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INVESTMENT CONTROLS

**AUSTRALIA, AUSTRIA, CANADA, FRANCE, GERMANY,
EUROPEAN UNION, THE NETHERLANDS, NORWAY,
POLAND, SINGAPORE, SWEDEN, UNITED KINGDOM,
UNITED STATES**

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I SUMMARY

Foreign direct investment (FDI) is a movement of capital by a natural or legal person (or group of persons) or government of one country into another country in order to gain a “lasting interest” in a form of property.¹ While traditional FDI activity usually involved the purchase of a significant part of a foreign enterprise, today’s concept of foreign “investment” covers a variety of forms of commercially valuable interests, including concessions, contractual rights to payment, intellectual property rights, and good-will.

The movement of capital among countries is widely considered to be necessary for increasing economic development. While the push for a liberal investment environment existed from the very beginning of the OECD (then the OEEC), the global acceptance of the beneficial nature of freer capital movements began only in the mid-1980s. It was then that developing countries began to promote themselves as a destination for foreign capital as a means of financing the construction of the industrial capacity, for creating employment opportunities, and gaining access to technologies.

The liberalization efforts led by the OECD and World Bank Group did not, however, change the underlying international law principle of sovereignty. Sovereignty dictates that states are competent to restrict or prohibit foreign investments, subject only to treaty obligations.

The 1961 OECD Code on the Liberalization of Capital Movements is a source of one such treaty obligation (binding on all OECD countries and open to non-OECD Members since 2012). That Code states, in Article 1: *(a) Members shall progressively abolish between one another [...] restrictions on movements of capital to the extent necessary for effective economic co-operation.*² Thus, as between Code Members, each government should permit foreign investments to enter with as few barriers as possible: the amount of capital and the percentage of ownership should not be limited, the forms the investment must take should be broad, and – of particular interest to this report – the administrative permissions necessary to enter the domestic market, should be as simply, as quick, and as low-cost as possible.

The OECD Code does allow for governments to maintain their sovereign competences to restrict foreign investments which would threaten national interests, including security. Article 3 states:

“The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:

i) the maintenance of public order or the protection of public health, morals and safety;

ii) the protection of its essential security interests;

*iii) the fulfilment of its obligations relating to international peace and security.”*³

This exception is not surprising, and it ensures that no Code Member country would be violating international law if it imposes investment restrictions or even prohibitions on foreign capital coming

¹ Maitena Duce and Banco de España, *Definitions of Foreign Direct Investment (FDI): a methodological note*, p. 2 (31 July 2003). Available at <https://www.bis.org/publ/cgfs22bde3.pdf>.

² OECD, Code of Liberalization of Capital Movements, Art. 1(a). Available at <http://www.oecd.org/daf/inv/investment-policy/Code-capital-movements-EN.pdf> (12.12.18).

³ Id., Art. 3.

from sources that might threaten it or on capital placed in certain activities or industrial sectors that might threaten it.

The legal availability of a national security exception on liberalized capital flows leaves room for political debate in the national context on the question of whether, and to what extent, governments should limit foreign investment coming from even other OECD Member countries in order to protect national security and public order.

A growing number of countries within Europe and around the world maintain, are currently, or will be) implementing restrictions on foreign investments in order to minimize the threat such investments create to the national interest. As a number of traditionally open economies begin to implement screening mechanisms, the topic becomes interesting from a comparative perspective.

The following report was composed by the ISDC for the State Secretariat for Economic Affairs (SECO), in response to two postulates posed by Swiss Council of States members Bischof and Stöckli.⁴ In each of the country reports, three main questions were addressed following a brief introduction into the investment context of that country:

- What are the notification requirements and procedures imposed on foreign investors?
- What screening or review processes are in place to determine whether an investment can proceed? and
- What is the actual practice of the screening agencies regarding foreign investments?

The jurisdictions we examined are: Australia; Austria; Canada; France; Germany; the European Union; the Netherlands; Norway; Poland; Singapore; Sweden; the United Kingdom; and the United States.

II. SUMMARY OF FINDINGS

1. Existence of restrictions

1.1. Generally applicable restrictions

Of the 13 jurisdictions examined, all jurisdictions have some restrictions on investments, although not all apply only to foreign investments.

Considerations of competition law for example, may be the reason for notifications of mergers, although in some systems, the notification is only mandatory above a certain threshold. In Norway, for example, mergers of companies with a combined annual turnover of NOK 1 billion in Norway are required to notify their plans to the competition authority. The same is true in Sweden (the only difference being that the amount in question is SEK 1 billion). In French law, there is a generally applicable double threshold of a combined turnover of EUR 150 million of which EUR 50 million are generated in France by at least two of the involved parties. Lower thresholds may, however, exist in certain sectors (such as retail distribution). In the UK, competition law examinations are the main source of current investment screening. While notification is voluntary, the factors taken into consideration include questions of special public interest. The competition law restrictions, as well as the security regulation notification requirements in the United States, appear to be non-discriminatory, however, aimed at a real safeguard against abuses of market power.

⁴ Postulate 18.3376 Bischof («Foreign company takeovers in Switzerland. Is the current barrier-free status still tenable?») and postulate 18.3233 Stöckli («Investment review for foreign investments»).

1.2. Sector Specific Restrictions

Sector specific restrictions on foreign investors exist in all jurisdictions as well. The sectors and the types of restrictions, however, differ substantially from jurisdiction to jurisdiction (although foreign investments the defense sector is commonly heavily restricted).

