricultural land and agribusinesses are regulated separately in the Act. In addition, a register of foreign ownership of agricultural land is maintained by the Australian taxation authority

Certain types of investors receive differing treatment for their deals:

- Free trade agreement investors: Consistent with Australia's free trade agreement (FTA) commitments, higher monetary thresholds apply to certain acquisitions made by investors from Chile, Japan, South Korea, China, Singapore, New Zealand, the US and countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP) is in force. For example, an acquisition of an Australian entity by an FTA country investor will only require FIRB approval if the entity is valued at more than AUD 1.154 billion (approximately US\$780 million), unless the investment relates to a "sensitive business" such as media, telecommunications, transport, defense and military-related industries (to which a lower threshold applies) or the investor is a foreign government investor. However, as part of the COVID-19 interim measures (see further below), all monetary thresholds have been temporarily removed, including for FTA country investors

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

TEMPORARY MEASURES IN RESPONSE TO COVID-19

Prior to March 29, 2020, actions were only notifiable if they met specific monetary thresholds as outlined above. In response to the COVID-19 pandemic, to protect against the perceived risk of large numbers of financially distressed Australian businesses being acquired by foreign persons, the Australian government has modified the approval regime, so that all of the above monetary thresholds are reduced to US\$0 (provided that the action otherwise is notifiable). As such, provided the acquisition meets the substantive criteria, the value of the transaction is irrelevant and must be submitted for approval. These interim measures have also resulted in increased review periods.

SCOPE OF THE REVIEW

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

– The impact on national security (with advice from the Critical Infrastructure Centre

on national security risks to critical infrastructure)

- The impact on competition
- The effects of other Australian government laws and policies (including tax and revenue laws)
- The impact on the economy and the community
- The character of the investor

TRENDS IN THE REVIEW PROCESS

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

However, some significant investment proposals have been rejected on national security grounds in recent years, including:

- Hong Kong-based CKI’s proposed acquisition of APA Group and its energy network in 2018
- The New South Wales government’s proposed sale of the Ausgrid electricity network to Chinese and Hong Kong investors in 2016
- The proposed acquisition of the S Kidman agricultural land holdings by Chinese investors in 2015

The publicized grounds upon which these acquisitions were rejected included excessive concentration of market power, proximity of land holdings to defense sites, as well as general concerns regarding foreign ownership of critical infrastructure assets.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

Foreign persons should file an application in advance of any transaction or make the transaction conditional on FIRB approval, and a transaction should not proceed to completion until the Treasurer advises on the outcome

of its review. For a more sensitive application (e.g., a transaction involving the power, ports, water, telecommunications, banking or media sectors), foreign investors should consider the government’s invitation in the Policy to engage with FIRB before filing an application for a significant investment. Given the extended review timeframes arising from the COVID-19 interim measures, foreign persons should be particularly cognizant of the need to engage with FIRB early in a deal timeline.

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

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

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

REVIEW PROCESS TIMELINE

Under the Act, the Treasurer typically has 30 days to consider an application and make a decision. However, pursuant to the interim COVID-19 measures, timelines for reviews have been revised to six months. While this does not mean that the review will take this long, investors should be prepared to factor a six-month review period into acquisition timelines. The timeframe for making a decision will not start until the correct application fee has been paid in full. If the Treasurer requests further information from the investor, the review period will be on hold until the request has been satisfied.

2020 UPDATE HIGHLIGHTS AND REFORMS

- Compliance: The Australian government has indicated an increased focus on compliance activities and audits, particularly with respect to tax conditions imposed by the Australian Taxation Office on FIRB approvals
- Reforms: In addition to introducing the interim COVID-19 measures discussed above, the Australian government has announced significant reforms to Australia's foreign investment approval regime, which are expected to be effective from January 1, 2021. The reform package includes:
 - A new "national security test" created for foreign investors proposing to acquire a direct interest in a "sensitive national security business." Consistent with the interim COVID-19 measures, the Treasurer may impose conditions or block any investment on national security grounds, regardless of value
 - Mandatory notification of any proposed foreign investment into a "sensitive national security business." The definition of "sensitive national security business" is subject to further consultation, but the Treasurer has indicated it will capture telecommunications, critical infrastructure, defense, businesses storing sensitive data and any business or land situated near defense or national security operations
 - A new "call in" power that allows the Treasurer to screen any investment that would not ordinarily require notification on national security grounds (including during or after the investment)
 - Private equity investors are no longer treated as foreign government investors purely by virtue of passive upstream investors who are foreign government entities
 - Expansion of the exemption certificate regime with ability for the Treasurer to grant investor-specific exemption certificates
 - Stronger and more flexible enforcement options, including powers to impose or vary conditions to approvals or, as a last resort, require divestment of previously approved investments where national security risks emerge (compliance with approval conditions is receiving more attention as the government has received criticism for failing to allocate sufficient resources to this area)
 - Increased monitoring and investigative powers and materially higher civil and criminal penalties
- Data: FIRB has increasingly emphasized that, as part of its national interest assessment, it will have particular regard to the protection of sensitive Australian data. For example, this has been a particular focus with respect to proposed investments in Australian healthcare groups and data centers

