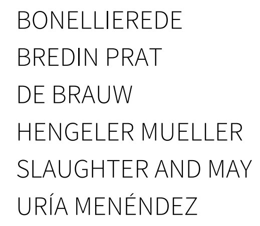

FOREIGN DIRECT INVESTMENT

JANUARY 2022

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INTRODUCTION

Foreign direct investment control mechanisms are different across the globe, both in substance and procedure. Although some jurisdictions have strong control mechanisms in this field, other jurisdictions have relatively open investment regimes.

There is growing concern worldwide about investment by foreign actors, including state-owned enterprises, in strategic activities. Foreign direct investment is therefore an increasingly important topic in cross-border transactions. Against this backdrop, this guide provides an overview of the regulations on foreign direct investment in several major European countries and at the supranational level in the European Union.

The guide first summarises the EU foreign direct investment Regulation and its practical implications. The subsequent chapters dealing with the various European countries are organised in a Q&A format, in order to provide an overview of the relevant subjects and their application in practice.

This guide reflects applicable laws at January 2022.

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1. EUROPEAN UNION

1. Currently applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control)

The Regulation establishing a framework for screening of foreign direct investments into the EU became fully operational on 11 October 2020. The Regulation aims to strike a balance between protecting critical infrastructures, technology and knowhow of the EU and its Member States and welcoming foreign investments as major source of economic growth. It does not introduce a central EU-wide screening mechanism for foreign direct investments. Clearance, restriction or prohibition of foreign investments remains a matter of national administrative practice and primarily subject to national laws. However, the views of the Commission and other Member States will be taken into account by the national authorities when conducting foreign investment screenings. This may add substantial political weight to the national decision-making process and could emerge as an important constraint on EU inbound investments from China and other security sensitive third countries.

In addition to the Regulation, there are EU-level restrictions on investments in the air services and energy sectors. EU rules on the operation of air services prohibit licensing of an air carrier in the EU if 50% or more of its shares are owned by non-EU persons, unless there is an agreement with its home country. In the energy sector, there is a certification mechanism for foreign gas and electricity transmission system operators controlled by non-EU countries. Such operators are prohibited to operate in the EU unless they have demonstrated that they will not put at risk the security of energy supply to the Member State in which they would operate or to the Union.

2. The Regulation

The main features of the Regulation are the following:

- The Regulation establishes certain minimum requirements for those Member States that decide to establish a foreign direct investment screening mechanism or that already have one in place, e.g. the possibility to seek recourse against decisions adopted under the screening mechanism and that the rules and procedures are transparent and do not discriminate between third countries. However, it does not oblige Member States to establish a foreign direct investment screening mechanism.

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- The Regulation covers a broad range of investments which establish or maintain lasting and direct links between investors from third countries including State entities, and undertakings carrying out an economic activity in a Member State. The Regulation does not, however, apply to "portfolio investments".

- Screening is a restriction to free movement of capital or freedom of establishment and is therefore limited to grounds of public order or security. According to settled case law of the European Court of Justice, acquisitions may only endanger public order or security if they affect fundamental interests of society. In screening foreign direct investments, the potential effects on, amongst others, the following fields may be considered:
  - critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, 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 certain dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace, defence, energy storage, nuclear technology, nanotechnologies and biotechnologies;
  - the security of supply of critical inputs, including energy or raw materials, as well as food security;
  - access to sensitive information, including personal data, or the ability to control such information; and
  - the freedom and plurality of the media.

- Moreover, Member States and the Commission may also take into account:
  - whether the foreign investor is directly or indirectly controlled by the government, state bodies or armed forces of a third country, including through ownership structure or significant funding;
  - whether the foreign investor has already been involved in activities affecting security or public order of a Member State; and
  - whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

- Member States can comment upon, and the Commission can issue an opinion on foreign investments undergoing screening in three different scenarios: Firstly, the Regulation establishes a mechanism for Member States to influence foreign direct investment screenings carried out in another Member State. When a Member State (i) considers that a foreign direct investment undergoing screening in another Member State is likely to affect its security or public order, or (ii) has information relevant for such screening in relation to that foreign direct investment, it may provide comments to the Member State in which the foreign direct investment screening will take place. The latter is obliged to give due consideration to the comments, but will not be bound by them. The Commission shall notify other Member States that comments were provided.

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- Secondly, the Regulation establishes a mechanism for the Commission to influence foreign direct investment screenings. The Commission *may* issue an opinion addressed to the Member State in which the foreign direct investment undergoes screening, if (i) it considers that a particular foreign direct investment is likely to affect security or public order in more than one Member State; or (ii) it has relevant information in relation to that foreign direct investment, or (iii) a Member State where a foreign direct investment is taking place requests the Commission to issue an opinion. The Commission is *obliged* to issue an opinion after at least one third of Member States consider that a foreign direct investment is likely to affect their security or public order. The relevant Member State is obliged to give due consideration to opinions of the Commission, but is not bound by it.

- If the foreign direct investment is likely to affect projects or programmes of EU interest, the Member State assessing the foreign direct investment must "take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed". Projects or programmes of EU interest include, inter alia, those involving a substantial amount or a significant share of EU funding, or which are covered by EU legislation regarding critical infrastructure, critical technologies or critical inputs. An indicative list of projects or programmes of EU interest is included as an annex to the Regulation. These currently include European GNSS programmes (Galileo & EGNOS), Copernicus and Horizon 2020, Trans-European Networks for Transport, Trans-European Networks for energy, Trans-European Networks for Telecommunications, European Defence Industrial Development Programme and Permanent structured cooperation.

- Thirdly, Member States which consider that a foreign investment undergoing screening on their territory is likely to affect its security or public order, may request the Commission to issue an opinion or other Member States to provide comments upon such investment.

- The Regulation sets transparency and information requirements for Member States. The following time periods for foreign direct investments undergoing screening apply:
  - The national authorities shall inform the Commission and all Member States of any foreign direct investment undergoing screening as soon as possible.
  - Member States and the Commission have 15 calendar days from the notice to inform the Member State of their intention to provide comments or an opinion in relation to the foreign direct investment undergoing screening.
  - Member States and the Commission may request from the national authorities any additional information necessary to provide their comments or opinions, if the information is duly justified and not unduly burdensome for the Member State in question.
  - Comments and opinions shall be provided within 35 calendar days of the original notice. Where additional information is requested, the deadline to respond is 20 calendar days after the receipt of such information.

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  - The Commission may issue an opinion following the comments of the Member States, if it does so, it must do so within the deadlines described above or at the latest within five calendar days of their expiry.
- Under exceptional circumstances, Member States can issue a screening decision before these time periods have terminated. The Member States and Commission will then provide comments or issue an opinion expeditiously.

If a foreign direct investment has not undergone screening, the Member States and the Commission are still able to provide comments or issue an opinion up to 15 months after the investment has completed. This possibility adds uncertainty for investors, who may be faced with an opinion of the Commission even after having completed the entire national review process. However, final decision-making power will remain with the Member States.

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2. FRANCE

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: In France, investment is in principle unrestricted. However, by way of exception, foreign investments carried out in business sectors deemed to be sensitive may be subject to prior authorisation from the French Minister for the Economy. The principle of this prior authorisation is laid down in Article L. 151-3 of the French Monetary and Financial Code ("CMF") (the "Foreign Investment Regulation"). Details of the authorisation procedure and the full list of activities deemed to be of strategic importance for the French State are defined in Articles R. 151-1 *et seq*. of the CMF.

Like most G20 countries, France has recently revised its Foreign Investment Regulation to widen the scope for scrutiny of foreign investments by (i) extending the list of sensitive sectors (which is updated on a regular basis), (ii) amending the timeframe and establishing a two-step review process and (iii) giving the Minister for the Economy greater powers to sanction non-compliance. The last steps of this reform came into force on 1 April 2020 (but were not part of the extraordinary measures adopted to face the COVID-19 crisis).

In response to the Covid-19 crisis, the French Minister for the Economy has further tightened the Foreign Investment Regulation to cope with the threats that high market volatility may imply for publicly listed companies in certain strategic and sensitive sectors. In this respect, the Minister for the Economy has the power, through 31 December 2022, to screen acquisitions by non-EU/EEA investors of more than 10% of the voting rights in sensitive listed French companies.

Against this background, and similar to other jurisdictions around the world, the French authorities have been increasingly vigilant in applying the Foreign Investment Regulation. Foreign investors contemplating investments (or divestments) in France are now, more than ever, strongly advised to carefully assess whether prior approval is required.

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2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

A: The Foreign Investment Regulation establish an authorisation system that differs according to the investor's nationality. There are more types of investment falling within the scope of the authorisation procedure for non-EU/EEA foreign investors than for EU investors.

What or who is a "Foreign Investor"?

Foreign Investors are broadly defined as:

- any foreign individual;
- any French individual whose tax residence is not located in France;
- any foreign entity; and
- any French entity controlled by an individual(s) or an entity(ies) mentioned in the bullet points above.

In addition, the Foreign Investment Regulation (applicable as from April 2020) introduced a concept of "chain of control". Any investor that has a Foreign Investor (whether domiciled in or outside the EU) in its chain of control will be deemed to be a "Foreign Investor", even if it is ultimately controlled by a French entity or a French individual tax-domiciled in France.

When used for the purposes of the definition of "Foreign Investor", the term "control" is defined broadly to mean:

- the power, direct or indirect, through the ownership of voting securities, by means of proxy voting, contractual arrangements or any other means, to determine, direct or decide matters affecting an entity (including on a de facto basis) or to appoint or dismiss the majority of the members of the management bodies (article L. 233-3 of the French Commercial Code), or
- the mere possibility of being able to exercise a "decisive influence" over an entity (whether or not exercised) on the basis of rights, contracts or any other means, either separately or in combination, having regard to the relevant considerations of fact and law (article L. 430-1, III, of the French Commercial Code).

Which type of investment are subject to prior authorisation?

For all Foreign Investors prior authorisation may be required if the investment results in the investor:

- acquiring control, within the meaning of Article L. 233-3 of the French Commercial Code, of a French entity. The term "control" is defined less broadly here than for the purposes of the definition of a Foreign Investor (see above) and refers to (i) the power, direct or indirect, through the ownership of voting securities, by proxy voting, contractual arrangements, or any other means, to determine, direct or decide matters affecting an entity (including on a de facto basis) or (ii) when it is a shareholder of the concerned entity, the power to appoint or dismiss the majority of the members of the management bodies (article L. 233-3 of the French Commercial Code);

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- acquiring all or part of a business division of a French entity (asset deals), whether located in France or abroad.

Furthermore, for non-EU/EEA investors prior authorisation may be required if the investment results in the investor:

- exceeding, directly or indirectly, the ownership threshold of 25% of the voting rights in a French entity;
- exceeding, directly or indirectly, the ownership threshold of 10% of the voting rights of a French entity listed on a regulated market (e.g. Euronext in France) and conducting businesses in sensitive sectors in France. This threshold is part of temporary measures adopted in response to the covid-19 crisis and is applicable until 31 December 2022. A fast track review process is applicable to such investments (see 2(f) below).

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A: The foreign investment rules apply to transactions in which, cumulatively, a Foreign Investor makes an investment falling within the scope of Article R. 151-2 (See 2.a) in a French entity and which is active in a "strategic" sector listed in Article R. 151-3 of the CMF. A single list of strategic sectors applies to all Foreign Investors (EU and non-EU).

The list of sensitive sectors includes:

I. Activities which could affect national defence interests, which contribute to the exercise of public authority or which could affect public policy and public security (i.e., activities sensitive by nature):

1. Activities, including those mentioned in article L. 2332-1 of the French Defence Code, relating to arms, munitions, powders and explosive substances intended for military purposes or to war materials and similar materials governed by Title III or Title V of Book III of Part Two of the French Defence Code;
2. Activities relating to dual-use items and technologies listed in Annex IV to Council Regulation (EC) no. 428/2009 of 5 May 2009 setting up a European regime for the control of exports, transfer, brokering and transit of dual-use items;
3. Activities carried out by entities holding national defence secrets;
4. Activities carried out in the information systems security sector, including as a subcontractor, for the benefit of an operator mentioned in articles L. 1332-1 or L. 1332-2 of the Defence Code;
5. Activities carried out by entities having concluded a contract, either directly or by subcontracting, for the benefit of the Ministry of Defence for the production of goods or services falling within the scope of an activity mentioned in items 1 to 3 or 6;

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6. Activities relating to the cryptology resources and services mentioned in paragraphs III and IV of articles 30 and I of article 31 of Law no. 2004-575 of 21 June 2004 on trust in the digital economy;
7. Activities relating to technical equipment or devices for the interception of correspondence or designed for the remote detection of conversations or the remote data capture, as defined in article 226-3 of the French Criminal Code;
8. Activities relating to the provision of services by approved evaluation centres under the conditions provided for in Decree no. 2002-535 of 18 April 2002 on the evaluation and certification of the security offered by information technology products and systems;
9. Activities relating to gambling, with the exception of casinos;
10. Activities relating to the means of coping with the illicit use of pathogenic or toxic agents or preventing the health consequences of such use;
11. Activities relating to the processing, transmission or storage of data, the compromise or disclosure of which could affect the exercise of the activities mentioned in I, 1 to 10 or II.

II. Activities which could affect national defence interests, which contribute to the exercise of public authority or which could affect public policy and public security, when they concern infrastructure, goods or services essential to ensuring:

1. The integrity, security or continuity of energy supply;
2. The integrity, security or continuity of water supply;
3. The integrity, security or continuity of operation of transportation networks and services;
4. The integrity, security or continuity of space operations mentioned in article 1, paragraph 3, of Law no. 2008-518 of 3 June 2008 on space operations;
5. The integrity, security or continuity of operation of electronic communications networks and services;
6. The exercise of the national police and gendarmerie missions, the civil security services, as well as the exercise of the public security missions of customs authorities and those of approved private security companies;
7. The integrity, security or continuity of operation of an establishment, installation or work of vital importance within the meaning of articles L. 1332-1 and L. 1332-2 of the French Defence Code;
8. Protection of public health;
9. The production, processing or distribution of agricultural products listed in Annex I to the Treaty on the Functioning of the European Union, where these contribute to the objectives of national food safety mentioned in paragraphs I, 1°, 17° and 19° of article L. 1 of the Rural and Sea Fishing Code;
10. The publishing, printing or distribution of press publications for political and general information, within the meaning of article 4 of Law no. 47-585 of 2 April 1947 on the status of undertakings grouping and distributing newspapers and periodicals, and

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online press services for political and general information within the meaning of article 1 of Law no. 86-897 of 1 August 1986 reforming the legal regime governing the press.