In a number of countries, media investments are limited or prohibited (e.g., Australia, Norway, Sweden, UK, US); in many energy and electricity sectors are protected from foreign control (e.g., Canada, Netherlands, Norway, Poland); investments in air transport may be limited in a number (Australia, Norway, Poland) as well. Land (residential, agricultural, as well as commercial properties) appears to be an object to which many governments want to limit foreign investors' access (e.g., Australia, Norway, Poland, Singapore). Finally, legal (e.g., Singapore, US) and financial (including Netherlands, Norway, Singapore, Sweden, UK, US) services sectors are subject to special restrictions in a number of jurisdictions.

1.3. Security Restrictions

The concerns about foreign investors' impacts on the security of the host have led to vigorous efforts to create screening mechanisms in most of the jurisdictions examined. In fact, of the 13, only Singapore, Sweden, and the UK have no active or imminent (ie, foreseeable within the next two years) mechanisms to screen foreign investments for national security threats. Traditionally open economies, including Germany, the Netherlands, and Norway have mechanisms that have just come into effect or which will be proposed to the legislature in the near future. Of the three with no clear screening mechanism, Singapore's overall control over economic activity and the UK's proposal for a screening mechanism (as well as the possibility of including national security interests in current merger reviews) leave Sweden as the sole examined government with no apparent will to screen on grounds of security.

III. NOTIFICATION REQUIREMENTS

The need for a foreign investor to notify the host prior to investing is found in various forms and to various degrees in the different jurisdictions. Here, there are few conclusions one can draw from comparative analysis beyond the fact that failure to make a notification where mandatory is usually (but not in Germany) punishable. This may be by fine or by the possibility of declaring any transactions already carried out void. In some jurisdictions, notification is required for all foreign investments (Canada) or for all foreign investments of a certain type (Australia's required notification of investments in land, water, and media, for example) or where the investment is of a certain size or gains a certain level of control (Austria). The US recently changed its entirely voluntary notification system to require a declaration if the investor is a governmental entity which has a "substantial interest" in the transaction. There are other variations on these general patterns. Norway, for example, combines size and type, requiring notification if the foreign investor in critical infrastructure or with control over sensitive information acquires one-third of the shares or capital or will have effective control. In France, notification is a step taken only after initial authorization to make the investment has been granted and the investment has been operationalized.

Even where notification of investments are not required, notification becomes desirable when the investor thereby becomes eligible to receive an implied or explicit statement of non-threat by the government which would shield the investor from future actions (France, US).

In Singapore, notification (in the form of registration) is required for any initiation of business activity, whether by a national or foreign investor. The application for registration, however, itself permits authorities to determine whether licenses are necessary and whether they will be granted.

Polish law, too, requires notification and licensing of numerous commercial ventures. One particularly restrictive aspect of Polish investment practice is the high level of discretion left to authorities in determining whether a particular project is a threat to national security. Moreover, the penalties for failure to notify or garner the necessary license can be severe: beyond invalidating transactions and imposing civil fines, the government may imprison investors for up to five years.

IV. SCREENING AND REVIEW

The screening and review procedures to more thoroughly examine suspect investments vary greatly in terms of institutional frameworks. The United States' screening is managed by an interdepartmental executive Committee on Foreign Investment, its sectoral breadth intended to ensure that the interests of both national security and liberal capital movements are represented. In other countries, the minister responsible for economics conducts reviews and leads decision-making. In Canada, for example, it is the Minister of Innovation, Science and Economic Development that is given this task. Similarly, the Bundesministerium für Wirtschaft und Energie is the single authority to conduct reviews in Germany and the *Ministre chargé de l'économie* is responsible in France. In Norway and the UK, it is the sector-relevant Secretary/Minister in charge that is to carry out the review, and in Australia the Treasurer decides with the advice of a body of non-governmental experts in a range of relevant fields (tax, regulation, business, etc.).

Singapore and Sweden, having no screening mechanisms, are outliers among the regimes examined in this report.

The factors taken into account in assessing risk differ in their detail, but generally take into account the threats to not only the military capacity of the host, but also the ability of the government to maintain control of critical resources and infrastructure. Most newer laws also emphasize the dangers of a foreign investor's access to specialized technology and to sensitive data. Some countries (Canada, France, UK) expand their reviews to include of how the investment may impact on national interests that are not directly security-related, such as employment and public service provision. The Netherlands, similarly, is proposing a non-inclusive list of twelve sectors of national economic security interest that points to agri-food, health, and logistics, among other areas in their draft. In the United States, the new law takes the concept of national interest even further, extending it to maintaining a leading position in the global economy.

Significantly, the traditional threshold, or capping, approach (setting out percentages of shares or assets or monetary amounts at stake) to determining what level of investment might constitute a threat in any particular project are being supplemented by language that (1) takes into account actual control of the sensitive assets (whether physical or digital); (2) aims to ensure enough flexibility to prevent screening avoidance manoeuvres by investors; and (3) applies additional stringency to screenings of foreign government or foreign government-owned company investments.

The reviewing processes are generally time-limited in order to allow the investor a foreseeable period of pre-investment investigation. The predictability of the process for the investor is heightened by practices that allow for an implied permission to come into effect if no answer is sent to an investor within the time limit (Austria and France, for example, do this, but Canada does not). Many systems,

however, provide the reviewers with the possibility of extending time limits to ensure sufficient leeway in case of complications.

In addition, most countries provide investors who are dissatisfied with a decision by the screening authority to challenge decisions in court (although in some of these jurisdictions, such as France, judicial review is limited in practice by the lack of a need for the Minister to give reasons for certain decisions). A number of systems, however, prevent judicial review of a decision to prohibit a project (in Australia, Canada and the US, the decisions are non-reviewable by a court, although in Australia there may be a possibility of a common law action against a negative decision, and in Canada a court could annul a decision if there was a fundamental breach of procedure or arbitrariness).