- Generally, the Treasurer approves the vast majority of applications
- FIRB has been increasingly willing to use conditions and undertakings as a mechanism to increase the government's oversight of more complex or sensitive investments. Undertakings required from FIRB may include matters relating to governance, location of senior management, listing requirements, market competition and pricing of goods and services (e.g., that all off-take arrangements must be on arm's-length terms) and other industry-specific matters. FIRB has also issued a set of standard tax conditions that apply to those foreign investments that pose a risk to Australia's revenue and make clear the requirements and expectations for investors
- The Treasurer has wide divestiture powers, and criminal prosecution and civil penalties can apply for serious breaches of Australia's foreign investment laws and for those facilitating such breaches such as professional advisors. The standard practice is to seek approval where there is any doubt as to whether approval is required

OUTCOMES

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



China

China has moved to strengthen its review of foreign direct investments in 2020

Z. Alex Zhang

The PRC Foreign Investment Law (FIL) and its implementation regulations, which establishes the new foreign investment regulatory framework in China, came into effect on January 1, 2020. In addition to escalating the national security review (NSR) system from a set of circulars issued by the State Council and the Ministry of Commerce (MOFCOM) to national law level, the FIL also expands the scope of NSR to capture transactions between two foreign parties as long as there is a Chinese company or Chinese interests involved (a “transaction with China Interests”).

The new law is in addition to the existing scope of the NSR, which covers any foreign acquisition of a domestic enterprise. The detailed implementation rules of the NSR standards and the process for transactions with China interests have yet to be released.

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

China has also promulgated the Measures for Cyber Security Review to strengthen its national security regulatory regime in 2020, but various rules under the cybersecurity regulatory regime are subject to further clarification from the relevant authorities.

CHINA NATIONAL SECURITY REVIEW REGIME

In 2011, a ministerial review panel (MRP) was established by MOFCOM and the National Development and Reform Commission (NDRC) pursuant to a set of rules issued by the State Council in the same year (the “2011 Rules”), and is responsible for conducting national security reviews of foreign investments in Chinese domestic enterprises.

China is expected to issue implementing guidelines and more detailed implementation regulations to govern national security review for foreign investments, but has yet to issue any so far. On July 1, 2015, China also promulgated the PRC National Security Law (the NSL), which is China’s most comprehensive national security legislation to date. However, the NSL’s provisions do not detail how the security review processes and measures will be implemented by the relevant agencies and local authorities.

SCOPE OF REVIEW

Under the 2011 Rules, the MRP has the ability to review any foreign investment transaction following a voluntary filing by the parties to the transaction, a referral from other governmental agencies or a report from third parties. A foreign investor must apply for national security review of the transaction if the investor acquires equity in or the assets of a domestic enterprise in China in certain sectors.

The 2011 Rules and relevant laws do not explicitly exclude transactions with China interests from the scope of national security review, but in practice and under the rules relevant to such application filings, such transactions are generally considered not to be subject to the national security review requirements.



In September 2020, MOFCOM promulgated the provisions on the Unreliable Entity List (UEL), pursuant to which foreign individuals and entities listed on the UEL may be restricted or prohibited from investing in China.

The 2020 FIL reiterated that China will establish a security review system for foreign investment under which security review may be conducted for any foreign investment that affects or may affect national security. More importantly, the FIL provides that NSR review shall apply to all “foreign investment” that “affects or may affect national security,” and as the definition of “foreign investment” includes transactions with China interests, the FIL essentially expands the scope of NSR.