III. Activities which could affect national defence interests, which contribute to the exercise of public authority or which could affect public policy and public security, when intended to be carried out in one of the activities mentioned in I or II:

1. Research and development activities relating to critical technologies listed by the French Minister for the Economy (i.e., cybersecurity, AI, robotics, additive manufacturing, semiconductor, quantum technologies, energy storage, biotechnologies and, as from 1st January 2022, technologies used in the production of renewable energy);
2. Research and development activities on dual-use goods and technologies listed in Annex I to the aforementioned European Council Regulation of 5 May 2009.

c) which authorities are competent to carry out such review;

A: The formal review process is carried out by the French Treasury (*Direction générale du Trésor*) within the French Ministry for the Economy in cooperation with other governmental agencies depending on the strategic sectors concerned. The administrative authorities empowered to instruct the prior authorisation may seek international cooperation, notably through the EU framework for screening of foreign direct investments, in order to verify the information provided by the foreign investor, in particular with respect to the source of the funds.

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

A: A prior approval of the French Minister for the Economy is required to close a transaction subject to foreign investment control. The transaction cannot be completed without this approval.

In the event the Foreign Investor is not sure whether prior authorisation of the French Minister for the Economy is required for a given transaction, it may, with the consent of the French target entity, submit a written request to the Ministry for the Economy asking it to assess whether all or part of the activities of the potential target fall within the scope of a sensitive sector. The target may also request a ruling from the Ministry for the Economy on whether its activities are within the scope of the Foreign Investment Regulation, if it is able to show that there is a potential transaction being contemplated.

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e) who must make the notification (buyer, seller, both);

A: The application must be presented by the buyer. Where the buyer is part of a group, any entity of the chain of control may file the request with the French Minister for the Economy on behalf of all the relevant members of the control chain. This flexibility could be useful for large groups or private equity investors investing through their portfolio companies. In practice, it is common that the buyer contacts the seller to obtain the required information for the preparation of the file.

f) the timetable for such review (both in law and practice, including possible pre-notification tracks).

A: The revised Foreign Investment Regulation has set up a two-step review process similar to the U.S. CFIUS review process. In addition, as part of temporary "covid-19 measures", a fast track review process is now applicable to Non-EU or non-EEA investors contemplating to acquire more than 10% of the voting rights of a listed sensitive French entity (through 31 December 2022 (described below)).

Standard two-step review process: following filing of a complete authorisation request, the French Ministry for the Economy should complete its initial review within 30 business days (Phase I). At the end of the initial review period, the Ministry for the Economy may either clear the proposed transaction or commence a 45-business-day investigation phase (Phase II).

If no decision has been received from the French Ministry for the Economy by the end of any of these phases, the authorisation will be deemed to have been refused.

The purpose of the Phase II investigation phase is to determine whether the safeguarding of national interests could be guaranteed by making the Ministry's authorisation subject to the Foreign Investor providing binding commitments vis-à-vis the French State (for a description of typical commitments required from a Foreign Investor, see 3. below). For very sensitive matters, Foreign Investors should expect negotiation of the commitments with the French Ministry for the Economy to last longer than the 45 business-day period. In our experience, for more sensitive matters, this negotiation period may take as long as four to six months.

Please note that the European Union screening and cooperation mechanism applicable since 11 October 2020 to certain non-EU foreign investments takes place simultaneously with the screening at the national level. The EU process adds complexity to the review process and may generate additional work for the French Treasury staff (and probably congestion). Therefore, delays in foreign investment review periods can be expected.

Fast track review process: a fast-track review process is temporarily applicable until 31 December 2022 in relation to contemplated transactions resulting in non-EU or non-EEA investors, directly or indirectly, alone or in concert, crossing the threshold of 10% of the voting rights of a French entity listed on a regulated market (e.g., Euronext in France) that conducts business in sensitive sectors.

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Non-EU or non-EEA investors contemplating such a transaction must seek prior approval pursuant to a notification (drafted in French) to the French Ministry for the Economy including the same information that investors would have to file with the French stock market authority (the AMF) upon crossing of the 10% threshold in any listed company.

The French Minister for the Economy must decide within 10 business days whether to screen the investment. If no decision is received from the Ministry at the end of the 10-business day period, the investment will be deemed to be cleared. The investor must then complete its investment within six months.

If the Minister for the Economy decides to screen the investment, the investor will have to file an authorization request. In this case, the approval process will be the same as with any other contemplated acquisition (e.g., an initial 30-business day review period, during which the transaction may be cleared without conditions, potentially followed by an additional 45-business day review period).

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The French Minister for the Economy does not have discretionary powers. His decision-making powers in this matter are regulated by articles R. 151-5 to R.151-11 of the CMF. The logic of these articles is as follows:

When the French Minister for the Economy considers that the investment could threaten national interests, he must seek to identify the conditions that would avoid such a threat in order to be able to approve the investment (Article R. 151-6 of the CMF). These conditions take the form of commitments given by the investor. The commitments and their duration are negotiated on a case-by-case basis during Phase II of the approval process between officials from the Ministry for the Economy and representatives of the investor and are set out in a letter attached to the authorisation. Commitments requested from Foreign Investors are required to be appropriate in view of safeguarding of the French national interests.

While the Ministry for the Economy coordinates the negotiation, it will involve teams from other French ministries relevant to the target's activities. For example, the teams of the *Direction Générale de l'Armement* (DGA) (within the Ministry of Defence) are always involved in such negotiations where the activities of the target are sensitive from a defence point of view (which is interpreted broadly to include space operations for instance).

The commitments typically pursue the objectives of maintaining the company's headquarters, activities and industrial capacities on the French territory, protecting the company's industry, IP, sensitive information, research and development capacities and related technologies and ensuring performance of the company's contractual obligations

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relating to public safety, national defence, or weapons research or manufacture. Recently, the Ministry for the Economy has also required to be involved in the subsequent resale of the French target (e.g., the right to be informed of any contemplated sale, right to include a potential buyer selected by the Ministry for the Economy in the sale process, and an undertaking from the Foreign Investor to sell to such potential buyer on the same terms and conditions as the best bidder). It should also be noted that there have been instances of the commitments being used as a public policy tool to maintain or increase employment in France.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: Applicable provisions of French law do not specify any fees.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: If the commitments which the investor may be requested to give, are not sufficient to ensure the protection of the national interests, the French Minister for the Economy may make the authorisation of the transaction subject to the sale of part of the shares acquired in the target, or the sale of all or part of the sensitive activity to an "acceptable buyer" that is independent from the Foreign Investor. This kind of measure is rare but there exists a few precedents, in particular in the defence sector.

The Minister for the Economy may refuse, giving reasons for its decision, to authorise a foreign investment in the following situations:

- if the commitments conditioning the authorisation would not be sufficient to safeguard national interests. In this respect, the Minister for the Economy may consider whether the Foreign Investor is linked to a foreign government or public body (and note that the Foreign Investor must disclose in the request for authorization any recent significant share ownership relationship with, or financial support from, any non-EU State or public body);

- if, during the five years preceding the filing of the request for authorization, the Foreign Investor has been sanctioned by the Minister for the Economy on the grounds of non-compliance with the Foreign Investment Regulation (e.g., in the event of non-compliance with the commitments conditioning a prior authorisation issued by the Minister for the Economy) or if the Foreign Investor has seriously and persistently disregarded the injunctions or protective measures ordered by Minister for the Economy in relation to the foreign Investment;

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- if there is a strong presumption that the Foreign Investor is likely to commit certain specific criminal offences or the Foreign Investor has been convicted of these criminal offences (or foreign equivalent) during the past five years.

Until recently, the French Minister for the Economy's refusal to grant an authorisation had been very rare. However, in view of the recent amendments to the Foreign Investment Regulation, which aim to reinforce the control of foreign investment, and the risks associated with the covid-19 crisis, the French Minister for the Economy's approach in this respect seems to be moving to a more protectionist attitude, similar to what is being observed in other jurisdictions around the world.

Indeed, refusals, whether official or de facto (i.e., where the Foreign Investor decides to withdraw its request for approval rather than receive a rejection) are becoming more common. For example, in 2020, the French Minister for the Economy blocked the sale of Photonis, a manufacturer of electro-optic components used in the detection and amplification of ions, electrons and photons, which are integrated into a variety of applications such as night vision optics (used by French and OTAN forces), nuclear safety detectors (including generation III and IV reactors), physics research and space exploration to Teledyne, a US investor.

In certain other cases, the French Minister for the Economy may discourage foreign investors to carry out their investment by stating publicly its opposition at an early stage (prior to any request for authorization being filed). For instance, in January 2021, the ambition of the Canadian group Couche-Tard for taking over Carrefour supermarket chain (which is the biggest employer in France) was cut short after the French Ministry for the Economy who stated publicly his opposition to the transaction, citing the food security of France.

It is therefore important that foreign investors undertake a foreign investment analysis early in the process and contact as soon as possible the French Ministry for the Economy to present the contemplated acquisition and discuss any potential concerns.

6. **Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.**

A: Since April 2020, French law has enhanced the powers of the French Ministry for the Economy to **act against non-compliance with the Foreign Investment Regulation,** notably (i) in case of non-compliance with the commitments attached to the authorisation or (ii) if a notifiable investment is completed without obtaining prior clearance.

Non-compliance with the commitments attached to the authorisation

If the French Ministry for the Economy considers that the Foreign Investor has not complied with the commitments it gave in order to obtain the foreign investment clearance, the

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Ministry may (i) withdraw its initial authorization (in which case the Foreign Investor will have to apply again for a new foreign investment clearance unless it remedies its breach(es)), or (ii) issue an injunction ordering (possibly under penalty) the Foreign Investor to comply with its commitments or implement measures in lieu of the breached commitments. The Ministry now has a legal duty to use these powers and may be accountable for its decisions in this respect before the French Parliament.

Precautionary measures: the French Ministry for the Economy may also take any precautionary measures it deems necessary, such as (i) suspending the voting rights attached to the shares owned by the Foreign Investor, (ii) prohibiting or limiting the distribution of dividends or remuneration attached to such shares and/or (iii) suspending, restricting or temporarily prohibiting the transfer of all or part of the assets related to the Sensitive Sectors.

Financial penalties: the French Ministry for the Economy may impose fines on the investor in the event of non-compliance with the commitments attached to the Ministry's authorisation or non-compliance (even partially) with the Ministry's decisions or injunctions. The amount of the fine will be proportionate to the seriousness of the breach and may be up to the highest amount of the following:

- twice the value of the investment at issue;
- 10% of the amount of the net annual turnover of the company that carries out the sensitive activities,
- €5 million for legal entities, and
- €1 million for individuals.

Criminal sanctions: the investor may also be sentenced to up to five years of imprisonment.

Future acquisitions: the French Ministry for the Economy can be expected to require enhanced undertakings from Foreign Investors that have already signed commitment letters in respect of French targets but have not been vigilant in respecting such commitments (including notably in respect of reporting obligations). The European track record of Foreign Investors in this respect is also likely to be taken into consideration following the entering into force of the EU-wide mechanism encouraging cooperation and information-sharing between the Member States on 11 October 2020.

Consequences if a notifiable investment is not notified

Any transaction falling within the scope of the Foreign Investment Regulation but carried out without the prior authorisation of the French Minister for the Economy is null and void, and any interested party may seek such nullity in court.

In addition, the French Minister for the Economy must issue an injunction ordering the foreign investor (possibly under penalty): (i) file an application for authorisation, (ii) restore

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the situation to how it was prior to its investment at the Foreign Investor's own expense, and/or (iii) modify the investment.

Appointment of an agent: the French Minister for the Economy may also appoint an agent who will be responsible for ensuring the safeguarding of national interests at the target company. This agent may block any decision of the management bodies likely to affect such national interests.

Precautionary measures: if the safeguarding of national interests is (or is likely to be) compromised, the French Minister for the Economy may also take the precautionary measures that it deems necessary. These measures are identical to those applicable in the case of non-compliance with commitments (see above).

If the injunction is not complied with, (i) the French Minister for the Economy may impose the same fines as in the event of a breach of commitments (see above) and (ii) the investor may be sentenced to up to five years of imprisonment.

7. Please indicate whether there are options available for the parties to challenge negative decisions by authorities.

A: So far, the Foreign Investment Regulation has not given rise to any legal action in France. Case law in this matter is very limited and we are not aware of any relevant precedents.

In the case of a dispute with respect to the decision of the French Minister for the Economy or its scope of powers, an administrative law action may be brought before the Paris Administrative Court (*recours de plein contentieux*), where the Court would have the power to review the full merits of the case and to reverse the Minister for the Economy decision if it considers that the factual circumstances should not have triggered such decision. Such proceedings could take up to one year.

To avoid this delay, it is possible to seek interim relief in a "fast track procedure" (*procédure en référé*) to obtain the suspension of the decision of the Minister for the Economy and require that the Minister reconsider its decision within a short period on the basis of the Court's decision. Such procedure can generally be completed within three or four weeks.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: In France, foreign investment decisions are not published. No formal statistics relating to the number of authorization (or refusal) granted is available. So far, the French Ministry for the Economy publishes only general statistics relating to the number of files examined by the Ministry (137 in 2017, 184 in 2018, 216 in 2019, and 275 in 2020), the business sectors involved

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(31.5% in the defence and security sector in 2020), and the nationality of the investors (EU (50.5% in 2020) or non-EU (49.5% in 2020).

In case of refusal, the French Minister for the Economy must explain the grounds for his decision (see 5. above). These grounds are precisely laid down by Article R. 151-10 of the CMF.

The procedure for examination of applications is strictly confidential. Civil servants are under an obligation of professional secrecy prescribed by the law. They must exercise professional discretion for any act, information or document which comes to their knowledge in the performance of their duties.

The French Minister for the Economy requires from the investor that it indicates the level of confidentiality of the information included in the authorisation request. In particular, the Foreign Investor should mention whether (i) stock market rules governing information are (or may be) applicable to the transaction (and if applicable, the rules and timeline of application) and (ii) certain information is not known by the target (its managers or employees labour organisations) upon filing.

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: In order to adapt the Foreign Investment Regulation to current developments and challenges in the renewable energy sector, France has decided to include R&D activities relating to technologies used in the production of renewable energy in the list of critical technologies falling within the scope of foreign investment control as from 1 January 2022.

In addition, the list of documents and information required when filing an authorization request has been completed and /or refined in order to adapt it to the information requested under the European cooperation mechanism. These provisions came into force on 1 January 2022.

The Minister for the Economy has also announced towards the end of 2021 that the extended foreign investment control over non-EU or non-EEA investments in sensitive listed target that was introduced in response to the pandemic would be extended until the end of 2022.

Finally, it is expected that the Ministry for the Economy publishes guidelines that may provide further clarification during the first semester of 2022.