Also interesting is the varying relationship between screening agent decisions and legislatures. The US system is the most advanced, with the law setting forth numerous reporting requirements for the CFIUS toward Congress. Publication of statistics accompanies the mandatory reporting of post-investigative decisions. France's new legislation will require the Ministry to give statistical information on requests, decisions, and sanctions to the newly established Parliamentary committee on economic security.

V. ACTUAL PRACTICE

The actual practices of screening agencies can be better compared than other areas of the study. Here, the results were much more harmonized: with few exceptions, investments rarely actually get prohibited by national security screening but there are many investors that cooperate with the reviewing agents by agreeing to adjust their original investment plans to alleviate the concerns raised in the review process (e.g., Canada, Germany, US). Moreover, those that do not adjust are unlikely to continue with their applications for admission due to public pressure to withdraw their request. In France, there are reports that point out that the Ministry informally discourages certain investors by indicating that acceptance will not be forthcoming unless conditions are fulfilled which the Minister realizes are not commercially viable.

The United States' decades-long experience with CFIUS is indicative of the findings in other countries (including Australia, Canada, and France): while a growing number of investment projects are being investigated, very few are actually prohibited. On the other hand, even where certain projects passed the screening process, the investors withdrew their planned project due to public opposition.

Singapore and Poland have different systems of restrictions in place. Each of these have numerous licensing or similar authorization procedures in place for commercial activities in multiple sectors. These are largely non-discriminatory in the law, requiring domestic actors to request authorization, too. The substantial room left for official discretion in determining whether authorization will be granted, however, leads to a significant possibility of de facto differential or disadvantageous treatment of foreigners. At the same time, the motivations behind the Polish and Singapore systems may lie mainly with maintaining government control over the economy (or at least strategic sectors of the economy), suggesting that discrimination is more individualized, making it more complex than origin-based bias.

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A. AUSTRALIA

1. Introduction

The foreign investment screening process in Australia is governed by a set of laws, regulations and policy documents.⁵ These comprise the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ('FATA'); the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) ('FATR'); the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth); the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth); the *Financial Sector (Shareholdings) Act 1998* (Cth); and Australia's official 'Foreign Investment Policy' statement together with Ministerial Statements.

This regime broadly establishes a screening process that reviews foreign investment proposals case-by-case against a 'national interest' test. The regime is largely administered by the Foreign Investment Review Board ('FIRB') and the Australian Tax Office ('ATO'), with assistance from certain other government agencies.

The Australian foreign investment regime is complex and detailed. This Report sets out the major relevant features of the regime. The Report does not capture all of the possible exceptions and requirements that are applicable in the regime. For instance, there are additional rules relating to internal corporate reorganisations that may involve 'new' acquisitions by foreign investors, and specific exceptions for acquisitions of aged care facilities and foreign government acquisitions for diplomatic purposes, amongst others. Other specific exceptions include a 49% cap on aggregate foreign ownership of any Australian airline (under the *Qantas Sale Act 1992* and other legislation), and a 35% cap on aggregate foreign ownership of Telstra (the former state monopoly telecommunications provider).

A full understanding of the regime can only be achieved by direct reference to the relevant legislation and regulations (FATA and FATR), and FIRB Guidance Notes.

2. Notification requirement

This section discusses situations where **only notification** to the government (whether *ex ante* or *ex post*), not prior approval, is required for a foreign investment. Section 3 discusses situations where prior approval (obviously also entailing prior notification) is required. Situations not captured in sections 2 or 3 (such as a foreign investment below the monetary thresholds discussed in section 3, where no notification is otherwise required) do not require either notification or approval.

2.1. Threshold triggering notification requirement

There are only three scenarios relevant to this section, relating to notification of agricultural land holdings, water rights and media interests.

An Agricultural Land Register was established in 2015. This requires **all foreign persons with an interest in Australian agricultural land** to notify the ATO, **regardless of the value** of the land. A 'foreign person' **includes Australian corporations with at least 20% foreign ownership**.

⁵ These documents are available at <https://firb.gov.au/resources/legislation/> and <http://firb.gov.au/resources/policy-documents/>.

Agricultural land is defined in FATA as land that is or could reasonably be used for a 'primary production business'. The latter term is defined to include cultivating plants, maintaining animals, manufacturing dairy produce, planting trees for lumber, or conducting operations relating to seafood.⁶

Foreign persons must also notify acquisitions of water rights, such as irrigation rights or rights to take water from Australian water sources.

Since 1 September 2018, foreign persons must notify holdings of more than 2.5% in Australian media businesses, regardless of whether approval is required.

2.2. Procedure of notification

Foreign persons required to notify an agricultural land holding must **complete a form**⁷ within 30 days of the *acquisition*.

Foreign persons required to notify a water right must complete a form⁸ within 30 days of the end of *the financial year* (1 July – 30 June) in which the acquisition occurred.

Foreign persons required to notify media holdings must complete a form⁹ within 30 days of the end of *the financial year* in which the acquisition occurred. (Initial disclosures under this new scheme must be made by 28 February 2019).

There is **no cost to register** these holdings or interests.

Penalties may apply to a failure to notify as required.

2.3. Existence of other notification requirements

N/A

3. Screening or review process

This section discusses situations where **approval** of a foreign investment is required. Where approval is required, it **must always be obtained prior to the relevant acquisition** (to avoid possible penalties or disposal orders).

There is no formal two-step screening process, such as a fast-track process for simple applications. **All applications are subject to the same formal test.** However, within FIRB processes, an initial examination will be undertaken to determine whether the application is for a significant or **sensitive investment**. If so, a **higher degree of consultation** will take place between FIRB and other government agencies, including state and territory government departments and national security agencies.

⁶ Subsection 995-1(1) of the *Income Tax Assessment Act 1997 (Cth)*.

⁷ The registration form is available at https://www.ato.gov.au/firb_land_registration/.