Although detailed implementation rules of the NSR standards and process for such transactions with China interests have yet to be released, the NDRC has already started monitoring transactions with China interests from an NSR perspective. In practice, MOFCOM would notify NDRC during the antitrust filing process of any transactions (including for transactions with China interests) with potential national security concerns, and NDRC will request the relevant parties to provide relevant information and initiate the NSR process if it confirms there is a national security concern.

SENSITIVE INDUSTRIES

MOFCOM has circulated an unofficial list of industries for which a national security review for a foreign investment transaction is likely to be triggered. These industries are mainly military or military-related products or services, national defense-related products or services, agricultural products, energy, resources, infrastructure, significant transportation services, key technology and heavy equipment manufacturing. However, since the list is unofficial, it may have only reference value to the determination of whether filing is required.

The scope of review focuses on the overall risk profile and impact that M&A transactions may have on China’s national security, defense, economy and the public interest.

Foreign investments in free trade zones are subject to broader national security review rules. In addition to the industries listed under the 2011 Rules, foreign investments in the industries related to culture and information technology products and services are within the scope of national security review.

The national security review rules for free trade zones have expanded the review scope of foreign investments to include greenfield investments and investments through offshore and other contractual agreements that affect or may affect national security.

REVIEW PROCESS AND TIMELINE

In practice, the timeline and details of the national security review process in China are not clear as information related to each individual application is not publicly available. Based on the 2011 Rules, the timeline is as follows:

- MOFCOM will submit an application to the MRP for review within five (5) working days if the application falls within the scope of review
- MRP will solicit written opinions from relevant departments to assess the security impact of the transaction. It could take up to 30 working days to complete the general review process
- MRP will conduct a special review of the application if any written opinion states that the transaction may have security implications and will conduct a more detailed security assessment of the overall impact of the transaction. A final decision from the review panel will be issued within 60 working days of the start of the special review

OUTCOMES

Generally, the possible outcomes of a national security review are as follows:

- The investment may be approved by MOFCOM, including with mitigation conditions
- The MRP will terminate a foreign investment project if it fails the national security review
- If the Chinese government has national security concerns about a transaction that is not submitted for approval, parties could be subject to sanctions or mitigation measures, including a requirement to divest the acquired Chinese assets
- A foreign investor may withdraw its application for national security review only with the MRP’s prior consent
- Decisions resulting from a national security review may not be administratively reconsidered or litigated

UNRELIABLE ENTITY LIST

In September 2020, MOFCOM promulgated the provisions on the Unreliable Entity List (UEL), pursuant to which foreign individuals and entities listed on the UEL may be restricted or prohibited from investing in China. The provisions state that the working group (), which is responsible for formulating the UEL, would consider various factors, such as the potential harm to state sovereignty, national security, national interests and Chinese entities/individuals, in determining whether to include a foreign entity/individual into the UEL.

Implementation of the provisions on the Unreliable Entity List falls primarily under the directive of MOFCOM, and MOFCOM could also involve other relevant departments to form the “working group” that gives MOFCOM broad discretion in deciding whether to place a foreign entity on the UEL.

MOFCOM has not yet released the UEL as of the date of this article. The consequence of being on the list is that foreign entities or individuals may face one or more of the following:

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

Given the tough consequences, foreign investors should be mindful of the new developments relating to the provisions on the UEL.

MEASURES FOR CYBER SECURITY REVIEW

In addition to the existing rules on trans-border data transmission control, the Cyberspace Administration of China (CAC) and other 11 ministerial-level regulatory authorities have jointly finalized and promulgated the Measures for Cyber Security Review (Measures for CSR), which came into force on June 1, 2020.

The Measures for CSR replace the Measures for the Security Review of Network Products and Services and provide detailed provisions regarding the security review standards for purchasing network products or services by critical information infrastructure operators that may affect national security.

The measures focus on evaluating whether the purchase of certain products or services will cause national security risks by considering certain factors, such as whether the network product or services will damage or divulge the data of critical information infrastructures, whether the disruption of supply of network products or services will harm the continuity of critical information infrastructures and the safety, openness, transparency and reliability of the network products or services. The measures also provide details of the materials and information to be submitted for cybersecurity review and the timeline of cybersecurity review.