In practice, a foreign investment filing may impact the timing of the transaction, as the foreign investment clearance will be a condition to closing. Sellers are increasingly trying to obtain a “hell or high water” provision in respect of the Minister’s clearance (in a style similar to a hell or high water antitrust closing condition). This type of provision is aimed to improve deal certainty, as the buyer will not be able to back out of the transaction if the Minister

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imposes difficult commitments or requires divestitures. As it can be expected that the French Ministry for the Economy will increase its level of scrutiny and enhance the commitments imposed on buyers due to increased parliamentary oversight and the general political climate, covenants imposed on buyers in this respect should be carefully reviewed.

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3. GERMANY

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Foreign direct investment screening in Germany is mainly governed by the following laws and regulations:

- Foreign Trade Act (*Außenwirtschaftsgesetz*, "AWG")
  - includes the general framework and certain basic provisions on foreign direct investment screening implemented by a governmental ordinance (*Rechtsverordnung*).
- Foreign Trade Ordinance (*Außenwirtschaftsverordnung*, "AWV")
  - contains detailed provisions on foreign direct investment screening.
- Circular orders (*Runderlasse*) and a general ruling (*Allgemeinverfügungen*) of the Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz,* "BMWK") as competent authority for foreign direct investment screening
  - provide regulatory guidance on the BMWK's application of the legal framework and in particular on required documentation.

An application for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*) also in cases in which notification is not required has become common with foreign direct investment in German companies to increase transaction security in a reasonable timeframe.

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

A: The German foreign investment regime covers the following investments:

- Cross-sectoral review (*sektorübergreifende Prüfung*)

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- a non-European (non-EU/non-EFTA) person or entity acquires directly or indirectly a German business (by a share deal or – if related to a (separable) business – an asset deal) or a direct or indirect shareholding in a German company and, after the acquisition, directly or indirectly holds at least 25% or, as the case may be, 10/20% of the voting rights in the German company (see the applicable thresholds below), each irrespective of the investor's industry, the target's size and economic importance or the transaction value
- After several reforms in the last years, the threshold of acquired voting rights has been lowered if the German company to be acquired is deemed to be particularly relevant under public order or security aspects, as defined by law. The threshold is 10% of voting rights in particular relating to the operation of critical infrastructure (e.g., energy, transport or healthcare facilities services, if the facilities concerned are vital to the functioning of the community) – as conclusively defined in a separate ordinance on critical infrastructure (Ordinance on the Definition of Critical Infrastructures under the BSI Act (*Verordnung zur Bestimmung Kritischer Infrastrukturen nach dem BSI-Gesetz*) –, critical components of or certain software products for the operation of critical infrastructure, the entrustment with or operation of telecommunications surveillance measures, certain cloud computing services, telematics infrastructure components and services, certain activities in the media industry and certain services for ensuring the non-disturbance and functionality of state communication infrastructure. Most recently, the threshold has been lowered to 20% in relation to certain – also exhaustively enumerated – activities and products of critical technologies (e.g. AI-based cyberattacks/cyber-surveillance, autonomous cars, robotics, semiconductors, IT security products, space/air travel, dual use/nuclear technology, quantum mechanics, additive manufacturing, data networks, smart meter gateways, classified patents, critical inputs, communication of important public agencies, agriculture).
- The threshold is 25% for all other foreign investments subject to the cross-sectoral review.

- Sector-specific review (*sektorspezifische Prüfung*)
  - a foreign (non-German) person or entity acquires directly or indirectly a German business (by a share deal or a business asset deal) or a direct or indirect shareholding in a German company and, after the acquisition, directly or indirectly holds at least 10% of the voting rights in it if the target's business relates to (i) certain military/defence goods, (ii) products with certain IT security functions to process classified information or (iii) qualifies as a security-important institution (as defined in a separate law). In categories (i) and (ii) it can be sufficient that the German target has been involved in relevant activities in the past.

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b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A: Foreign direct investment screening is applicable under the following conditions:

1. Foreign investor

- The German foreign direct investment regime generally applies to any non-European (non-EU/non-EFTA) investors, whether they are state-owned or private investors (cross-sectoral review).
- If the German target's business involved – or under certain circumstances has involved – activities relating to (i) certain military/defence goods, (ii) products with certain IT security functions to process classified information or (iii) qualifies as security-important institutions (as defined in a separate law), the German foreign direct investment regime applies to any foreign (non-German) investor (sector-specific review).
- Acquisitions by EU or EFTA-incorporated investors (including German investors) may only be reviewed, if the BMWK has indications that the structure has been chosen to circumvent the applicability of the foreign direct investment screening regime. An acquisition by EU or EFTA-incorporated investor with non-EU/non-EFTA shareholders is considered an indirect acquisition by the latter.

2. Relevant threshold

- Any acquisition that leads directly or indirectly to a holding of 25% or, as the case may be, 10/20% or more of the voting rights may be reviewed, including any acquisition of shares, capital increases and debt-equity swaps as well as asset deals for a German business (i.e. not only single assets).
- In contrast, acquisitions of non-voting shares, put or call rights, or pre-emptive rights are, as such, not subject to review. There is also a limited exception in the cross-sectoral review for group internal restructuring if the parties to the transaction are wholly-owned subsidiaries of the same parent company and have their seat in the same country.
- However, the regime's scope of application extends to transactions in which the investor obtains other forms of effective participation in the target's management, i.e. if the purchaser (i) acquirers voting rights, (ii) this is accompanied by special rights (e.g. additional board seats/majorities or veto rights for strategic decisions that grant the investor influence equivalent to the voting shares triggering the applicability of the screening), and (iii) this provides a level of participation in control that is comparable to that provided by the respective applicable threshold of voting rights. Also circumventions that formally do not meet the applicable thresholds of voting rights are covered as well.
- The 25% or, as the case may be, 10/20% threshold is relevant (and sufficient) at each shareholder level, e.g. in case the direct acquirer is a group company with multilevel shareholder structures.

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- Additional acquisitions above the relevant entry threshold (25% or 10/20%) are covered (only), if the already invested acquirer reaches or exceeds subsequent voting share thresholds, i.e. (20, 25,) 40, 50 or 75%.
- Voting rights in the German target held by a third party are attributed to the investor if the investor holds at least 25% or, as the case may be, 10/20% of the voting rights in the third party, or if the third party and the investor have entered into an agreement on the joint exercising of voting rights in the German target (acting in concert). Post-closing agreements on the joint exercising of voting rights likewise qualify as a relevant acquisition if the thresholds are met.
- The establishment of a new business is not restricted under the foreign investment regime. It will, however, have to meet any other applicable regulatory requirements for such a business or operation under German law.

c) which authorities are competent to carry out such review;

A: The BMWK is the competent authority for foreign direct investment screening in Germany. The BMWK will generally consult with other ministries and authorities. Further, prohibitions and restriction orders require consent of other ministries as well (e.g., of the full federal government (i.e. the federal cabinet) for a prohibition under the cross-sectoral regime, and of the Federal Foreign Office, Federal Ministry of the Interior and Community and of Federal Ministry of Defence for any prohibition or restriction order in the sector-specific screening).

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

A: The German foreign direct investment screening provides for various types of review:

- Approval Requirement (sensitive cross-sectoral and all sector-specific review proceedings)
  - In the sensitive categories of the cross-sectoral screening (i.e. those with entry voting share thresholds of 10 or 20%) and in all cases of sector-specific foreign direct investment screening, the (direct) acquirer has to notify the transaction to the BMWK. The transaction (i.e. its completion) is preliminarily invalid until BMWK has cleared it (or it is deemed to be cleared).

- Certificate of Non-Objection (other-sectoral review proceedings)
  - In all other cases of the cross-sectoral foreign direct investment screening, the purchaser can voluntarily apply for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*). Such certificate confirms that there is no objection to the acquisition in terms of public order or security. It provides legal certainty to the purchaser, seller and target as the effectiveness of the agreement is subject to the statutory condition subsequent of a (possibly much later) prohibition within the respective review periods. Issuance (or deemed issuance) of a non-objection certificate is often included as closing condition in the respective

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purchase agreement. There is also the – practically less used – option of a voluntary notification; such notification also triggers certain review periods for BMWK, but does not result in a formal certificate.

- Review ex officio (all review proceedings)
    - BMWK may also review foreign investments on its own initiative (ex officio) – e.g. if the transaction has not been notified and a certificate of non-objection has not been applied for. BMWK is increasingly monitoring the M&A market and actively approaching parties to (potentially) sensitive transactions.

e) who must make the notification (buyer, seller, both);

A: The (direct) purchaser must notify the BMWK or apply for a certificate of non-objection with the BMWK. Generally, the purchaser-side will closely cooperate with the seller and/or target in the preparation of any filings, e.g. with regard to information necessary to provide a fair and accurate description of the target, and any further documentation requests and steps in the review proceeding.

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: In straightforward cases, the purchaser often gets a non-objection certificate (cross-sectoral review) within a few weeks up to two months (cross-sectoral review) upon application. In case of in-depth review, the basic overall duration is six months from the initial filing. However, the review periods are extendable under certain circumstances and suspended by information requests and negotiations of a mitigation agreement. Due to such suspension and extension provisions, there is factually no fixed maximum period and the overall duration of the review proceedings thus depends on the specifics of the case.

- The timetables of the cross-sectoral and sector-specific regimes have recently been harmonized:
    - The (direct) purchaser notifies the (envisaged) acquisition to the BMWK or applies for a certificate of non-objection. Such filing is typically made shortly after signing the acquisition agreement, but can also be made in advance once the acquisition scope and structure is sufficiently clear. If notification is mandatory, it must in any event be made without undue delay after signing.
    - The transaction is deemed cleared or a certificate of non-objection is deemed issued if the BMWK has not opened an in-depth review within two months upon receipt of the filing. If no filing is made, BMWK may generally review ex officio for up to five years from signing.
    - If the BMWK opens an in-depth review (phase 2), certain further information, as defined in a general ruling, must be submitted and the BMWK may – also later – require all (directly/indirectly) participating entities to submit further documentation.

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- The BMWK has further four months from receipt of the complete documents to complete its in-depth review. If the BMWK does not prohibit the transaction or impose restrictions within the four-month period, it is precluded from doing so later and the transaction is deemed cleared. The BMWK may – and typically does – explicitly clear the transaction or issue a certificate of non-objection in advance.
- Subsequent requests for information suspend the phase 2-period (until the requested documentation is fully provided).The BMWK may extend it by three months in particularly complex cases, and by another (fourth) month if the transaction particularly affects German defence interests. The review period may also be extended by further time periods with acquirer's and seller's consent. It is also suspended if and while the BMWK is negotiating with the parties to the acquisition contractual provisions to address substantial security interests.

Under both investment screening schemes, the application for clearance, notification or application for a non-objection certificate must include a description of the acquisition, the (direct and indirect) acquirer and the German company to be acquired as well as the basic features of the fields of business of the acquirer and the target. BMWK has issued a general ruling precisely specifying the information to be submitted and provides an excel sheet on its website to be used for the essential information.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The applicable test is slightly different for cross-sectoral and sector-specific foreign direct investment screening. Due to the rather vague, broad scope of the respective requirements, the BMWK generally claims considerable discretion in its review, however only public order or security aspects are relevant.

- cross-sectoral review procedures
  - The BMWK reviews whether the investment will likely affect the public order or security of the Federal Republic of Germany, of another EU Member State or in relation to projects or programmes of EU interest. General economic or political goals do not justify to restrict or prohibit a transaction.
  - The term ‘public order or security’ refers to the term used in Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (EU Screening Regulation).
  - While the investment review is not limited to particular sectors, acquisitions in specific sectors listed in the AWV (i.e. those with the lower entry review thresholds of 10 and 20%, see above) are deemed to be of particular relevance for public order and security. This list specifies the factors that may be taken into consideration pursuant to Article 4(1) of the EU Screening Regulation.

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  - The purchaser-related screening factors of Article 4(1) of the EU Screening Regulation have also been codified in German law, including control by a non-EU/non-EFTA state, prior conduct that had a negative impact on public order or security of an EU member state, and (risk of) certain criminal misconduct (i.a. corruption, fraud, offenses under the AWG).

- sector-specific review procedures
  - The BMWK reviews whether the acquisition endangers essential security interests of the Federal Republic of Germany. This does not only include imminent dangers to the internal/external safety (e.g. threat of armed conflicts), yet includes also further security interests such as e.g. vital security considerations or military precautionary measures (e.g. security of supply).
  - The purchaser-related screening factors described above are considered in the sector-specific review as well.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: Foreign direct investment screening proceedings do not trigger any filing fees or other fees payable to the competent authorities.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: The BMWK – in case of cross-sectoral reviews only upon the federal government's (i.e. the federal cabinet's) consent – may (i) prohibit an acquisition or (ii) impose conditions or restrictions in order to ensure the public order or security (cross-sectoral review) respectively essential security interests (sector-specific review) of Germany. Such prohibitions or conditions/restrictions may be imposed within the timetables described, i.e. in case of cross-sectoral reviews also post-closing.

- In case an approval is needed (sector-specific review and particularly sensitive acquisitions subject to the cross-sectoral regime) the completion of the acquisition of a German business or a shareholding in a German company is invalid unless it is cleared (with retroactive effect). Thus, (deemed) clearance by the BMWK qualifies as statutory closing condition. If no approval (clearance) is required (all other acquisitions subject to the cross-sectoral review), the effectiveness of a purchase agreement is subject to the condition subsequent that the BMWK prohibits the transaction within the applicable timeframes. In case of such a prohibition the purchase agreement becomes invalid. In order to avoid complex unwinding of a completed acquisition, parties more and more commonly include (deemed) non-objection certification as closing condition in the respective purchase agreements.

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- Possible instructions may *inter alia* include restrictions related to the shareholding, e.g. restrictions on potential further increase of the participation, minimum holding periods, limits on the investor's influence, or approval requirements for potential de-investment, and/or restrictions or commitments (incl. veto rights for the Federal Republic of Germany) related to the business, e.g. commitments to keep certain production or activities in Germany or in the EU/EFTA or commitments on certain security safeguards.

Further, the BMWK may – instead of unilaterally imposing instructions or prohibiting the acquisition – enter into negotiations with the parties to the transaction to address public order or security-related concerns in a (security) agreement. These negotiations suspend the review deadlines.

6. **Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.**

A: As the decisions of the BMWK under the foreign direct investment screening schemes qualify as administrative acts, they may be enforced in accordance with the general rules on administrative enforcement (e.g. by penalty payments (*Zwangsgeld*)). As specific measures for enforcing a prohibition, BMWK may prohibit or restrict the exercise of voting rights and appoint a fiduciary for unwinding an already closed acquisition. BMWK may also impose reporting obligations on the parties and appoint a third party as monitor to track compliance.