⁸ The registration form is available at https://www.ato.gov.au/firb_land_registration/.

⁹ The form is available at <https://acma.gov.au/theACMA/new-reporting-requirements-for-foreign-media-owners>.

3.1. Activation of screening or review process

Notification

Notification to trigger the screening process will typically come in the form of an application made by the foreign investor to FIRB, seeking approval for an acquisition.

Thresholds

Screening **thresholds vary depending on the sector** in which the investment will be made, the **country of origin of the investor**, the **nature of the investor** (government or private), and the **type of asset** being acquired. Since the screening thresholds differ most obviously between sectors (rather than nature of investor, country of origin or type of asset), this section will be organised by sector.

The various monetary thresholds described in this section are indexed each year on 1 January, except for the A\$15 million cumulative threshold for agricultural land, and the A\$50 million threshold for agricultural land for Singaporean and Thai investors. (These particular thresholds are described further below.)

Residential land

Foreign persons who are permanently resident in Australia are not subject to any restrictions or approval requirements for purchasing residential land in Australia. Foreign persons (whether resident or not) who are purchasing residential land as joint tenants (ie, co-owners) with their spouse who is a citizen of Australia or New Zealand or a permanent resident of Australia are also not subject to any restrictions or approval requirements. Otherwise, various restrictions are imposed as detailed below.

Non-resident foreign persons are generally prohibited from purchasing **established dwellings** in Australia. Temporarily resident foreign persons in Australia may (upon receiving approval) purchase one established dwelling, but will typically be subject to the condition that they must sell the property within three months of ceasing to live in it.

Foreign persons (whether resident or not) may acquire **new dwellings** in Australia **without significant restrictions**. Approval is required, but is usually granted without conditions. Foreign persons may seek approval for a specific purchase, or may apply for a certificate allowing them to purchase any one dwelling (within a specified Australian state or territory) within a six-month period. (This allows the foreign person to make multiple attempts to purchase a new dwelling, for instance, providing for the possibility of failure at several auctions before a successful purchase.)

Vacant land is generally treated as equivalent to a new dwelling, with the additional condition that a dwelling be constructed on the land within four years of approval.

Foreign acquisitions of residential property must be **registered** following approval, within 30 days of purchase. There is no cost to file the registration form.¹⁰

Agricultural land

Agricultural land is defined in FATA as land that is or could reasonably be used for a 'primary production business'. The latter term is defined to include cultivating plants, maintaining animals, manufacturing dairy produce, planting trees for lumber, or conducting operations relating to seafood.¹¹

¹⁰ The registration form is available at https://www.ato.gov.au/firb_land_registration/.

¹¹ Subsection 995-1(1) of the *Income Tax Assessment Act 1997 (Cth)*.

All foreign acquisitions of agricultural land must be **registered** with the ATO within 30 days of purchase (as described in Section 2).¹² In addition to registration, foreign **acquisitions** of agricultural land that go beyond a **value threshold** require **prior approval** from FIRB.

FIRB approval will be required where the acquisition would bring the **cumulative total** of the foreign person's agricultural land holdings in Australia to **more than A\$15 million**. A **preferential threshold applies for foreign investors from certain countries** with which Australia has free trade agreements. For instance, the threshold for Thai and Singaporean investors is A\$50 million, while for investors from Chile, New Zealand and the United States, the threshold is A\$1,134 million.¹³

A **threshold of A\$0 applies to all foreign government investors** (including corporations in which a foreign government holds at least a 20% stake) from any country; such investors must always apply for approval.

Investors who are expected to have a high volume of acquisitions in agricultural land may apply for an **exemption certificate**. This certificate permits the investor to undertake a program of land acquisitions over a defined time period (eg, 12 months) without the need to seek approval for each individual acquisition. Agricultural land acquired under an exemption certificate must still pass the 'open and transparent sale process' test (described in Section 3.2 below).

Commercial land

Commercial land is defined as any land other than 1) land that is used wholly and exclusively for a primary production business, 2) land on which the number of dwellings that could reasonably be built is less than 10, or 3) land on which there is at least one dwelling.

All foreign investors (whether government or private) must apply for **approval to acquire any interest in vacant commercial land** in Australia. A monetary threshold of A\$0 applies; ie, approval is required regardless of the value of the transaction. **Approval** will usually be **granted subject to the conditions** that construction commences on the land within five years of approval, and that the land must not be sold until construction is complete.

The monetary **threshold is higher for developed commercial land**. In general, acquisition of any interest in developed commercial land will require approval only if the value of the interest is **more than A\$261 million**. A lower threshold of **A\$57 million applies for sensitive** developed commercial land (including **mines and public infrastructure** such as airports or ports). However, **investors from certain countries** (Chile, China, Japan, New Zealand, Singapore, South Korea and the United States) benefit from an approval threshold of A\$1,134 million for acquisitions of any developed commercial land (whether sensitive or not).

Approval is always required for **foreign government investors** acquiring any interest in commercial land.

Mining land

In general, **all foreign investors** must obtain **approval** for acquisition of interests in a mining or production tenement, **regardless of value**. However, non-government investors from Chile, New Zealand and the United States only require approval where the value of the interest being acquired is more than A\$1,134 million.

¹² The registration form is available at https://www.ato.gov.au/firb_land_registration/.

¹³ These two thresholds are *not* cumulative.

Exemption certificates for a program of mining acquisitions are available.

Businesses

Foreign investments in Australian businesses require approval where the foreign investor is acquiring (or following the acquisition will hold) a **stake of 20% of more in a business valued at higher than** a certain monetary threshold. In general, **the threshold is A\$261 million**.