HOW FOREIGN INVESTORS CAN PROTECT THEMSELVES

The promulgation of the FIL and UEL indicates that China is making a strong effort to implement a more structured and comprehensive system to keep a closer eye on transactions that might have national security implications. However, it is unclear what direction China's national security review will take, as implementation measures have not been released.

Foreign investors should continue to be mindful of the NSL, FIL and UEL, and pay special attention to transactions that might fall within the industries that are more likely to trigger national security concerns for MOFCOM. Non-Chinese buyers should also be cautious when completing transactions before obtaining national security approval, as they might be forced to divest the acquired assets if the transaction ultimately fails the security approval process.

Due to enforcement uncertainties and the broad scope of captured industries, foreign investors interested in sensitive industries often schedule voluntary meetings with MOFCOM officials to determine the national security review risk before commencing the formal application process.



GALLERY OF MODERN ART
MUMBAI

India

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

By Nandan Nelivigi

Non-residents investing in India are required to comply with India's Foreign Direct Investment (FDI) Policy and other foreign investment and foreign exchange regulations, including the Foreign Exchange Management Act (FEMA) and the regulations and notifications thereunder.¹ The FDI Policy is issued and revised from time to time by the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry, Government of India (GOI).

REGULATORY FRAMEWORK

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

FDI is permitted in most sectors under two routes: the automatic route and the approval route. Under the automatic route, the investment may be made without any approval from any government agency. Examples of sectors under the automatic route include, among others, e-commerce, healthcare, manufacturing and renewable energy. Under the approval route, prior government approval is required for FDI. Sectors under the approval route include, among others, broadcasting, banking, defense, mining, print media and biotechnology. FDI is prohibited in a limited number of sectors such as manufacturing of tobacco, trading in transferrable development rights, real estate business (subject to

limited exceptions), and gambling and betting, including casinos.

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

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



Press Note 3 will also affect investors from countries that do not share a land border with India if such investors have direct or indirect beneficial owners situated in a country that shares a land border with India.

WHO FILES

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

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

TYPES OF DEALS REVIEWED

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

¹ FDI by Non-Resident Indians (NRIs) is regulated by separate regulations and this note does not cover such regulations.

SCOPE OF REVIEW

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

TRENDS IN THE REVIEW PROCESS

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

The GOI has not laid out specific criteria for evaluation of investments, and appears to be mainly concerned with national security. With the heightened scrutiny, many ongoing transactions with Chinese investors are being put on hold while awaiting more specific guidance from the GOI on Press Note 3.

REVIEW PROCESS TIMELINE

The DPIIT, along with the relevant Competent Authority, is required to make its decision within eight to ten weeks after receiving an application. A single governmental department relevant to the sector (subject to security clearance, if applicable) identified by the DPIIT is required to take the lead in processing the application.²

2020 UPDATE HIGHLIGHTS

The GOI introduced Press Note 3 with a view to curbing "opportunistic takeovers/acquisitions of Indian companies" due to COVID-19, and added the following two additional restrictions:

- An entity of a country that shares a land border with India, or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only through the approval route
- Government approval will also be required where subsequent changes in "beneficial ownership" (by way of direct or indirect transfers) of any existing or future FDI would result in such beneficial ownership falling within the purview of the first restriction

The most significant effect of Press Note 3 is expected to be on new or follow-on FDI from China. Press Note 3 does not affect existing investments but will affect any changes to such investments after the date of notification of Press Note 3.

Press Note 3 will also affect investors from countries that do not share a land border with India if such investors have direct or indirect

beneficial owners situated in a country that shares a land border with India. This implies that non-Indian entities that have subsidiaries in India and are seeking to raise funds in their own country, or whose shareholders are looking to sell their stakes, will be affected by Press Note 3.

The GOI has not yet provided any guidance regarding the criteria for granting approvals pursuant to Press Note 3 or how beneficial ownership of an entity will be determined.

Authorized dealer banks (which process inbound foreign investments, particularly under the automatic route) are currently requiring investors to make a self-declaration to verify compliance with Press Note 3, and some of them have indicated that beneficial ownership of 10 percent or more in an entity would be subject to restrictions under Press Note 3. Authorized dealer banks have also taken the position that Hong Kong, Macau and Taiwan are treated as part of China, for purposes of Press Note 3.