In case, an approval is needed (sector-specific review and particularly sensitive acquisitions subject to the cross-sectoral regime) the agreement on the acquisition of a German company or a shareholding in the company is provisionally invalid unless it is (deemed) cleared by the BMWK. In such case, it is prohibited to exercise voting rights related to the acquisition and to share sensitive information of the German target with the acquirer(s) until the transaction is (deemed) cleared.

Non-compliance, in particular with the gun jumping prohibitions, constitutes administrative and criminal offenses.

7. **Please indicate whether there are options available for the parties to challenge negative decisions by the authorities.**

A: The (direct/indirect) purchaser as well as the seller can challenge a prohibition or restriction of an acquisition under the foreign direct investment screening schemes before the administrative courts. The target is generally not entitled to make a claim in court based on its own rights. A third party (e.g. a competing bidder) may generally not challenge a (deemed) clearance or (deemed) non-objection in court. The foreign direct investment regime shall primarily protect public interests rather than those of third parties.

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There is no established case law on challenges of foreign direct investment decisions, presumably mainly because the BMWK has, to our knowledge, only rarely formally disallowed any transaction and typically negotiated any restrictions with the parties, instead of unilaterally imposing such restrictions. However, first cases are now pending before the administrative court of Berlin.

8. Please indicate to what extent the authorities in are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: Decisions of the BMWK on the clearance, non-objection to, restriction or prohibition of an acquisition under the foreign direct investment screening scheme are not published.

The BMWK generally has to keep information and documents relating to the acquisition provided by the parties to the transaction confidential and may not disclose them to any unauthorised third party. While everyone can file an application for file access under the freedom of information acts (*Informationsfreiheitsgesetze*), business or trade secrets generally remain protected.

Foreign direct investment review proceedings are not public and do not comprise public hearings or other forms of public participation. The BMWK may require any (directly/indirectly) participating entities to submit necessary documentation for its foreign direct investment review.

Decisions rejecting an application or restricting a transaction as administrative acts must include a reasoning. Mitigation agreements typically contain a rather extensive preamble in which the authorities' reasoning is laid out. Certificates of non-objection generally only include the non-objection statement without stating any further reasons.

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Germany has passed a significant reform of its foreign direct investment screening scheme in recent years. Notably, it has expanded the scope of acquisitions subject to a mandatory filing and a lower entry threshold of review (10/20%).

Institutionally, Germany has allocated significant personal resources to process the large amount of filings (the number of in-depth reviews has risen from 66 in 2017 to 159 in 2020). The new EU cooperation mechanism is adding further workload and stakeholders. So far, however, BMWK has run the EU cooperation rather separately from the German FDI screening itself, ensuring that it does not cause delays in the latter.

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While outright prohibitions are still the rare exception, mitigation agreements, particularly in the defence sector, have become more and more frequent. Following industrial strategies at German and European levels, the German government has also been expanding the notion of order and security to include rather indeterminate concepts such as technological sovereignty. The government is also becoming more creative on the tools to address security concerns. Currently under discussion is a statutory basis for white knight-like acquisitions of the German state for a limited term to prevent a sale to unwelcome foreign or non-EU/non-EFTA investors.

Overall, it is expected that the German government will continue its increasingly tight scrutiny of acquisitions it considers to be of concern for public order or security. This may eventually bring certain decisions before courts allowing them to provide some legal specifications to the rather vague terms applicable under the German foreign direct investment screening.

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4. ITALY

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Foreign direct investment supervision in Italy is governed by the following laws and decrees (together, "Golden Power Legislation"):

- Law Decree No. 21 of 15 March 2012 (converted into Law No. 56 of 11 May 2012);[1]
- Presidential Decree No. 35 of 19 February 2014 on the procedures for exercising special powers in the defence and national security sectors;
- Presidential Decree No. 86 of 25 March 2014 on the procedures for exercising special powers in the energy, transport and communications sectors;
- Prime Minister's Decree No. 108 of 6 June 2014 that sets out the activities of strategic importance to national defence and security;
- Prime Minister's Decree of 6 August 2014 that sets out the organisational and procedural rules for exercising special powers;
- Prime Minister's Decree No. 179 of 18 December 2020 that sets out the activities of strategic importance to sectors under Art. 4, para. 1 of Regulation (EU) 2019/452; and
- Prime Minister's Decree No. 180 of 23 December 2020 that sets out the assets of strategic importance in the energy, transport and communications sectors.

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;
b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime):

[1] As then modified by Law Decree No. 105 of 2019 (converted into Law No. 133 of 2019), by Arts. 15 and 16 of Law Decree No. 23 of 8 April 2020 (converted into Law No. 40 of 5 June 2020), and by Art. 4 of Law Decree No. 56 of 30 April 2021: "Rules on golden powers over corporate structures in the defence and national security sectors, and over activities of strategic importance in the energy, transport, communications and technology-intensive sectors".

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A: The Italian supervision on foreign direct investments is structured as an *ex ante* control mechanism that applies to certain transactions related to strategic activities in the following macro-sectors:

- DEFENCE AND NATIONAL SECURITY SECTOR

  Prime Minister's Decree No. 108 of 6 June 2014 details the activities of strategic importance to defence and national security. The decree lists the following activities: the study, research, design, development, production, integration and life-cycle support (including the logistics chain) of a series of systems, materials and equipment intended for national defence and security. For instance, the decree refers to electronic and acoustic warfare systems, ballistic protection systems and explosive device detection systems.

  The obligation to notify and the situations in which a notification is mandatory depend on the envisaged transaction, regardless of the nationality of the investor.[2] The Golden Power Legislation distinguishes between (1) acquisition of shareholdings and (2) other relevant acts.

  1. The purchase, in any capacity, of shareholdings in companies that carry out activities of strategic importance to defence and national security - including key strategic activities that directly or indirectly involve the Ministry of the Defence or the Ministry of the Interior - a notification requirement is triggered when the Buyer acquires a stake of at least 3% for listed companies and 5% for non-listed company. Obligations to re-notify are triggered every time additional shares are acquired that result in a stake of 5%, 10%, 15%, 20%, 25% and 50% in the company.

     Corresponding golden power – The Italian government may:

     - impose specific conditions in relation to the security of supply, the security of information, technological transfers and the control of exports;
     - reject the purchase and order the resale of the shareholdings within a year if the buyer is not: (a) the Italian State itself, (b) an Italian public subject/body, or (c) an entity controlled by either (a) or (b), and the buyer comes to hold, directly or indirectly (including through shareholders' agreements, subsequent purchases, a third party or linked third parties), a shareholding carrying voting rights which could compromise in the specific case the national defence and security interests.

[2] The notifying party and its control chain up to the ultimate investor. An EU investor is deemed to be EU or extra-EU on the grounds of the place of establishment of the ultimate investor. Therefore, in the case of an investment by a subsidiary of a larger group, the Italian FDI legislation looks at the place of establishment of the parent company (e.g., an EU investor with extra-EU parent must be considered extra-EU, an EU investor with in-between extra-EU companies that lead to an EU parent company must be considered EU, whereas an extra-EU investor with EU parent company remains extra-EU). Instead, in the case of PE funds, the Italian FDI legislation looks at the place of establishment of its ultimate managers/general partners, it may look also at the place of establishment of an investor in the fund only if that investor controls the fund.

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2. **Resolutions of shareholders' meetings** (including pledges) or **of corporate bodies** of any company that carries out activities of strategic importance to defence and national security - including key strategic activities that directly or indirectly involve the Ministry of the Defence or the Ministry of the Interior - when the resolutions concern: the merger or split of the company, the transfer of the company or of its branches or subsidiaries, the transfer abroad of the company's registered office, the change to the company's corporate purpose, the winding-up of the company, the amendment of certain clauses in the company's articles of association, or the transfer of property rights or usage rights relating to tangible or intangible assets.

   Corresponding golden power – The Italian government may **veto** the resolutions.

- BROADBAND 5G TECHNOLOGY SECTOR

  The conclusion of contracts or agreements concerning goods or services related to (*i*) the planning, the realisation, the maintenance and the management of broadband telecommunication networks with 5G technology and to (*ii*) the acquisition of highly technological components needed to implement or manage services based on broadband 5G technology.

  In particular:
  - The conclusion of contracts or agreements with **non-EU companies** concerning the above goods or services are subject to a filing obligation.
  - Contracts and agreements with EU companied are not subject to such notification obligation in the sector of broadband 5G technology.

- STRATEGIC ACTIVITIES RELATED TO THE ENERGY, TRANSPORT AND TELECOMMUNICATIONS SECTORS

  The strategic assets in the energy, transport, and telecommunications sectors are set out by Prime Ministerial Decree No. 180 of 23 December 2020.

  Similarly to the rules for the national defence and security sector, the Golden Power Legislation distinguishes between (1) acquisition of shareholdings and (2) other relevant acts:

1. **The purchase, in any capacity**, of **shareholdings** in a company that holds strategic assets in the energy, transport or telecommunications sectors may be subject to filing obligation to the Presidency of the Council of Ministers.
   In particular, until 31 December 2022:
   - **EU investors** must notify the acquisition of control over the target company. The definition of acquisition of control refers to the Italian legislation and it is similar to the notion of control under EU merger control rules.

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- Non-EU investors must notify the (i) acquisition of control over the target company, (ii) the acquisition of a shareholding or voting rights exceeding 10%, if the transaction value exceeds EUR 1 million, or (iii) the acquisition of a shareholding exceeding 15%, 20%, 25% and 50% (exceeding each of these thresholds requires a new notification).

Corresponding golden power- The Italian government may:

- Impose specific conditions to ensure protection of the Italian State's interests;
- Reject the purchase

2. Any decision, act or transaction adopted by a company holding one or more strategic assets (i.e. assets that are of strategic relevance to the national interest) - in the energy, transport, communications sectors - if the decision, act or transaction modifies the ownership, control, availability or use of those assets, regardless the nationality of the beneficiary. This includes resolutions of the company's shareholders' meeting or administrative bodies concerning the merger or demerger of the company, the transfer abroad of the company's registered office, the transfer of the assets of the company, or one of its branches if they include these assets, and the assignment of the assets as collateral.

   Corresponding golden power – The Italian government may veto the decision, act or transaction.

- STRATEGIC ACTIVITIES RELATED TO SECTORS INCLUDED IN ART. 4 OF REGULATION (EU) 2019/452

Until 31 December 2022, the scope of Golden Power Legislation is defined by a direct reference to the sectors listed in Article 4 of Regulation (EU) 2019/452. Moreover, Prime Ministerial Decree No. 179 of 18 December 2020 provides guidance as to the assets which are deemed strategical under Article 4 of Regulation (EU) 2019/452.

1. The purchase, in any capacity, of shareholdings in a company that holds strategic assets in said sectors may be subject to filing obligation to the Presidency of the Council of Ministers.

In particular, until 31 December 2022:

- EU investors must notify the acquisition of control over the target company. The definition of acquisition of control refers to the Italian legislation and it is similar to the notion of control under EU merger control rules.
- Non-EU investors must notify the (i) acquisition of control over the target company, (ii) the acquisition of a shareholding or voting rights exceeding 10%, if the transaction value exceeds EUR 1 million, or (iii) the acquisition of a shareholding

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exceeding 15%, 20%, 25% and 50% (exceeding each of these thresholds requires a new notification).

Corresponding golden power – The Italian government may:

- impose specific conditions to ensure protection of the Italian State's interests;
- reject the purchase.

2. Any decision, act or transaction adopted by a company holding one or more strategic assets in such sectors must be notified if they lead to a modification of the ownership, control, availability or use of those assets, regardless the nationality of the beneficiary.[3] This includes resolutions of the company's shareholders' meetings or administrative bodies concerning the merger or demerger of the company, the transfer abroad of the company's registered office, the transfer of the assets of the company, or of one of its branches if they include these assets, and the assignment of the assets as collateral.

Corresponding golden power – The Italian government may veto the decision, act or transaction.

As to jurisdictional thresholds, foreign direct investment rules apply to all the above sectors, regardless the turnover of the target company.

As regards the jurisdictional scope of FDI control in Italy, as a general principle, any act/resolution within the meaning of the abovementioned paragraphs that occurs in Italy requires a Golden Power notification. In general, a filing obligation may be triggered if the relevant undertaking is registered or has a subsidiary registered in Italy or it has branches or physical assets in Italy. However, even if this is not the case, the notification obligation can still be triggered if the target undertaking is active in the supply of critical inputs sectors.

The Golden Power Legislation does not apply to purely intra-group transactions. Nonetheless, parties are required to notify these transactions, through a simplified procedure.

c) which authorities are competent to carry out such review:

A: Reviews are carried out by the Italian government. More precisely, notification must be addressed to the President of the Council of Ministers, and golden powers are exercised through decrees of the Prime Minister. These decrees must be adopted based on a positive resolution of the Council of Ministers, which must then send the resolution to the competent parliamentary committees.

[3] As of 1 January 2023, with reference only to companies that carry out activities of strategic importance in the sectors included in Art. 4 of Regulation (EU) 2019/452, resolutions of a shareholders' meeting or of the administrative bodies must be notified only if the transfer of ownership, control, availability or use goes in favour of a non-EU operator.

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d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: If shareholdings are acquired, the burden of notification is on the buyer. Conversely, if notification concerns a resolution of the shareholders' meeting or of the administrative bodies of a company, the burden of notification is on the company concerned.

In any case, the obligation to notify also entails a standstill obligation. Consequently, the Italian government has up to 45 days (with possible extensions (i) of another period of 10 or 20 days if an information request is submitted, and/or (ii) in case of activation of the cooperation mechanism under Regulation (EU) 2019/452) to decide whether to exercise its golden powers. During this period the operation is suspended, the company's decisions do not become effective, and the rights linked to the acquired shareholdings are suspended until the government adopts a decision. However, the suspension expires if the government fails to act by the deadline given.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The golden powers can be exercised in the following two situations:

(i) A THREAT OF SERIOUS DAMAGE TO DEFENCE AND NATIONAL SECURITY ESSENTIAL INTERESTS:

In this case, the Italian government evaluates whether the set-up resulting from the decision or transaction – in light of the object of the act and the strategic importance of the goods or undertakings being transferred – is adequate to ensure the integrity of: (a) national defence and security; (b) military defence information security; (c) the international interests of the State; and (d) the protection of national territory, critical and strategic infrastructure, and borders.