Again, for investors from certain countries with which Australia has free trade agreements (currently Chile, China, Japan, Korea, Singapore, New Zealand and the United States), the threshold is higher (A\$1,134 million). However, the threshold for these investors is also A\$261 million if the acquisition is in a 'sensitive industry', such as telecommunications, transport, defence, encryption, and nuclear including uranium or plutonium mining.

A threshold of **A\$0 applies to all foreign government investors** (including corporations in which a foreign government holds at least a 20% stake) from any country. Such investors must always apply for approval where they are acquiring a 'direct interest' (in general, either a stake of **more than 10% or a *de facto* controlling stake**)¹⁴ in an Australian business.

Exemption certificates for a program of business acquisitions are available.

Agribusinesses

Stricter monetary thresholds and shareholding thresholds apply **for acquisitions in Australian agribusinesses**.

In general, a **lower monetary threshold** (compared to other businesses) of A\$57 million applies to acquisitions of agribusinesses. This threshold is met when the price paid for the interest being acquired, plus the value of any existing interests in that agribusiness, amount to more than A\$57 million.¹⁵ However, pursuant to Australia's free trade agreements, this threshold is A\$1,134 million for investors from Chile, New Zealand and the United States. A threshold of A\$0 applies to all foreign *government* investors (including corporations in which a foreign government holds at least a 20% stake) from any country.

These thresholds only apply to acquisitions of a 'direct interest' (in general, either a stake of more than 10% or a *de facto* controlling stake)¹⁶ in an agribusiness.

Media businesses

Foreign investments in the Australian media sector are **not subject to a monetary threshold**, but **require approval when a stake of at least 5% is being acquired** (regardless of value). As discussed in

¹⁴ Regulation 16 defines 'direct interest' as an interest of at least 10%, or an interest of at least 5% where the foreign investor has entered into a legal arrangement relating to the business in which the interest is being acquired, or an interest of any percentage where the interest grants the foreign investor the ability to influence or participate in the central management or policy of the business. See <http://firb.gov.au/resources/guidance/gn23/> for examples.

¹⁵ Note that this cumulative test for meeting the agribusiness monetary threshold is different to the test used for meeting the monetary threshold for other businesses.

¹⁶ Regulation 16 defines 'direct interest' as an interest of at least 10%, or an interest of at least 5% where the foreign investor has entered into a legal arrangement relating to the business in which the interest is being acquired, or an interest of any percentage where the interest grants the foreign investor the ability to influence or participate in the central management or policy of the business. See <http://firb.gov.au/resources/guidance/gn23/> for examples.

Section 2, a **notification requirement** has recently been introduced **for foreign holdings of at least 2.5%**.

3.2. Screening or review decision

Grounds for screening/review

When approval is required in the circumstances outlined above, the basic criterion against which a decision will be made is whether the foreign acquisition is contrary to the **national interest**. This concept is not defined in legislation. Instead, the Treasurer assesses the national interest of each application on a case-by-case basis. A broad range of **factors** typically affect this decision. These include:

- (1) whether the investment affects **national security** issues, based on advice from Australia's national security agencies;
- (2) **competition** issues, such as whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia;
- (3) the impact of a foreign investment proposal on Australian **tax revenues**;
- (4) the impact of the investment on the **general economy**, including the level of Australian participation in the relevant business following the foreign investment;
- (5) the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and **supervision in their home state**; and
- (6) the **corporate governance** practices of foreign investors.

Higher degrees of scrutiny will be imposed on **larger investments** or investments in **sensitive** businesses.

As part of the national interest test, an **additional test** is imposed (at a policy level) on approval of acquisitions of **agricultural land** that will be used for a primary production business or residential development.¹⁷ This additional test considers whether the land was subject to an 'open and **transparent sale process**' prior to acquisition by the foreign investor. This process is intended to ensure that Australian investors had an opportunity to acquire the land in preference to the foreign investor.

There is no defined process to meet this additional test. However, relevant factors will include whether the sale was sufficiently widely advertised in Australia for a sufficient period of time, and whether there was an equal opportunity for offers to be made. Guidance Notes from FIRB indicate that a sale advertised in major Australian newspapers or on a 'widely used real estate listing website' for at least 30 days within the six-month period prior to the purchase would be likely to meet the test. The Guidance Notes also indicate that the test would not be applied where the sale allowed Australian investors to participate in a significant way, for instance where the foreign purchaser is listed on the Australian Securities Exchange.

Furthermore, for any foreign investment proposal in the agricultural sector generally, the Treasurer will consider a number of more specific factors: the quality and availability of Australia's agricultural resources, including water; land access and use; agricultural production and productivity; Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and Australia's trading partners; biodiversity; and employment and prosperity in Australia's local and regional communities.¹⁸

¹⁷ The test is not established in legislation but is outlined in policy guidance issued by FIRB, available at <http://firb.gov.au/resources/guidance/gn17/>.

¹⁸ Australia's Foreign Investment Policy 10, available at

Where a proposal involves a **foreign government investor**, the Treasurer will also consider aspects including whether the investment is commercial in nature or **whether** the investor may be pursuing broader **political or strategic objectives**. Proposals for foreign government investment are more likely to be accepted where there are external partners or shareholders in the investment, where proper governance arrangements for the investment are in place, where there are ongoing arrangements to protect Australian interests from non-commercial dealings, and where the recipient of the investment will be (or will remain) listed on the Australian Securities Exchange.

Principles applied when determining admission

The **general principle** applied in foreign investment screening in Australia is that foreign **investment is beneficial**. As mentioned below, **rejections** of foreign investment applications are **extremely rare**. The government describes its foreign investment regime as ‘open and non-discriminatory’.¹⁹

Beyond this general principle, there are no principles such as non-discrimination or predictability that are set out in the law or explicitly applied at a policy level by the Treasurer.