OUTCOMES

- While the GOI continues to welcome FDI and make it easier to navigate the FDI regime, Press Note 3 has significantly raised hurdles to FDI in India, particularly for FDI from Chinese investors
- Market participants are expecting more clarity from the GOI on how Press Note 3 will be implemented

² The indicative timeline can be accessed at <https://fifp.gov.in/Forms/SOP.pdf>

Japan

In 2020, Japan tightened foreign direct investment review but also introduced a prior notification exemption scheme

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

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

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

WHO FILES

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

- Individuals who do not reside in Japan, termed "non-residents"
- Entities or other groups established under laws or regulations of, or having their principal offices in, foreign countries
- Entities in which an individual or entity described above holds 50 percent or more of the total voting rights

- Partnerships operating in the investment business of which 50 percent or more of the total capital has been contributed by foreign entities, foreign groups or non-residents, or the majority of general partners are non-residents
- Entities in which the majority of directors or representative directors are non-residents

TYPES OF DEALS AND ACTS REVIEWED

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

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

An inward direct investment is defined to include where a foreign investor:

- Acquires a listed target entity's shares after which acquisition such foreign investor "beneficially owns" 1 percent or more of the listed target entity's outstanding shares. (The 2020 FEFTA Amendment reduced the threshold from 10 percent to 1 percent.) "Beneficial ownership" means the possession of voting rights by the foreign investor, collectively with its "special related persons," through shares held directly by any such persons, shares that any such person has been granted authority to manage on a discretionary basis and shares with respect to which any such person has been granted a voting proxy

"Special related persons" means (i) certain direct and indirect subsidiaries and certain direct and indirect parent companies of the foreign investor; (ii) the officers and directors of the foreign investor and those direct and indirect subsidiary and parent entities to which clause (i) applies; (iii) entities of which the officers and directors of clause (ii) constitute a majority of the officers and directors; (iv) where the foreign investor is an individual, the foreign investor's spouse and direct blood relatives; (v) where the foreign investor is a government, administrative body, public body or the like, governments, administrative bodies and public bodies and the like of the same country or region as the foreign investor; and (vi) other non-residents who have agreed to exercise voting rights together with the foreign investor and the "special related persons" of such other non-residents.



The introduction of the new exemptions for prior notification of share acquisitions will reduce the burden on foreign investors who only have a passive, pure investment intention.

The direct and indirect subsidiary and parent entities to which this applies are defined as (1) entities that the foreign investor directly holds 50 percent or more of the voting rights in; (2) entities that the entities of (1) directly hold 50 percent or more of the voting rights in; (3) entities that directly hold 50 percent or more of the voting rights in the foreign investor; (4) entities that directly hold less than 50 percent of the voting rights in the foreign investor individually but, in the aggregate with the direct holdings of entities that such entity directly holds 50 percent or more of the voting rights in, directly hold 50 percent or more of the voting rights in the foreign investor; (5) entities that directly hold 50 percent or more of the voting rights of entities described in (3) or (4); (6) entities that the entities described in (5) directly hold 50 percent or more of the voting rights of; (7) entities that the entities of (5) or (6) directly hold 50 percent or more of the voting rights of; (8) entities that the entities of (3) directly hold 50 percent or more of the voting rights of; and (9) entities that the entities of (3) or (8) directly hold 50 percent or more of the voting rights of.

- Acquires voting rights of a listed target entity after which acquisition such foreign investor beneficially owns 1 percent or more of the listed target entity's total voting rights
- Acquires shares of an unlisted target entity, including at incorporation, from resident shareholders
- Consents to material changes to the business purposes of an unlisted target company at any beneficial ownership level, or a listed target company where the foreign investor's beneficial ownership accounts for one-third or more of the target company's total voting rights
- Consents to shareholder meeting proposals that are defined to have a material impact on the target Japanese company's business

in the regulations, specifically including (among other things) the appointment of a foreign investor or a foreign investor's "closely related person" as a director or an audit & supervisory board member; the transfer or disposal of the entirety of the business; a merger in which the target Japanese company is not the surviving company; or dissolution of the company for an unlisted target company at any beneficial ownership level, or for a listed target entity, where the foreign investor's beneficial ownership accounts for 1 percent or more of the total voting rights of the target company