To assess the threat of serious damage, the Italian government considers the following factors:

- the adequacy (also taking into account the modalities in which the operation is financed) of the economic, financial, technical and organizational capacity of the purchaser as well as of the industrial project, with respect to the regular continuation of

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the activities, the maintenance of the technological asset, also with reference to key strategic activities, security and continuity of supply, as well as the correct and timely execution of contractual obligations taken in relation to public administrations, directly or indirectly, by the company whose investments are subject of acquisition, with specific regard to the relations relating to national defence, public order and national security; and

- the existence, having regard also to the official positions of the European Union, of objective reasons on the basis of which it can be considered possible the existence of links between the buyer and third countries that: (*a*) do not recognise the principles of democracy or the rule of law; (*b*) do not respect rules of international law; (*c*) have adopted conduct that threatens the international community; or (*d*) have relations with criminal or terrorist organisations, or with natural or legal persons in any way connected to them.

(ii) A THREAT OF SERIOUS DAMAGE TO THE ENERGY, TRANSPORT, OR COMMUNICATIONS SECTORS, OR THE SECTORS INCLUDED IN ART. 4 OF REGULATION (EU) 2019/452

In these cases, the government may choose to exercise special powers if:

- the adoption of resolutions, acts and operations represents an exceptional circumstance – not governed by national or European sector legislation – that poses a threat of serious damage to the public interests of the safety and functioning of networks and facilities and to the continuity of supply; or

- an acquisition by an (EU or non-EU) entity poses a threat of serious damage to the State essential interests of the safety and functioning of networks and facilities, and to the continuity of supply, or a danger to safety, or to public order.

In these cases, the golden powers must be exercised exclusively on the basis of objective and non-discriminatory criteria. To this end, the government considers the following factors, among others:

- the existence, having regard also to the official positions of the European Union, of objective reasons on the basis of which it can be considered possible the existence of links between the purchaser and third countries which do not recognize the principles of democracy or the rule of law, which do not respect rules of international law or that have taken risky behaviour towards the international community, taken from the nature of their alliances, or have relations with criminal or terrorist organizations or with subjects in any way connected to them; and

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- whether the set-up resulting from the legal act or the transaction – also taking into account the modalities in which the operation is financed, of the economic, financial, technical and organizational capacity of the purchaser – is adequate for ensuring:
    - the security and the continuity of supply; and
    - the maintenance, the security and the operation of networks and plants.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: No filing fees are required for foreign direct investment supervision in Italy.

5. Please describe to what extent authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: See the answer to question 2, points a) and b), above.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: The powers at disposal of the government are the same both in case of non-compliance with its decisions and in case of non-notification or violation of the standstill obligation. In particular, in case of breach of foreign direct investment provisions, the following sanctions apply:

- nullity of the resolutions, of the transactions or of other acts implemented in violation of government decisions, in breach of the notification and standstill obligations or approved thanks to the voting rights linked with the shareholdings concerned;

- possibility for the government to order the company to restore at its own expenses the situation previously existing;

- in case of non-compliance with or non-implementation of a decision imposing conditions, all non-capital rights linked with the shareholdings concerned are suspended;

- in case of non-compliance with a decision rejecting the acquisition and ordering to resale the shareholding within a year, the government may ask a national court to order the resale of the shareholding concerned, in accordance with Art. 2359-*ter* of the Civil Code); and

- except where the act constitutes a criminal offence, the violation of the Golden Power Legislation implies an administrative fine up to twice the transaction value and, in any

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case, not less than 1% of the cumulative turnover (in the last fiscal year) of the companies involved.

7. Please indicate whether there are options available for the parties to challenge negative decisions by authorities.

A: Parties may challenge government decisions before national courts. Specifically, all disputes relating to the exercise of special powers over the activities of strategic importance examined above are subject to the exclusive jurisdiction of the administrative courts, i.e. the Lazio regional administrative court ("TAR Lazio") at first instance, which will apply the accelerated procedure, and the Council of State on appeal.

An exceptional appeal to the President of the Republic is an alternative route to challenge government decisions. If this route is chosen, the President of the Republic will refer the case to the Council of State for advice. The Council of State's advice is binding on the President.

An appellant cannot pursue both routes.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: In general terms, Italian administrative law requires that decisions include clear reasoning. Moreover, President of the Republic's Decree No. 35 of 19 February 2014 and President of the Republic's Decree No. 86 of 25 March 2014 also require that decisions on the exercise of golden powers indicate, in detail, the threat of serious damage to the essential interests of defence and national security, or the threat of serious damage to the State's essential interests in terms of: (*a*) the security and functioning of networks and facilities, and (*b*) the continuity of supply. The decision must clearly specify any conditions the government imposes and the administrative fines due in the event of non-compliance or non-implementation.

The government's decisions on foreign direct investment are not published. Nonetheless, Art. 3-*bis* of Law Decree No. 21 of 15 March 2012 requires Prime Minister to send – by 30 June of each year – a report to the Italian parliament on the activities carried out under the Golden Power Legislation. The report must specify the cases and the public interests that motivated the exercise of the golden powers. This report is published on the Italian parliament's website.

Information and data contained in documents produced by public administrations or private parties for the purposes of foreign direct investment supervision are not subject to the right of access.

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9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: On 18 December 2020, the Prime Minister adopted Decree No. 179 setting out the activities of strategic importance falling within the sectors of Art. 4, para. 1, of Regulation (EU) 2019/452 and Decree No. 180 setting out the strategic activities in the energy, telecommunication and transportation sectors.

As regards upcoming developments, the exceptional rules widening the subjective and objective scope of the golden powers, in force until 31 December 2021, were recently extended until 31 December 2022 in accordance with Art. 17 of Law Decree No. 228 of 31 December 2021. Therefore, the transitional provisions will apply at least until year-end. After 1 January 2023, the ordinary regime will become applicable unless the Italian legislator introduces further amendments.

As decisions are not published, it is not possible to have a clear and complete overview of the golden power decisional practice. However, summaries of four recent cases where the Italian government exercised its veto power are set out below:

- *Agreement between Fastweb from Huawei regarding the purchase of components and services in the 5G sector.* Fastweb notified the agreement with Huawei concerning the purchase of components of the Core Stand Alone (SA), and related services. With its decision of 23 October 2020, the Italian government exercised its veto power, due to the absence of a diversification of suppliers, in accordance with EU and international principles and guidelines.

- *Acquisition of LPE by Shenzhen Invenland Holdings.* The company Shenzhen Invenland Holdings notified the acquisition of 70% of the share capital of LPE, a company active in the development of technologies based on epitaxy (used for semiconductors). The notification has also been submitted to the European Commission and other Member States according to Art. 6, para. 1, of Regulation (EU) 2019/452. The European Commission, Sweden and the Netherlands submitted a request for information and observations. Taking into consideration the opinions submitted by the Commission and the other Member States, with its decision of 31 March 2021, the Italian government prohibited the acquisition, as it could threaten Italian and European essential interests as regards the safety and continuity of supply, and it could have led to a transfer of relevant know-how abroad.

- *Acquisition of Verisem by Syngenta Crop Protection.* On 19 October 2021, the Italian government vetoed the acquisition of Verisem by Syngenta, a Swiss company acquired in 2017 by Chinese company ChemChina (State-owned). Verisem (the target) is a global seed producer with processing facilities in several countries, including Italy. As its business is of national strategic interest, a takeover by Syngenta might have shifted the

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global strategic balance in the control of seeds for vegetable and herb production to Asia.

- *Joint Venture between Zhejiang Jingsheng Mechanical and Applied Materials*. On 23 November 2021, the Italian government vetoed the creation of a joint venture in the semiconductors sector between Chinese company Zhejiang Jingsheng Mechanical, a producer of microchip components, and the Hong Kong branch of Applied Materials, a leading American producer of software for semiconductors. The joint venture was intended to acquire control over the Italian branch of Applied Materials regarding the screen printing equipment business in Italy.

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5. THE NETHERLANDS

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: The Netherlands has traditionally had a liberal policy with regard to foreign direct investment but this stance is shifting. Although Dutch law does not presently provide for a general foreign direct investment screening mechanism, a bill establishing a national security screening regime was recently submitted to parliament and is pending approval. It intends to apply retroactively to qualifying investments made after 8 September 2020. The bill covers vital sectors and sensitive technologies and applies equally to Dutch and non-Dutch investors (for more details on this bill, please see the answer to question 5, below). Therefore, more than just a FDI regime, the new law will be a national security regime. However, if another, more specific national security screening mechanism already applies - such as the screening regimes in the telecoms, gas and electricity sector – no separate notification has to be made under the proposed general national security screening regime. Moreover, if the notification thresholds of that sector-specific regime are not met, no notification is needed under the new national security regime. Other notification regimes that do not concern national security – for example, regimes observed by the Dutch central bank, healthcare authority or competition authority – will not release the parties from their obligation to notify the transaction under the general national security screening regime. Currently, sector specific screening regimes apply in certain publicly owned or controlled sectors including: energy, mining, water, transport, nuclear, defence, telecommunications, healthcare and finance.

This will be described in more detail below. Since these sectoral rules are not part of a foreign direct investment mechanism as such, some of the questions that have been addressed in the previous parts of this guide concerning other jurisdictions have been left out in this part on the Netherlands.

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2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

c) which authorities are competent to carry out such review;

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: Although there is currently no overarching regulatory framework dealing with FDI in the Netherlands -a bill establishing a national security screening regime has been submitted to Parliament- certain limitations and/or requirements on foreign investment presently exist in the following sectors:

- Telecommunications
  - An act introducing screening of acquisitions (or retention) of predominant control in a telecoms undertaking has come into force in the Netherlands. The Minister of Economic Affairs and Climate Policy (the "Minister") will now assess whether a transaction of this kind results in a threat to the public interest, such as abuse or disruption of telecommunication services. Under the new law, any investor intending to acquire "predominant control" of a company significant enough to give that investor "relevant influence" in the Dutch telecoms sector will have to notify the Minister. This new notification and screening regime is not limited to "traditional" telecoms providers, but also extends to internet hubs and data centres.

The screening mechanism shall apply a three-step test.

First, "predominant control" must be acquired. Predominant control is a distinct test from "decisive influence" under the Dutch Competition Act. Predominant control exists when the transaction leads to:

- a party, or several parties acting in concert, holding at least 30% of the voting rights of the target;
- a party, or several parties acting in concert, having the right to appoint or dismiss more than half of the target's managing or supervisory directors;
- acquisition of one or more shares with special statutory rights (regardless of the actual amount of power conferred); or

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- in the case of an acquisition of assets, the target becomes a branch of the acquiror(s) and the assets give access to either an electronic communications network or hosting, internet hub, or data centre services.

As per the *second* test of the screening mechanism, the acquired company or assets must be significant enough to give the controlling investor relevant influence in the Dutch telecoms sector. The thresholds defining relevant influence in the telecoms sector are:

- Telecoms: providing telephone services, internet access services or electronic communications network access to more than 100,000 end users.
- Internet hub: providing an internet node that more than 300 autonomous systems are connected to.
- Data centres: providing data centre services with a power capacity exceeding 50 MW or providing hosting services for more than 400,000 domain names with a ".nl" extension.
- Trust services: providing a qualified trust service, such as electronic signatures, stamps, time stamps, registered electronic delivery services and website authentication certificates.

If these two tests are met, the transaction has to be notified to the Investment Screening Bureau of the Ministry of Economic Affairs. As a *third* test, the Minister will then assess whether the transaction risks threatening the public interest, i.e. if the relevant influence could lead to: (i) breach of confidentiality in internet traffic and/or telephone communications; or (ii) a telecoms services outage for a large number of users or for the national or military security and intelligence agencies. The Minister has the power to require guarantees to address the threat or, as a last resort, prohibit the acquisition or retention of control. Notifications are non-suspensory but must be made at least eight weeks before completion. The obligation to notify the transaction to the Minister rests on the buyer. Failure to notify in a timely manner may lead to a fine of up to EUR 900,000.

- <u>Gas and electricity</u>
  - The Electricity Act ("*Elektriciteitswet*") and the Gas Act ("*Gaswet*") require companies with a production plant with a nominal electrical capacity of more than 250 MW to report a change of control to the Minister no later than four months before the intended change of control. The Minister has the ability to prohibit the change of control or give additional instructions, based on considerations of public security, security of services or supply. Legal acts that trigger a change of control without reporting to the Minister are voidable. In addition, companies that are responsible for the national electricity and gas transmission systems are entirely state-owned. Foreign ownership in a Dutch systems operator is not possible.

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- Mining
  - The Mining Act ("*Mijnbouwwet*") requires that state-owned company Energie Beheer Nederland (''EBN'') must hold 40% of the shares in all mining activities. Foreign investments in mining activities are possible. However, EBN has a veto right with respect to the outsourcing of mining operations, obligations towards the supply of gas and the transportation of gas. Furthermore, the Mining Act prescribes that gas can only be stored in empty gas fields and salt caverns in the Netherlands if the company holds the required permit. The Minister has the ability to revoke the required permit if there are justifiable grounds to believe that it is in the interest of national security and national defence. Refusal to issue a licence on environmental grounds or due to the licensee's financial instability is also possible.
  - The Mining Act also prohibits the exploration for and extraction of gas without a permit of the Minister. The Mining Act does not explicitly oblige the Minister to revoke the permit in the event of a change of control. However, a change in the technical and financial abilities of the permit holder may cause the Minister to revoke the permit. Such a situation may for example occur if a foreign investor with controlling interest wants to divest parts of the company on a large scale.

- Crude Oil Extraction
  - Legislation in relation to crude oil does not provide for explicit protection against foreign investment, except in the field of extraction of crude oil. EBN holds 40% of the shares in all extraction activities. The regime of the Mining Act also applies here. For example, if a foreign investor decides to divest a large portion of the crude oil production, the Minister may revoke the extraction permit. The Minister may also revoke a storage permit if there are justifiable grounds to believe that it is in the interest of national security or national defence.

- Water
  - The drinking water companies in the Netherlands are government-owned. Under the Drinking Water Act (*''Drinkwaterwet''*), drinking water companies can only be controlled by legal entities under public law or companies whose shares can only be held by legal entities governed by public law. Therefore, foreign ownership of drinking water companies is not permitted.

- Transport infrastructure
  - The transport infrastructure, such as the road network, is owned by the state. The port of Rotterdam and Schiphol airport are owned by public entities. Only after privatisation, would foreign investment in these fields be possible. Privatisation is, however, not planned at this time.

- Nuclear sector
  - Most companies in the nuclear sector are fully or partially state-owned, either solely by the Dutch state or jointly with other states. For instance, the nuclear fuel

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company Urenco Ltd, is owned by the Dutch and British states. Urenco is also subject to the Almelo Treaty, which contains provisions with respect to the protection of sensitive information in relation to national security and non-proliferation. The Joint Committee ("*Gemengde Commissie*") of government representatives that supervises Urenco must consent unanimously to any disposal of Urenco's shares.