3.3. Procedure of screening or review

Institutional aspects of the controller

Decisions on foreign investment applications are **formally made by the Australian Treasurer** (a senior Government Minister). These decisions are made **on the advice of FIRB**, a non-statutory advisory body established specifically to advise the Treasurer on approval of foreign investment proposals. FIRB has no decision-making power; this power lies with the Treasurer.

FIRB is composed of **six part-time, non-governmental members** and **one full-time Executive Member**.²⁰ The Executive Member sits on FIRB *ex officio* as the Head of the Treasury’s Foreign Investment Division. The current six part-time members have backgrounds in business, politics, academia and the civil service.

FIRB’s **operational costs in 2016–17 were A\$500,000**, largely comprising remuneration of FIRB members. **Costs relating to foreign investment approvals within the Treasury were A\$7.7 million** in 2016–17, including 48 full-time staff.

Since January 2017, the new **Critical Infrastructure Centre** (established within the Australian **Attorney-General’s Department**) provides **additional assistance**, particularly on national security issues, to the Treasurer in making foreign investment decisions.

Certain categories of foreign investment application, however, are not handled by the Treasurer and FIRB. Since December 2015, the **Australian Tax Office** has handled all aspects of foreign investment in residential real estate and, since April 2017, non-sensitive commercial real estate and commercial reorganisations. The ATO also collects application fees for all foreign investment applications, and administers the register of foreign ownership of agricultural land, water entitlements and residential land. Costs relating to foreign investment approvals, administration, compliance activities and litigation within the ATO in 2016–17 were A\$9.6 million.

¹⁹ <https://cdn.tspace.gov.au/uploads/sites/82/2017/06/Australias-Foreign-Investment-Policy.pdf>.

2016–17 Annual Report 7, available at <http://firb.gov.au/about/publication/2016-17-annual-report/>.

²⁰ A current list of FIRB members is available at <http://firb.gov.au/about>.

Timing/deadlines

When approval is required, it must be applied for in advance of making the foreign investment. **Penalties apply for failure to obtain approval** where required.

In most cases, notification is part of the *ex ante* application to the government for foreign investment approval. However, where the foreign investor has applied for an exemption certificate (described in section 3.1), notification of the specific property acquired will only be given after the acquisition has occurred.

Duration of process

Decisions on applications are made within **30 calendar days** of payment of the application fee. The **Treasurer may extend** this period for a **further 90 (or fewer) days**. Decisions are notified to applicants within 10 calendar days of being made. **If no decision** is made or notified within this timeframe, the application is **deemed to be approved**.

Applicants are given an opportunity to comment on any national interest concerns raised, and **mitigating factors proposed by applicants** may be taken into account in the final decision.

Costs

Application fees for approval for residential land acquisitions vary **depending on the price to be paid** for the dwelling or land. For instance, at present, a foreign person seeking approval to purchase a new dwelling for a price of A\$1 million or less will pay an application fee of A\$5,600; the fee for approval to purchase at a price of A\$2 million or less is A\$11,300.²¹

Application fees for commercial land and business acquisitions similarly vary depending on the price to be paid for the land or business. At present, where the price is A\$10 million or less, the fee is A\$2,000; where the price is between A\$10 million and A\$1 billion, the fee is A\$25,700; and where the price is greater than A\$1 billion, the fee is A\$103,400.

Application fees for agricultural land acquisitions are as follows: where the price is A\$2 million or less, the fee is A\$2,000; where the price is between A\$2 million and A\$10 million, the fee is A\$25,700; and where the price is greater than A\$10 million, the fee is A\$103,400.

Application fees for foreign private investors acquiring interests in mining land are A\$25,700, or A\$10,200 for foreign government investors.

Fees may be combined and thereby reduced where several actions/acquisitions are being taken at the same time and approval is sought for them all at once.

The fee for an exemption certificate (for programs of acquisitions of land or businesses, as described in Section 2) is A\$35,600.

Final decisions

The Treasurer **may impose conditions** on approvals. For instance, in 2013, the Treasurer approved the acquisition by a Chinese state-owned electricity firm of a 19.9% stake in an Australian company owning electricity and gas transmission and distribution assets. The Treasurer imposed a condition that at least 50% of the members appointed by the Chinese firm to the board of the Australian company be

²¹

A full fee schedule is available at <http://firb.gov.au/resources/guidance/gn29/>.

Australian citizens ordinarily resident in Australia.²² Regular reporting on the investor's compliance with conditions is required.

In 2016–17, **40% of approvals were issued subject to conditions.**

Rejections are extremely rare. Of 14,360 decided applications in 2016–17, only three applications were rejected; two of those applications related to the same project (a proposed 99-year lease of 50.4% of the electricity distribution network covering eastern Sydney).²³ In 2014–15, all of the 37,953 applications decided by the Treasurer were accepted.²⁴ However, it is possible that some applications are never submitted because, after informal discussions with the government, the applicant feels that the application is unlikely to succeed. Thus, the 'rejection' rate in practice may be higher.

Decisions of the Treasurer on foreign investment applications are excluded from review under Australia's statutory administrative law regime in the *Administrative Decisions (Judicial Review) Act 1977*.²⁵ However, **judicial review under common law may be available.** Such actions are rare, presumably given the low rates of formal rejection (although applicants might also challenge the imposition of conditions by the Treasurer).