- Obtains proxy voting authority where the target company is publicly listed and the aggregate voting rights beneficially owned by the foreign investor after obtaining such proxies equals or exceeds 10 percent of the total voting rights, or the target company is not publicly listed. This applies only where the proxy is not held by the target company or any of its officers or directors; the agenda items with respect to which proxy voting authority is granted may grant the proxy holder control over the management of the target company or material influence over the management of the target company; and the proxyholder solicited the proxy
- Acquires the right to cause voting rights to be exercised with respect to listed companies, after which acquisition such foreign investor's total voting rights beneficially owned equals or exceeds 1 percent of the total voting rights
- Obtains the agreement of other foreign investors to jointly exercise their respective beneficially owned voting rights of a publicly listed company, where the aggregate beneficially owned voting rights across all relevant foreign investors account for 10 percent or more of the total voting rights of the publicly listed company

- Lends to a Japanese company where both the amount owed to the foreign investor exceeds JPY 100 million and the aggregate amounts owed including corporate bonds held by the foreign investor exceed 50 percent of the target company's debt
- Purchases corporate bonds that meet all of the following criteria: (i) the bonds are issued to the specific foreign investor; (ii) the redemption date is more than one year in the future; (iii) the balance due on the bonds exceeds JPY 100 million; and (iv) the aggregate of the balance due on the bonds and under other loans made by the foreign investor account for more than 50 percent of the target company's debt

VOTES IN FAVOR OF AGENDA ITEMS

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

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

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

- Vote in favor of a shareholders' meeting proposal submitted by the foreign investor to transfer or dispose of the target entity's businesses in designated industries

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

- The directors and officers (regardless of title, those with the power to execute business, and including the Japan representative) of the foreign investor and certain of its direct and indirect parent and subsidiary entities
- Members of the governing body with authority to make investment decisions, whether termed an investment committee, management committee or otherwise, for the foreign investor or certain of its direct or indirect parent or subsidiary entities
- The foreign investor's spouse and direct blood relatives, if the foreign investor is an individual
- The directors, officers, agents and employees of the individual, entity or other organization that have agreed with the foreign investor to jointly exercise their voting rights and such individual, entity or other organization's closely related persons

If the resolution is proposed directly or indirectly by the foreign investor, however, closely related persons include:

- Employees, agents, directors and officers of the foreign investor and certain of its direct and indirect parent and subsidiary entities
- Employees, agents, directors and officers of individuals or entities for whom the foreign investor is a major customer or supplier or that are major customers or suppliers of the foreign investor
- Persons who have received large amounts of money or other assets from the foreign investor
- The foreign investor's spouse and direct blood relatives, if the foreign investor is an individual

- Individuals or entities who agreed with the foreign investor to jointly exercise their voting rights, and such individuals' or entities' closely related persons
- Persons who fell within any of the categories described in this list within the past year

FILING AND REVIEW PROCESS

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

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

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

If the MOF and the ministry with jurisdiction over the transaction find the transaction under review problematic in terms of national security, they can recommend that the foreign investor change the content of the transaction or discontinue the transaction after hearing opinions of the Council on Customs, Tariff, Foreign Exchange and other Transactions. The foreign

investor must notify the MOF and the relevant ministry of whether it will accept the recommendation within ten days after receiving such recommendation. If the foreign investor does not provide notice or refuses to accept the recommendation, the MOF and the relevant ministries may order a modification of the content of the transaction or its discontinuance before the expiration date of the waiting period.

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

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

NEW EXEMPTION SCHEME FOR PRIOR NOTIFICATIONS

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

All of the exemptions are subject to the requirement that the foreign

investor comply with the following three exemption conditions:

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

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

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

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

Core sectors include weapons, airlines, space, nuclear facilities, dual-use technologies, cybersecurity, electricity, gas, telecommunications, water supply, railway services and oil. Where general investors acquire shares of a target company that conducts a core sector business, they will be exempted from making a prior notification until the investment reaches 10 percent, provided that they comply with not only the exemption conditions but also the additional conditions for core sector businesses, which require that foreign investors do

not sit on the target company's executive board or committees that make important decisions in the core sector businesses, and that foreign investors do not make proposals, in written form, to the executive board or board members of the target company requiring their responses and/or actions by a specific deadline.