  - The nuclear power plant in Borssele (*''Kernenergiecentrale Borssele''*) is majority-owned (70%) by state-owned company DELTA. The Dutch government concluded an agreement with DELTA and other shareholders in relation to the ownership of and exploitation of the nuclear power plant in Borssele. Any changes in the shareholder structure of the power plant must be reported to the Minister. The Minister has the power to block the proposed change, based on considerations of public security, security of services or supply. Non-compliance with the prohibition to dispose of the shares is punishable by a penalty of EUR 35 million.

- Financial Sector
  - The direct or indirect acquisition of an interest of 10% or more of the share capital or voting rights of a Dutch investment firm, insurer, or certain other financial undertakings requires the prior approval of the Dutch Central Bank (DCB). The direct or indirect acquisition of an interest of 10% or more of the share capital or voting rights of a Dutch bank requires approval by the European Central Bank (ECB). Both the DCB and ECB will assess whether the acquirer meets certain criteria. Amongst others, they will assess the financial soundness and track-record of the acquirer.

- Healthcare
  - The Healthcare Market Regulation Act requires compulsory notification to the Dutch Healthcare Authority in the case of a change of control of a regulated healthcare provider. The Healthcare Authority assesses especially whether (i) the continuity of essentials forms of care will not be jeopardized by the merger; (ii) clients, personnel and other stakeholders have been involved carefully in the merger process and whether their opinions and recommendations have been duly taken into account. The Healthcare Authority can impose instructions on the exercise of control or ultimately prohibit the change of control.

- Defence
  - While foreign investors cannot invest in the Netherlands Ministry of Defence, foreign investment is possible in private suppliers of defence material, such as vehicles and ships. However, all companies having a contractual relationship with the Netherlands Ministry of Defence must meet the requirements set forth in the General Security Requirements for Defence Assignments 2017 (*''Algemene Beveiligingseisen voor Defensieopdrachten 2017''*). In particular, such contracting companies must notify the Military Intelligence and Security Service (*''Militaire Inlichtingen- en Veiligheidsdienst*") if they intend to transfer the ownership largely or

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completely to foreign persons, to nominate directors that are not Dutch citizens or to work with foreign persons. The Military Intelligence and Security Service may suspend or end the contract if it believes that there will be too much foreign influence.
    - A separate bill introducing a screening mechanism is being prepared for the defence industry, but no further details are known yet. This bill will introduce a national security screening regime which will apply to essential companies in the supply chain of the vital process of "defence deployment".

- FDI review as part of existing licensing process
    - In addition, investors are often screened where a company requires a government licence to conduct its business (for example, operating a chemical plant). The government can grant these licences conditionally and revoke them based on, for example, grounds of public interest, such as national security.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: Please refer to question 2 and the limitations and/or requirements cited there.

4. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: Please refer to question 2 and the limitations and/or requirements cited there. The Minister of Economic Affairs can block changes of control in the electricity and gas sectors or give instructions relating to such a change of control and also block changes in shareholder structures in nuclear power companies. The Minister may also revoke certain permits in the mining and crude oil extraction sectors in specific circumstances.

5. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: With a view to implementing the EU FDI Screening Regulation, the Government of the Netherlands introduced the Foreign Direct Investment Screening Regulation (Implementation) Act which entered into force on 4 December 2020, but which does not itself contain an FDI screening regime. Instead it primarily regulates contact with the competent authorities of the EU member states.

The Government of the Netherlands on 30 June 2021 has, as such, also submitted to Parliament an "Investment, Mergers and Acquisitions Security Test" or "National Security

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Test" (NST) bill which proposes to establish an ex-ante review mechanism for screening investments aimed at acquiring target undertakings in the Netherlands which are active in vital processes or sensitive technology . With this bill, the Netherlands joins a growing number of countries introducing M&A screening mechanisms. Once the proposed Dutch mechanism enters into force, bans are expected to be rare, given the limited "risk to national security" grounds. But parties can expect an additional administrative burden and a potential impact on their transaction timetables where investments fall within the scope of the screening mechanism.

As indicated above, a separate bill is being prepared for the defence industry. Until the separate bill for the defence industry enters into force, it is envisaged that the general national security screening regime, once adopted, will apply when the undertaking is active in military or dual- use goods.

The Government of the Netherlands has furthermore proposed a bill which would provide Dutch private companies a protective buffer against hostile/unwanted foreign and domestic bids by allowing them to invoke a 250 day long standstill period. The cooling off or "stand still" period is intended to create more space and time for boards to evaluate the social impact of the takeover and the consequences for all stakeholders. The debate on this topic was triggered by the foreign acquisition attempts of Dutch multinational companies PostNL, AkzoNobel, and Unilever.

Retrospective application of proposed national security screening mechanism

In 2020, the Dutch government had already indicated its intention for the national security screening regime to apply retroactively. Per the current NST bill, the regime would apply to qualifying investments made after 8 September 2020. However, parties will only need to notify the Minister retroactively if ordered to do so in relation to national security risks and the Minister can exercise this right only up to eight months after the bill becomes law. Moreover, the bill's explanatory memorandum indicates that retroactive screening will be done only where material grounds to do so exist. As the legislative process of the NST bill is still underway, further comfort on the point of retrospective application will only be possible once the legal provisions are finally approved and made applicable law.

Activities covered by the Dutch NST bill

The bill introduces a screening mechanism for investments in undertakings active in vital processes or sensitive technology. The bill lists three sectors it considers vital: energy, banking, and certain activities at Amsterdam airport and the port of Rotterdam. These sectors are not covered in their entirety by the bill – it would apply to specific *functions* that are considered vital to a sector, such as the financial market infrastructure. The bill allows the Minister to expand the scope of vital infrastructure providers in the case of an emergency.

Military goods and dual-use items which fall under EU Dual-Use Regulation 2021/821 (which is a recast of the EU export control regulation 428/2009) are considered

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sensitive technology, although some may be excluded from that category by ministerial order. Other technologies may by order be designated as sensitive, provided they:

- may be essential for the functioning of defence, investigative, intelligence and security services in the exercise of their tasks;
- are essential to prevent unacceptable risks to the availability of certain essential products or facilities that contribute to the national security interests of the Netherlands or of its allies, such as NATO partners; or
- are characterised by a broad scope of application within different vital processes or within processes affecting national security – such as quantum technology.

Drafts of these possible orders have yet to be published.

Investments covered

The bill covers acquisitions of control in an undertaking established in the Netherlands and active in vital processes or sensitive technology as described above. The terms "control" and "undertaking" need to be understood as defined and developed in EU competition law. "Control" means the ability to exercise decisive influence, either on the basis of shareholding, or on a *de facto* basis. "Undertaking" is an economic entity which exploits economic activities, and this may encompass various legal persons or just a branch without a legal personality that only has assets and employees in the Netherlands. An undertaking is "established in the Netherlands" when the activities or the actual management takes place in the Netherlands; formalities like the place of incorporation are not decisive.

With regard to the Netherlands-based undertakings active in sensitive technology (military goods and dual-use items), the bill authorises the Minister to appoint specific categories of sensitive technology for which a lower threshold than control will trigger the mandatory screening regime. It concerns the acquisition of or increase in "significant influence". The bill defines "significant influence" as the acquiring party's possibility of exercising at least 10%, 20% or 25% of the votes at the general meeting. The ministerial order will specify which of the three lower thresholds applies to the specific categories of sensitive technology. A draft order describing these categories has yet to be published.

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

Notification Obligations

The bill applies equally to Dutch and non-Dutch investors. Strictly speaking, the new law would thus be a national security regime and not only a foreign direct investment (FDI) regime. If the envisaged investment falls within the screening regime's scope, a notification would have to be made by either the acquirer or the target company. While in the majority of cases the acquirer would seem to be the most appropriate party to handle the notification, in specific cases, the target undertaking would be bound to observe non-disclosure obligations and would be the only appropriate entity to assess whether the transaction falls within the national security screening regime. In that case, the target undertaking would

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need to make the notification. Hence, if investors are considering M&A activities in vital sectors or activities involving sensitive technology, they should expect closer scrutiny – notably during the Covid-19 crisis, but also beyond – and anticipate longer transaction timelines due to an additional notification process. At the same time, companies and advisers considering a sales process involving potentially vital sectors should take into account national security concerns posed by certain bidders.

There is no need for notification if another more specific national security screening mechanism already applies. The Minister will have the power to intervene in case of non-notified transactions or if its assessment was based on incomplete or incorrect information.

Timeline

Once the new regime enters into force, a notifiable transaction can only be executed after the Minister approves the transaction (a standstill obligation). The Minister has to decide within eight weeks of notification (phase 1). That period can be extended by up to six months where, for example, information from third countries is required. If an in-depth review is necessary, the Minister has another eight weeks (phase 2). The phase 2 period can also be extended by six months, but any extension in phase 1 is deducted from that six-month extension. An extension by another three months is possible if an investor is established outside the EU and the investment falls under the EU FDI screening regulation. This permits investment screening authorities from other member states and the European Commission to intervene in a case, as provided for by that regulation. Importantly, if the Minister requests additional information from the notifying parties, the statutory review period is suspended.

Assessment & Possible Decisions

After receiving a notification, the Minister assesses whether the investment poses a national security risk. The bill lists several factors that will be taken into account. These include the transparency of the ownership structure; ongoing sanctions against the acquiring party; the geopolitical situation of the acquiring party's country or region of origin; and its track record in operating businesses in the same sector. Based on the assessment, the Minister decides on whether to allow the investment (either unconditionally or with the condition that certain mitigating measures be met, such as additional security requirements or the appointment of a security officer). If the national security risks cannot be remedied through mitigating measures, the Minister will prohibit the transaction. If the Minister does not take a decision within the eight-week or extended period, the transaction is automatically permitted.
In exceptional circumstances, the Minister can reassess a transaction, even after a positive decision. But only if there is a serious national security risk in the form of either a potential social disruption with economic, social or physical consequences, or a direct, increased and real threat to Dutch sovereignty. The Minister must make that reassessment no later than six months after becoming aware of that risk. The Minister does not need the prior authorisation from a court before reaching a final decision after the reassessment.

Upon request the standstill obligation can be lifted by the Minister where there is a chance of economic, physical or social damage to society.

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Public shareholding as an FDI surrogate

The European Commission has called upon member states to protect companies by nationalizing companies – in part or in whole - if protection from FDI is needed and when screening is not sufficient. A recent example is the Dutch public-private joint venture which acquired the Dutch shipbuilder IHC to safeguard the Dutch international competitive position in this sector since IHC was considered strategic and innovative. Another example is the increase of the Dutch shareholding in KLM-Air France which was considered in the public interest in order to safeguard the Dutch hub-function in international air traffic. During the start of the Covid-19 pandemic, the Dutch State was in the middle of the privatization of the state-owned vaccine R&D lab Intravacc. It annulled the privatization and announced that public interest guarantees must be taken into account in a future sale of the shares (if any). These examples demonstrate that public shareholding might be a surrogate to safeguard public interest and to prevent foreign direct investments.

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6. PORTUGAL

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: The main piece of legislation concerning foreign direct investment in Portugal is Decree-Law 138/2014 of 15 September ("Decree-Law"), which sets out a screening procedure (further described in our answer to question 2) that applies to transactions with the following features ("Transaction"):

- The purchaser in the Transaction is foreign to the European Union and the European Economic Area ("EU/EEA Foreign Investor");
- The Transaction involves one or more main infrastructures and assets assigned to defence and national security or to the performance of essential services in the energy, transportation or communication sectors ("Strategic Assets");
- The Transaction will result in the EU/EEA Foreign Investor acquiring direct or indirect control ("Control") over a Strategic Asset.

In practice, this screening procedure is rarely triggered and, to the best of our knowledge, no Transaction has been blocked by the use of this mechanism to date.

Other than as set out in the Decree-Law, foreign direct investment in Portugal is not subject to requirements or restrictions additional to those applicable to investments by Portuguese entities.

2. Please indicate/describe:

a) which types of investments are caught by foreign direct investment rules;

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

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c) which authorities are competent to carry out such review;

d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

e) who must make the notification (buyer, seller, both);

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: According to the Decree-Law, following a proposal from the Minister overseeing the sector to which the Strategic Asset pertains ("Sector Minister"), the Portuguese Council of Ministers (*Conselho de Ministros*) may oppose the execution of a Transaction if it poses a real and serious threat to national security or the provision of basic services considered fundamental to the country.

The *ex officio* procedure to review the Transaction is the following:

- Within 30 calendar days from (a) the signing date of the Transaction agreement (or other legal instrument, as applicable); or (b) the date when the Transaction becomes public knowledge, if later, the Sector Minister may start the review procedure to assess the risk that the Transaction may pose to national security or to the provision of basic services considered fundamental to the country;

- Upon the start of the screening procedure, the EU/EEA Foreign Investor must provide all information and documentation requested by the Sector Minister;

- The Council of Ministers may oppose the completion of the Transaction within the 60 calendar days following the date the EU/EEA Foreign Investor submits the information or documentation requested by the Sector Minister;

- If the Council of Ministers opposes the completion of the Transaction, the associated legal instruments and any subsequent related actions (including transfer of ownership of the Strategic Asset) will be deemed null and void.

- The Council of Ministers is deemed not to oppose the Transaction if it does not do so within the 60-day term.

- The EU/EEA Foreign Investor may appeal a decision of the Council of Ministers opposing a Transaction.

In addition to this *ex officio* procedure (which is triggered by the Sector Minister) the EU/EEA Foreign Investor may request confirmation directly from the Sector Minister that the

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Transaction will not be opposed by the Council of Ministers. This request must be accompanied by a description of the Transaction's terms and conditions.

If the Sector Minister does not respond to the request for confirmation within 30 calendar days, confirmation of non-opposition is deemed to be tacitly given.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: As mentioned, the Council of Ministers may oppose a Transaction that presents a real and serious threat to national security or to the provision of basic services considered fundamental for the country.

The real and serious nature of the threat is assessed solely on the basis of the following criteria:

- The physical security and the integrity of the Strategic Asset;
- The continued permanent availability and operability of the Strategic Asset, as well as the ability of the entities that Control it to fully comply with the obligations associated with the Strategic Asset, in particular public service functions.
- The continuity, regularity and quality of the public interest services to be provided by the person or company who Controls the Strategic Asset; and
- The protection of confidentiality, imposed by law or public contract, of the data obtained in the course of operating a Strategic Asset by those who Control it and of the technological resources required to manage the Strategic Asset.