In one 1997 case, the Federal Court of Australia stated that a 'court would be loathe to interfere with a discretion vested in the Treasurer on a matter such as the national interest', because 'Parliament has entrusted decisions on matters of national interest to the Treasurer, not to the courts'. Nevertheless, the Federal Court envisaged that it could intervene if the Treasurer made an error of law, for instance in wrongly determining that a party was a foreign corporation and was thus required to seek approval for a transaction. Furthermore, if the Treasurer 'takes into account a matter which is clearly irrelevant to the national interest' or 'has made a decision which no reasonable person acting in accordance with his authority could have made, the court can intervene'.²⁶ The court also determined that a fair hearing must be given to an affected applicant before a decision on national interest is taken.²⁷

While domestic court review may thus be available on certain grounds, international review is less likely. Many of Australia's recent bilateral and multilateral investment treaties provide that decisions made under the country's foreign investment regime (which would include a decision to reject a foreign investment application) are not subject to investor-state dispute settlement in international arbitration under those treaties.²⁸

Penalties in case of breach of final decisions

Failure to notify and seek approval, where required, for a residential real estate purchase attracts a **range of penalties and remedies**.²⁹ These may be affected by the seriousness of the failure, and

²² See <http://jbh.ministers.treasury.gov.au/media-release/038-2013/>.

²³ These two rejected applications were filed by the final two bidders in the tender process, a Chinese state-owned enterprise and a publicly-listed Hong Kong company. The lease was later granted to two Australian companies.

²⁴ 2016-17 Annual Report 23.

²⁵ See Schedule 1 to the Act, available at http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/adra1977396/sch1.html.

²⁶ *CanWest Global Communications Corporation v Treasurer of the Commonwealth* (1997) 147 ALR 509, 525. Appeals from decisions of the Federal Court may be taken to the country's final appellate court, the High Court of Australia. The *CanWest* decision was not appealed.

²⁷ *ibid* 527.

²⁸ See, eg, Annex 9-H, Trans-Pacific Partnership.

²⁹ A full penalties schedule is available at <http://firb.gov.au/resources/guidance/gn11/>.

whether the non-compliant party self-discloses their failure to the ATO (for instance, claiming that they were previously unaware of the approval requirements) or whether their failure is identified through ATO compliance activities.³⁰ For instance, a basic failure by a foreign person to obtain approval for purchase of a new dwelling is likely to be subject to a 'tier 2' **infringement notice** of A\$12,600. If the person had self-disclosed their failure to obtain approval before any infringement notice was issued, a lower 'tier 1' infringement notice of A\$2,520 is likely to be issued. In 2016–17, 417 infringement penalties worth around A\$1.7 million were issued.

More serious failures may be subject to **civil penalties** rather than infringement notices. For instance, a temporarily resident foreign person who purchases a second established dwelling (going beyond the permitted one established dwelling) could be subject to a civil penalty of the greater of 10% of the acquisition price or 10% of the market value of the dwelling. Beyond this, criminal penalties are also available, currently set at A\$157,500 and/or three years' imprisonment for individuals, and A\$787,500 for companies.

The Treasurer may also order **disposal of the property**. In 2016–17, 96 residential properties worth nearly A\$97 million were divested by foreign persons who had acquired the properties in breach (or alleged breach) of the rules. Of those 96 divestments, 21 resulted from formal disposal orders made by the Treasurer, while the remainder resulted from voluntary disposal by the foreign investor during an investigation.

Similar civil and criminal penalties and disposal orders (but not infringement notices) are available for other breaches of the foreign investment regime not relating to residential real estate.

4. Assessment of actual practice

Australia's foreign investment regime has undergone **significant changes in recent years**. Some monetary **thresholds have been significantly reduced**, for instance in relation to agricultural investments (from A\$252 million to A\$15 million in 2015). Other thresholds have been raised due to free trade agreements with specific countries. **Further thresholds** have been introduced, such as the A\$57 million threshold on acquisitions of agribusinesses. The **definition of 'foreign government investor' was amended** in 2013. Perhaps more significantly, **fees for foreign investment applications were introduced** in December 2015, which has greatly lowered the number of applications for residential real estate approvals in particular. (This does not necessarily translate to a reduced level of investment; prior to the introduction of fees, foreign investors would seek approval for real estate purchases that ultimately did not proceed. Under the current regime, investors are more likely to seek approval only for purchases that are more likely to proceed.) In 2017, exemption certificates were introduced for business acquisition programs, similar to the certificates available for programs of land acquisitions. These certificates make the process easier for foreign investors and reduce the need to pay multiple application fees. A web-based interface to submit applications was also introduced in 2013.

The 2017 OECD FDI Regulatory Restrictiveness Index places Australia 16th most restrictive out of 69 OECD and non-OECD countries ranked.³¹ Australia (0.15) ranked in between Canada (0.16) and South Korea (0.14), while the most restrictive country was the Philippines (0.39). For illustration, other countries included China (0.32), New Zealand (0.23), Switzerland (0.08) and Luxembourg (0.00).

³⁰ A self-disclosure form is available at <http://compliance.firb.gov.au/self-disclosure/>.

³¹ See <https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX#>.

Chinese investors in Australia were the largest source of foreign investment approvals in the 2016–17 year, both by value (A\$38.9 billion) and number of approvals (9,714). These approvals were largely in mining, manufacturing, electricity and gas, and commercial and residential real estate. United States investors were second largest by value (A\$26.5 billion), with applications in the services sector, mining and commercial real estate. Malaysian investors were second largest by number of approvals (666), in real estate and services.

Commentators have criticised Australia's national interest test on the grounds that it is too vague and uncertain, and that it should be restricted solely to matters of defence and national security rather than other economic or governance factors.³² Others have expressed concern that treating state-owned enterprises as foreign government investors, which are subject to greater scrutiny under Australia's regime, effectively discriminates against Chinese enterprises. By contrast, supporters of the scheme observe that rejections are rare, that the case-by-case review approach provides flexibility, and that the regime has clearly not deterred foreign investment into Australia. Other supporters note that competition concerns are potentially tied to strategic interests and national security, citing conditions imposed by the Treasurer on the 2009 bid by a Chinese state-owned enterprise to purchase Lynas Corporation, an Australian rare earths mining company. Given that China already controlled 93% of global rare earths production, these supporters said, it was important for Australia to impose conditions on an application that would have led to Chinese majority control of one of the few non-Chinese producers worldwide.