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

OUTCOMES

- Japan expanded the coverage of foreign investment review to be in line with global trends. At the same time, the introduction of the new exemptions for prior notification of share acquisitions will reduce the burden on foreign investors who only have a passive, pure investment intention
- The 2020 FEFTA Amendment does not prevent foreign investors from engaging with target companies, but a foreign investor who may wish to nominate board members at the target company's shareholders' meeting with whom the foreign investor or its related parties has a connection or relationship with should seek counsel early to evaluate whether the proposal—and share acquisitions in advance of such proposal—requires a prior notification filing to be made

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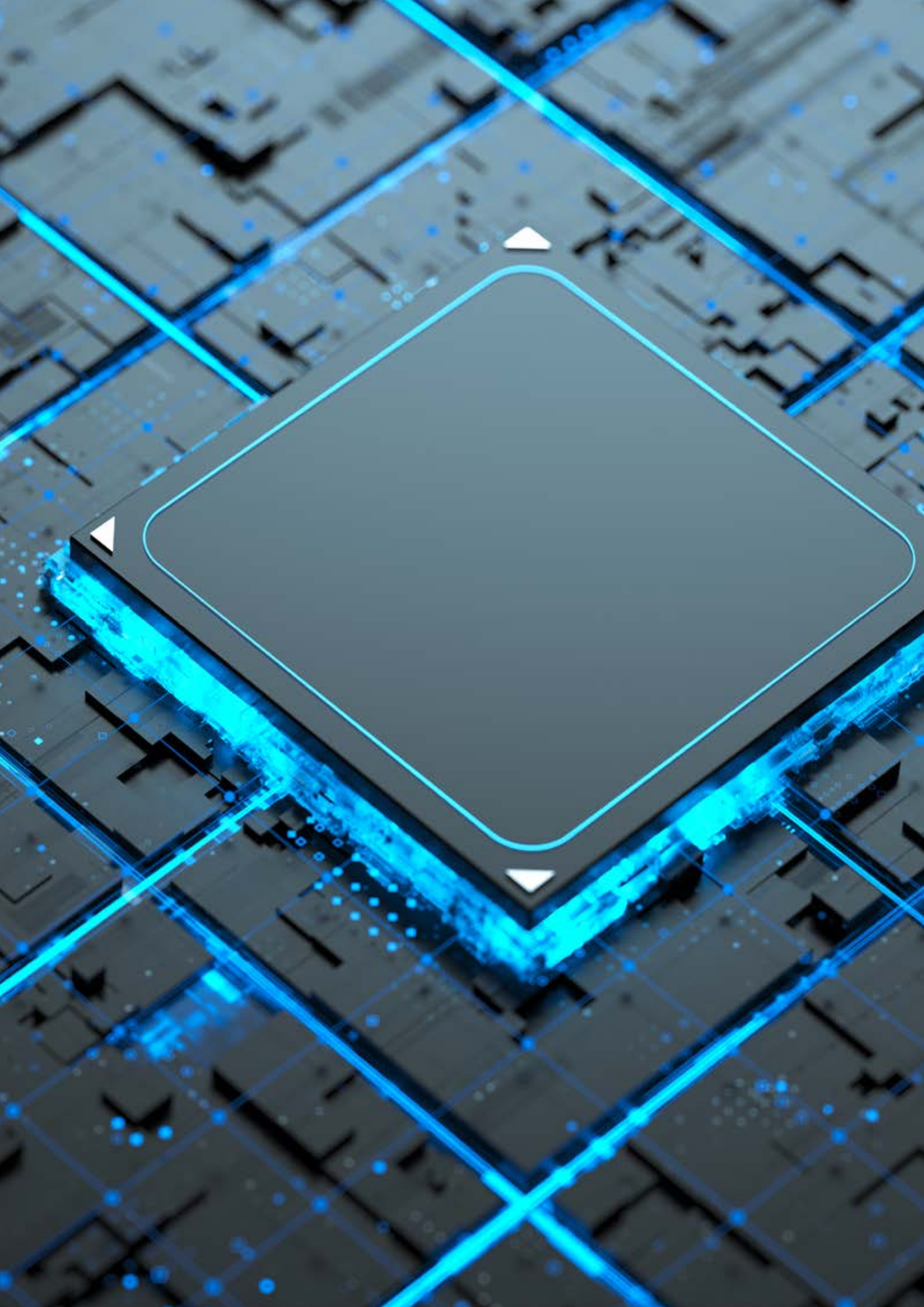
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