Moreover, a Transaction is deemed to represent a threat to national and homeland security, or to the provision of basic services considered to be fundamental for the country, whenever:

- There are serious indications, based on objective factors, of connections between the EU/EEA Foreign Investor and countries that (a) do not observe the principles of the rule of law; (b) represent a risk to the international community as a result of the nature of their alliances; or (c) maintain relations with criminal or terrorist organisations or with persons associated with such organisations, taking into account the official position of the European Union on these matters, if any.
- The EU/EEA Foreign Investor:

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- has in the past used the control held over other assets with the aim of creating serious disruption to the regular provision of essential public services in the country where the assets were located or in neighbouring countries;

- does not ensure that the Strategic Asset is assigned to its main function, or that it is returned to its owner upon the termination of the corresponding concession agreements, if applicable, particularly if there is an absence of appropriate contractual provisions.

- The Transaction leads to a change in purpose of the Strategic Asset that threatens its permanent availability and operability, in particular as regards public service obligations, in the terms prescribed by law.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: Not applicable.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: The Council of Ministers has the power to oppose a Transaction for up to 60 days post-closing. The Decree-Law does not provide for the possibility of the Council of Ministers to ask the parties to modify a Transaction and, as far as we are aware, this has never occurred.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: As explained in our answer to question 2, the Council of Ministers holds the right to assess a Transaction *ex officio* and oppose it if the criteria for doing so are met. If a Transaction is opposed, the associated legal instruments and any subsequent related actions (including transfer of ownership of the Strategic Asset) will be deemed null and void. No other specific consequences are foreseen in the Decree-Law.

While the parties to a Transaction may decide to notify the Sector Minister thereof, there is no express obligation to do so.

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7. Please indicate whether there are options available for the parties to challenge negative decisions by the authorities.

A: The parties can challenge the Council of Ministers' opposition to the Transaction by filing an appeal in accordance with the Portuguese Code of Administrative Court Procedure (*Código de Processo nos Tribunais Administrativos*).

The grounds for the Council of Ministers' decision to oppose the Transaction should be set out in clear and objective terms, and it is these terms that the administrative courts consider if an EU/EEA Foreign Investor files an appeal against an opposition decision.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: As stated, any opposition decision from the Council of Ministers must be based on clear and objective criteria and sufficiently reasoned. If it is not, it may be declared invalid pursuant to the Portuguese Code of Administrative Procedure (*Código do Procedimento Administrativo*). Decisions of the Council of Ministers are published in the Portuguese Republic Gazette (*Diário da República*).

In addition, pursuant to Law 26/2016 of 22 August, administrative documents are generally accessible to anyone requesting access, regardless of the reasons for the request. The following are key exceptions to this rule:

- where the administrative documents are still for internal use only when the request is made - such as internal documentation being prepared by the Sector Minister's department to review a Transaction. The disclosure of such a document may be deferred until a final decision is adopted or until one year has passed since the start of the procedure.

- Access to documents containing information that could put the fundamental interests of the state at risk if disclosed may be prohibited or made subject to authorisation for as long as is strictly necessary.

Court proceedings documents are generally available for consultation. There are exceptions to this (e.g. criminal proceedings declared secret or family law proceedings).

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: Not applicable.

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7. SPAIN

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Within the context of the COVID-19 crisis, the Spanish government amended Act 19/2003, on the legal regime of foreign capital exchanges and economic transactions (Act 19/2003) to suspend the liberalization regime for non-EU and non-EFTA investors in certain strategic sectors related to public order, public health and public security and established a Screening Mechanism. This Screening Mechanism is expected to remain in force long-term. Royal Decree 34/2020 (as amended by Royal Decree 12/2021 of 24 June and Royal Decree 27/2021 of 23 November) imposes similar screening requirements on non-Spanish EU and EFTA investors until 31 December 2022.

When the Screening Mechanism applies, *ex ante* authorisation from the Spanish Council of Ministers (for investments of at least EUR 5 million) or a lower-tier authority (for investments between EUR 1 million and below EUR 5 million) is required for the completion of the relevant transaction. If the authorisation is not obtained before completing the transaction, such transaction would be invalid and ineffective until the required authorisation is obtained.

The Screening Mechanism aligns part of the Spanish foreign investment legal framework with Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union.

In addition, Spanish law provides for specific rules on foreign investments by non-EU persons in certain sectors: national defence-related activities, audio-visual communications, air transportation, telecoms, energy and financial activities. For EU residents, the only sectors with a specific regime are the national defence-related activities.

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2. Please indicate/describe, for your jurisdiction:

a) which types of investments are caught by foreign direct investment rules;

A: The Screening Mechanism set out in Act 19/2003 applies to investments that meet the following cumulative requirements:

- Shareholding in Spanish companies: investments in Spanish companies by non-EU or EFTA investors (a) acquiring 10% or more of the share capital of a Spanish company or (b) otherwise acquiring the control over a Spanish company (having decisive influence);
- Value of investment in Spain: the value of the investment in Spain is (a) of at least EUR 1 million (if the investor is a non-EU or EFTA investor) or (b) of at least EUR 500 million, or any investment value if the target is a listed company (if the investor is a non-Spanish EU or EFTA investor) – please note that this regime relating to non-Spanish EU or EFTA investors is set to expire on 31 December 2022 and we cannot rule out further extensions;
- Captured investments: investments on the basis of (a) the objective nature of the activities of the Target or (b) the subjective circumstances of the investor:
    - Objective nature of the activities of the Target. The Screening Mechanism captures investments affecting national security, public order or public health and in particular relating to the following strategic sectors:
        - critical infrastructure, either physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, as well as sensitive facilities and investments in land and real estate, crucial for the use of such infrastructure;
        - critical and dual use technologies, key technologies for industrial leadership and training, technologies developed under programmes and projects of particular interest for Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace, defence, energy storage, nuclear technology, nanotechnologies and biotechnologies;
        - supply of critical inputs, including energy, strategic connectivity services or raw materials, as well as food security;
        - access to sensitive information, including personal data, or the ability to control such information; and
        - media.

      The government reserves the right to extend the objective scope to any other sector that it deems may affect the public order, public health or public security.
    - Subjective circumstances of the investor. Three categories of non-EU and EFTA investors are required to undergo the Screening Mechanism regardless of the sector where they invest:
        - investors directly or indirectly controlled by a non-EU/EFTA government.
        - non-EU/EFTA Investors who have already made an investment affecting national security, public order or public health in another EU Member State (and in particular in the strategic sectors listed above), which in practice and according to the approach taken by the Spanish authority is deemed to apply if the

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investor has been denied or approved subject to conditions an FDI authorization by any EU Member State.

- if there exists a serious risk that the non-EU/EFTA investor engages in illegal or criminal activities affecting national security, public order or public health in Spain.

In addition to the Screening Mechanism, all foreign investments and divestments must be notified post-closing to the Foreign Investments Registry of the Ministry of Industry, Commerce and Tourism. This is a notification only; there is no approval required for most inbound investment in Spain.

A number of transaction-types require additional notifications:

- Acquisition or sale of at least 50% stake in certain non-listed Spanish businesses or assets by entities resident in a country listed as a tax haven pursuant to Royal Decree 1080/1991 must be notified to the Ministry of Industry, Commerce and Tourism before completion. This is a notification only; prior approval is not required;
- Acquisitions of real estate by non-EU countries for use as diplomatic property require prior approval from the Council of Ministers; and
- Foreign investments in national defence-related activities require the authorisation from the Council of Ministers except if they are made in listed companies, below 5% of the share capital and do not allow the investor to take part in the managing body of the company.

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A: See above.

c) which authorities are competent to carry out such review;

A: The Sub-Directorate General on Foreign Investment (*Subdirección General de Inversiones Exteriores*) of the Ministry of Industry, Commerce and Tourism (*Ministerio de Industria, Comercio y Turismo*) is responsible for the processing and review of the foreign direct investment notifications.

The adoption of a decision is responsibility of:

- the General Directorate of International Trade and Investments (*Dirección General de Comercio Internacional e Inversiones*) if (a) the investment was agreed on a binding basis prior to 18 March 2020 or (b) if the investment value in Spain is above EUR 1 Million but below EUR 5 Million; or
- the Council of Ministers (*Consejo de Ministros*) for the rest of the cases.

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d) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

A: Investments subject to the Screening Mechanism are subject to an obligation to notify and to obtain the relevant approval (or confirmation that no filing is required for the transaction) prior to closing.

e) who must make the notification (buyer, seller, both);

A: The investor(s).

f) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A: The Spanish foreign direct investment authority has a deadline of six months as of the notification to adopt a decision. If the deadline is elapsed without the adoption of any decision, the investment is deemed not to be authorized (*silencio negativo*).

While in the beginning of the entry into force of the new Screening Mechanism the Authority replied consultations within weeks, nowadays the increasing workload is delaying authorizations or confirmations that no filing is required to one to three months as of filing.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A: The substantive test carried out by the Spanish authority will consider whether the investment may result in a threat for public security, public order or public health in Spain. This assessment involves public policy concerns and is carried out by the Spanish Government under its Council of Ministers (except for minor investments or those signed prior the entry into force of the Screening Mechanism, see above).

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A: No.

5. Please describe to what extent the authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A: The Spanish authorities may block foreign direct investments subject to the Screening Mechanism. They have also granted their approval to certain conditions and obligations.

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Such powers can be exercised post-closing when no notification has been made before closing or when closing is performed before the Screening Mechanism process is completed.

6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A: Failure to make a required notification under the Screening Mechanism is subject to a fine ranging from EUR 30,000 to the value of the investment. In addition, any transaction completed without a required approval is deemed to be invalid and ineffective until the required approval is obtained.

7. Please indicate whether there are options available for the parties to challenge negative decisions by the authorities.

A: The resolution granted by Spanish administrative authorities is subject to administrative (when the decision is adopted by the General Directorate of Trade and Investments) and judicial challenge.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A: As a general rule, only decisions adopted by the Council of Ministers are published in the Spanish Official Gazette. Little information is provided on the reasoning behind the Foreign Direct Investment authorizations under the Screening Mechanism. Information is kept confidential during the entire procedure and is not revealed upon termination of the review procedure.

9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: It is expected that the Spanish Government enacts an implementing regulations or that the Authorities publish guidelines that may provide further clarification as to the material scope of the Screening Mechanism, which is very broad as it currently stands in Act 19/2003. In this regard, a draft implementing regulation has been published by the Spanish Ministry of Industry, Commerce and Tourism in November 2021.

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8. UNITED KINGDOM

1. Please describe, in general terms, the applicable laws, regulations and practice with regard to foreign direct investment supervision (excluding merger control).

A: Until recently, investments into the UK have mostly been assessed under the UK's merger control and public takeover regimes. However, the recent introduction of a new national security screening regime paved the way for significant changes to the UK's approach in scrutinising foreign investments.

The National Security and Investment Act 2021 (the "NS&I Act") came fully into force on 4 January 2022. The regime permits the relevant Secretary of State to scrutinise and potentially prohibit, unwind or impose conditions on transactions on the basis of national security concerns. The rules apply to all qualifying transactions completed on or after 12 November 2020 (being the day after the NS&I bill was first published).

In addition, the UK Government has the power under the Enterprise Act 2002 ("EA02") to formally intervene in a proposed transaction on public interest grounds, which include cases involving the media, stability of the financial system or public health issues. The relevant UK Secretary of State, as the competent decision-maker, also has a wider power to intervene in any other case deemed to be of public interest by issuing an order to this effect.

In addition, the UK government holds golden shares in a number of UK defence companies which may be used to prevent a foreign investor from acquiring a certain percentage shareholding in a company or to veto arrangements resulting in certain levels of influence or control.

For completeness we also note that, formally, the Industry Act 1975 allows the UK Secretary of State to prevent control of an "important manufacturing undertaking" passing to a non-UK resident where this would be contrary to the UK's national interests. However, this power has never been exercised and would require approval by both houses of the UK Parliament to enact.

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There are also a number of industry specific licensing and regulatory regimes in the UK which may require, among other things, the consent of a UK sector regulator before a foreign investment by way of acquisition can be made.

2. Please indicate/describe, for your jurisdiction:

a) which types of investments are caught by foreign direct investment rules;

A:

I. NS&I regime

The NS&I Act enables the UK Government to review transactions involving the acquisition of control over:

- "qualifying entities", capturing any entity whether it is a legal person or not; and/or
- "qualifying assets", comprising land, tangible moveable property and "ideas, information or techniques which have industrial, commercial or other economic value" (such as trade secrets, designs or software) (section 7(4) of the NS&I Act).

The regime is not limited to investment by foreign investors (although the UK government expects that will be its focus), nor is it restricted to investments in UK companies or assets. In contrast to many other foreign investment screening regimes, the NS&I Act catches investment in both UK companies and non-UK companies, provided that the latter carry on activities in the UK or otherwise supply goods or services to people in the UK. As for investment in assets, even land or property located outside of the UK may be caught, if such assets are used in connection with activities in the UK or the supply of goods or services to people in the UK.

As explained further below, the NS&I regime is a hybrid system where some transactions require mandatory notification while others may be notified voluntarily.

II. EA02 regime

The EA02 does not define what constitutes a foreign investor or foreign investment. There is currently no distinction between foreign and domestic investors.

Under the EA02 public interest intervention regime, the UK government has the power to intervene on public interest grounds in:

- public interest mergers, in essence these are transactions where the jurisdictional tests of the UK merger control regime are met and where one or more "public interest

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considerations" (defined below) are relevant and need to be considered in relation to the transaction (see sections 42(1) and (2) of the EA02); and

- special public interest mergers, these are transactions where: the jurisdictional tests of the UK merger control regime are not met but which would otherwise be considered to be within the scope of the UK merger control regime;[4] where one or more "public interest considerations" is relevant to a consideration of the transaction; and where at least one of the businesses concerned meets the conditions set out in section 59 of the EA02 (set out in further detail below).

b) what the jurisdictional thresholds are that trigger review under foreign direct investment rules (i.e. when does an investment / transaction fall under the review regime);

A:

I. NS&I regime

The NS&I Act defines a range of "trigger events", including:

- the acquisition of shares in a qualifying entity which causes the total holding to exceed a threshold of 25%, 50% or 75% ("Trigger Event A");
- the acquisition of voting rights in a qualifying entity which causes the total holding to exceed a threshold of 25%, 50% or 75% ("Trigger Event B");
- the acquisition of voting rights that enable or prevent the passage of any class of resolution governing the affairs of the qualifying entity ("Trigger Event C");
- the acquisition of material influence over a qualifying entity's policy ("Trigger Event D"); and/or
- the acquisition of a right or interest in, or in relation to, a qualifying asset providing the ability to: (i) use the asset, or use it to a greater extent than prior to the acquisition; or (ii) direct or control how the asset is used, or direct or control how the asset is used to a greater extent than prior to the acquisition ("Trigger Event E").

By contrast to the position under the EA02, the UK Government's powers to intervene in transactions under the NS&I regime do not depend on the target of the acquisition meeting minimum turnover or share of supply thresholds.

As explained further below, the notification regime applicable to a transaction will depend on the specific trigger event involved as well as the sector in which the relevant entity operates.

[4] That is, the transaction is one where "two or more enterprises have ceased to be distinct" or where "arrangements are in progress or in contemplation" which, if carried into effect, will lead to the enterprises ceasing to be distinct (see sections 23 and 33 of the EA02).

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II. EA02 regime

The conditions for public interest and special public interest mergers are described in more detail below:

Public interest mergers

The Secretary of State must have reasonable grounds for suspecting that it is or may be the case that:

- the UK merger control regime is applicable;
- the relevant UK merger control jurisdictional thresholds are met, or if the target is a Relevant Enterprise the jurisdiction thresholds for Relevant Enterprises are met; and
- one or more "public interest considerations" are relevant. The current identified public interest considerations are set out in section 58 of the EA02 and include accurate news and free expression, media plurality, broadcasting, media standards, the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies, and in the interest of maintaining the stability of the UK financial system.

Special public interest mergers

The Secretary of State must have reasonable grounds for suspecting that it is or may be the case that:

- while the jurisdictional tests of the UK merger control regime are not met, the structure of the transaction is of the type to which the UK merger control rules would otherwise apply (see above) (section 59 EA02);
- one or more public interest considerations are relevant (see above); and
- the person or persons by whom one of the enterprises was carried on supplied at least 25% of all newspapers of any description, or all broadcasting of any description in the UK or a substantial part of it (section 59 EA02).

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c) which authorities are competent to carry out such review;

A:

I. NS&I regime

The Secretary of State for Business, Energy and Industrial Strategy ("**BEIS**") is the competent decision-maker for the assessment of transactions under the NS&I Act.

II. EA02 regime

The Secretary of State for BEIS is the competent decision-maker for all EA02 cases, excluding media mergers. The latter are reviewed by the Secretary of State for Digital, Culture, Media and Sport. The UK Competition and Markets Authority ("**CMA**") is responsible for conducting the relevant Phase I and Phase II investigations for public interest cases and will report to the relevant Secretary of State. Where relevant, specific sectoral regulators may also be involved in the process.

a) what type of review is carried out: is it only a notification requirement or is prior approval required to close a transaction?

A:

I. NS&I regime

The NS&I regime includes a hybrid notification system:

- A **mandatory notification obligation and clearance process** for transactions involving Trigger Event A, B or C (as described above – this will mainly target the acquisition of a shareholding or voting rights of more than 25%,) in 17 sensitive areas (see table below). The types of transactions and sectors subject to the mandatory notification obligation may be varied through secondary legislation. A mandatorily notifiable transaction that is completed without being approved by the Secretary of State will be void (section 13 if the NS&I Act): completion prior to clearance is prohibited.

- A **voluntary notification** process for (i) in-scope transactions in any of the 17 core sectors listed above but which do not fall within the mandatory regime, namely acquisitions of certain shareholdings below 25% conferring material influence (Trigger Event D, as described above) or assets (Trigger Event E), and (ii) transactions involving any trigger event in a non-core sector.

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NS&I regime - seventeen sensitive areas	
• Advanced Materials • Advanced Robotics • Artificial Intelligence • Civil Nuclear • Communications • Computing Hardware • Critical Suppliers to Government • Cryptographic Authentication • Data Infrastructure	• Defence • Energy • Military and Dual-Use • Quantum Technologies • Satellite and Space Technologies • Suppliers to the Emergency Services • Synthetic Biology • Transport

Regardless of the specific trigger event concerned and whether the transaction has been notified to it, the Secretary of State will have powers to "call in" transactions for review where there is a reasonable suspicion that it may give rise to a risk to national security (section 1 of the NS&I Act). The "call in" power applies to transactions which are completed on or after 12 November 2020 (being the day after the NS&I bill was first published). The power may be exercised while the transaction is in progress or in contemplation, or up to six months after the Secretary of State becomes aware of a completed transaction (but only if this occurs within five years of completion, unless completion was in breach of the mandatory notification obligation – in which case the five-year time limit does not apply). The UK Government has stated that the call in power is most likely to be used for transactions in, or related to, the seventeen core sectors.

II. EA02 regime

There is no separate formal notification for UK public interest mergers outside the UK merger control notification processes. As the UK operates a voluntary merger control regime there is no legal requirement to obtain prior approval before closing. In the event that the relevant Secretary of State has reasonable grounds to suspect that the respective public interest tests (set out above) are satisfied, they may issue a public interest intervention notice or a special intervention notice. Once the Secretary of State has intervened, the CMA (in conjunction with sectoral regulators as appropriate) is obliged to report to the Secretary of State setting out its views on the competition law issues and the public interest considerations raised by the case.

While the Secretary of State will be bound by the CMA's findings on competition issues, the Secretary of State has the power to refer a transaction to the CMA for formal (Phase II) investigation based on public interest considerations, notwithstanding the CMA's initial views on those considerations. Following a reference, the CMA must investigate and submit a report to the Secretary of State within the normal Phase II UK merger control timetable considering whether the transaction operates, or may be expected to operate, against the

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public interest, taking account of any substantial lessening of competition and the public interest considerations identified and on whether any remedies would be appropriate.

Following the CMA report, the Secretary of State will then decide whether or not to make an adverse public interest finding and what, if any, remedies are appropriate. As with the initial report, the secretary is bound by the CMA's findings on competition law issues but not in relation to public interest considerations. As such, the Secretary of State has the power to prohibit a transaction based solely on public interest considerations regardless of the CMA's findings on the matter, albeit any such decision will be reviewable by the UK courts.

b) who must make the notification (buyer, seller, both);

A:

I. NS&I regime

The NS&I Act differentiates where the onus of notification falls based on whether the notification is mandatory or voluntary. In a mandatory notification situation, the "acquirer" of the relevant qualifying asset or qualifying entity is required to make the notification. There is no prescribed party responsible for the notification in a voluntary notification situation; instead, the NS&I Act states that "a seller, acquirer or the qualifying entity concerned may give a notice to the Secretary of State."

II. EA02 regime

As noted above, there is no separate notification process for public interest mergers. The UK merger regime does not dictate who should secure merger approval, although the acquiring party generally makes the notification in practice.

c) the timetable for such review (both in law and in practice, including possible pre-notification tracks).

A:

I. NS&I regime

Following acceptance of a mandatory or voluntary notification, the Secretary of State will have 30 workings days to issue a notice to clear the transaction or decide to issue a call-in notice. If a call-in notice is issued, the Secretary of State has a further 30 working days to carry out a detailed assessment, which may be extended by up to an additional 45 working days. The parties may also consent to a "voluntary extension" giving the Secretary of State

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further time to review the transaction, which may be helpful to finalise an agreement on remedies.

The review timeline only starts to run once the Secretary of State has formally accepted the notification or exercised their call-in powers, and the Secretary of State is able to "stop the clock" by issuing requests for additional information.

II. EA02 regime

The usual UK merger control timetable applies to public interest cases. However, the involvement of the Secretary of State may, in practice, extend the review process significantly, since the Secretary of State must first consider the CMA's position before they can issue a final decision.

Conversely, the Secretary of State has the power to expedite a Phase I merger review and proceed to a Phase II referral immediately, provided that the transacting parties agree and it is likely that a Phase II referral will be made. As a consequence of following this fast-track procedure, the parties are required to waive certain procedural rights under the Phase I process.

3. Please describe the substantive test for assessing foreign direct investments and please briefly describe how this test is applied in practice. Please also describe to what extent the authorities are allowed to take national public policy concerns into account in their review.

A:

I. NS&I regime

In order for the Secretary of State to issue a "final order" under the NS&I Act, they must:

- be satisfied on the balance of probabilities that a trigger event (see above) has occurred or may occur and that a risk to national security has arisen or will arise from the trigger event; and
- reasonably consider that whatever final order is decided upon is necessary and proportionate for preventing, mitigating, or remedying the relevant national security risk (section 26(3) of the NS&I Act).

II. EA02 regime

As noted above, public or special public interest mergers must raise public interest considerations (see response 2(b)). The substantive test will depend on the public interest consideration that has prompted the intervention. Specifically:

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- Public interest mergers. The transaction will be referred to a formal Phase II investigation where the Secretary of State believes that the transaction falls within the UK merger regime and that it operates or may be expected to operate against the public interest (sections 45(2)-(5) of the EA02). Once the Phase II investigation has concluded, the Secretary of State will apply the same test in reaching a final decision.
- Special public interest mergers. The transaction will be referred to a formal Phase II investigation where the Secretary of State believes that the relevant criteria (set out at response 2(b) above) are, or may be, met and that the transaction operates, or may be expected to operate, against the public interest, taking into account the relevant public interest considerations (sections 62(2) and (3) EA02). Again, once the Phase II investigation has concluded, the Secretary of State will apply the same test in reaching a final decision.

4. Please indicate whether there are any filing fees that need to be paid in connection with the above.

A:

I. NS&I regime

No filing fees are payable.

II. EA02 regime

The standard CMA merger notification fees apply to public interest and special public interest merger cases. The fees increase on a scale depending on the value of the UK turnover of the acquired enterprise(s). For completed mergers the relevant turnover is from the year preceding the date of completion. For anticipated mergers it is either the year preceding the date of the CMA's decision on reference or an earlier business year if the CMA or Secretary of State considers it appropriate. The following fees apply:

£40,000	Value of the UK turnover of the enterprises being acquired is £20 million or less
£80,000	Value of the UK turnover of the enterprises being acquired is over £20 million but not over £70 million
£120,000	Value of the UK turnover of the enterprises being acquired exceeds £70 million, but does not exceed £120 million
£160,000	Value of the UK turnover of the enterprises being acquired exceeds £120 million

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A fee is not payable if the acquirer meets the criteria to be a small or medium sized enterprise, which is defined by reference to provisions of the Companies Act 2006. The acquirer must meet the criteria by reference to its financial year before the time the fee would become payable.

5. Please describe to what extent authorities can block or ask the parties to modify a transaction on the basis of foreign direct investment rules. Please also indicate whether such powers can be exercised post-closing.

A:

I. NS&I regime

A final order by the Secretary of State may (among other things) include provisions requiring a person to do or not to do particular things and the appointment of a person to conduct or supervise certain activities (section 26 of the NS&I Act). The key criteria is that the provisions of the final order are reasonably considered by the Secretary of State to be necessary and proportionate for the purpose of preventing, remedying or mitigating the national security risk.

The powers of the Secretary of State are therefore stated in broad terms under the NS&I Act, and include the ability to impose conditions, prohibit or unwind a transaction, including post-closing.

II. EA02 regime

The relevant Secretary of State can prohibit a UK public interest or special public interest merger if, following the Phase II CMA report, an adverse public interest finding is made and such action is considered reasonable and practicable to remedy, mitigate or prevent any of the adverse public interest effects that have resulted from, or may be expected to result from, the transaction (sections 55(2) and 66(6) and Schedule 8 of the EA02 and section 12(7) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order). This power can be exercised post-closing if the relevant test above is met.

The Secretary of State and the CMA may also impose separate obligations on the parties to prevent integration or impose obligations to undo any integration which has already occurred. The Secretary of State may refer a UK public interest or special public interest merger to a Phase II investigation up to four months after the transaction completes or the material facts become public knowledge, whichever is the later, or accept undertakings in lieu of a reference.

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6. Please describe what powers the authorities have to act against non-compliance with its decisions. Please also describe what the consequences are if a notifiable investment / transaction is not notified.

A:

I. NS&I regime

A transaction falling under the mandatory notification regime that is completed without being approved by the Secretary of State will be void. The Secretary of State may also unwind a transaction where they reasonably believe it is proportionate and necessary to address a national security risk.

A person who completes a transaction without obtaining clearance may be subject to criminal and/or civil sanctions, including fines of up to (the higher of) £10 million or 5% of total worldwide turnover for businesses, or up to £10 million where the offence is committed by an individual (section 41 of the NS&I Act).

II. EA02 regime

Transactions under review do not need to receive clearance before the transaction can close, although obligations to prevent or unwind integration may be imposed on the parties.

7. Please indicate whether there are options available for the parties to challenge negative decisions by authorities.

A:

I. NS&I regime

Decisions taken by the Secretary of State under the NS&I regime may be subject to judicial review. In principle, judicial review is not concerned with the merits of the decision being challenged and the grounds of appeal are instead limited to errors of law and procedure. This means that the Court can only review a decision (or lack thereof) for unreasonableness, unfair treatment or illegality. However, a full merits appeal is available before the High Court in respect of civil fines (section 50 of the NS&I Act).

II. EA02 regime

Merger control decisions taken by the CMA and the relevant Secretary of State can be challenged in the Competition Appeal Tribunal ("CAT"). The relevant Secretary of State's decision may also be subject to judicial review by the High Court. CAT and UK High Court decisions may be appealed on a point of law before the Court of Appeal of England and

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Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland, subject to judicial permission. In certain circumstances, the UK Supreme Court may hear the case.

When reviewing merger decisions by the CMA and the relevant Secretary of State, the CAT (and the UK High Court) is required to apply judicial review principles.

8. Please indicate to what extent the authorities are (required to be) transparent about the reasoning behind their decisions. Are decisions published? Please also describe the treatment of confidential information during and after the review process.

A:

I. NS&I regime

A copy of the decision reached by the Secretary of State (whether a final order or a decision that no further action will be taken) must be given to each person to whom the call-in notice was given. For final orders, a copy must also be given to each person who is required to comply with the order (if different) and such other persons as the Secretary of State considers appropriate.

The Secretary of State is required to publish notice of the fact that a final order has been made, including basic details such as the person(s) required to comply with the order, and any other information considered appropriate to include (section 29 of the NS&I Act). The Secretary of State may exclude from the notice any information that would, if published, be contrary to the interests of national security or prejudice the commercial interests of any person.

II. EA02 regime

Merger decisions by the CMA and Secretary of State are published on the CMA website and are required by the EA02 to state reasons. These reasons must be intelligible and adequate and must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. The CMA has stated its commitment to transparency while maintaining appropriate confidentiality. Parties involved are given the opportunity to request the removal of confidential information from decisions before they are published.

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9. Please describe any recent and upcoming developments with regard to foreign direct investment supervision.

A: The NS&I regime came fully into force on 4 January 2022. The UK Government expects that between 1,000 and 1,830 deals each year will be reviewed under the regime – of which 75 to 90 will be subject to a detailed review, and around 10 will require remedies. Even that relatively small estimate of remedies cases per year would be a marked increase compared to the UK's previous track record on intervening in deals on national security grounds under the EA02 regime.

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