The regime will likely continue to change in various respects over time, as Australia's political, economic, strategic and other interests change.

³² A review of these criticisms and responses is contained in Vivienne Bath, 'Foreign Investment, the National Interest and National Security – Foreign Direct Investment in Australia and China' (2012) 34 *Sydney Law Review* 5, 16–19.

B. AUSTRIA

1. Einleitung

Ende **2011** hat Österreich sein **damals gültiges Aussenhandelsgesetz in sein neues Aussenwirtschaftsgesetz³³ umgewandelt.**³⁴ Dabei wurde auch der § 25a Aussenwirtschaftsgesetz eingeführt. Dieser sieht eine Prüfungs- und Genehmigungspflicht durch das Wirtschaftsministerium für den Erwerb von mindestens 25 % an bestimmten österreichischen Unternehmen vor, wenn der Erwerb durch eine natürliche oder eine juristische Person, die weder Bürger der Europäischen Union noch des Europäischen Wirtschaftsraumes noch der Schweiz (im Folgenden: Angehörige von Drittstaat) geschieht.³⁵ Dies gilt jedoch nur für solche Unternehmen, die in einem Bereich tätig sind, der die öffentliche Sicherheit und Ordnung³⁶ betrifft, nämlich Bereiche der inneren und äusseren Sicherheit³⁷ und der öffentlichen Sicherheit und Ordnung einschliesslich der Daseins- und Krisenvorsorge³⁸. Als **Prüfungsmassstab** gelten mithin die Auswirkungen der Übernahme auf die **Versorgungssicherheit** des Landes.³⁹ Im Rahmen einer **Gesetzesnovelle von 2013** wurde allerdings die Genehmigungspflicht auf diejenigen Erwerbsvorgänge eingeschränkt, in denen unions- oder völkerrechtliche Vorschriften einer Genehmigungspflicht nicht entgegenstehen.⁴⁰

2. Meldepflicht (Antrag auf Genehmigung)

Der Erwerbsvorgang an einem österreichischen Unternehmen durch Angehörige von Drittstaaten unterliegt grundsätzlich einer **vorherigen Genehmigungspflicht nach § 25a Aussenwirtschaftsgesetz**. Dieser geht in der Regel in einem ersten Schritt ein Antrag auf Genehmigung voraus.⁴¹

2.1. Meldepflichtiger Schwellenwert

Meldepflichtig sind der **Erwerb von Unternehmen**, die **massgebliche Beteiligung an Unternehmen** und der **Erwerb eines beherrschenden Einflusses auf Unternehmen sensibler Bereiche**, die ihren Sitz

³³ Die neuen gesetzlichen Regelungen sind seit dem 08.12.2011 in Kraft.

³⁴ Siehe hierzu allgemein A. Birkner, Schutzgesetz mit scharfen Zähnen, Der Standard 2014/12/08, Wirtschaft und Recht, 20.03.2014; P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51.

³⁵ P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51 ff.; A. Birkner, Schutzgesetz mit scharfen Zähnen, Der Standard 2014/12/08, Wirtschaft und Recht, 20.03.2014.

³⁶ Im Sinne der Artikel 52 und 65 Absatz 1 Vertrag über die Arbeitsweise der Europäischen Union.

³⁷ Verteidigungsgüterindustrie und Sicherheitsdienste, § 25a Abs 3 Z 1 lit. a), b) Aussenwirtschaftsgesetz.

³⁸ Insbesondere Energieversorgung, Wasserversorgung, Telekommunikation, Verkehr und Infrastruktureinrichtungen im Bereich der Aus- und Weiterbildung und des Gesundheitswesens, § 25a Abs 3 Z 2 lit. a) bis e) Aussenwirtschaftsgesetz.

³⁹ I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 10; P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51, S. 52.

⁴⁰ § 25a Abs 2 Aussenwirtschaftsgesetz.

⁴¹ § 25a Absatz 6 Aussenwirtschaftsgesetz; ein Antragsformular findet sich unter https://www.bmdw.gv.at/Aussenwirtschaft/exportkontrolleonline/Documents/80%20Unternehmense_rwerb.pdf (06.09.2018).

in Österreich haben.⁴² Es kann sich damit sowohl um sogenannte **Asset-Deals**⁴³ als auch um sogenannte **Share-Deals**⁴⁴ handeln.⁴⁵ Erfasst werden Erwerbsvorgänge an Kapitalgesellschaften, einschliesslich der GmbH & Co KG und ähnlichen, sowie an allen anderen Unternehmen, die nach dem Unternehmensgesetzbuch buchführungspflichtig sind.⁴⁶ Aus § 25a Absatz 4 Aussenwirtschaftsgesetz ergibt sich, dass der meldepflichtige Schwellenwert bei 25 Prozent der Stimmrechtsanteile liegt. Es muss mithin ein **Stimmrechtsanteil von 25 Prozent oder mehr** durch den konkreten Erwerb erreicht werden. Darüber hinaus gilt es zu beachten, dass die **Anteile zusammengerechnet** werden, wenn mehrere beim Erwerb gemeinsam vorgehen.⁴⁷ Dies kann entweder vorliegen bei wechselseitiger Beteiligung oder bei sogenannten Syndikatsverträgen zur gemeinsamen Ausübung der Stimmrechte.⁴⁸ Es handelt sich damit um einen relativen Schwellenwert. Wird der Schwellenwert alleine nicht erreicht, genügt alternativ das Vorhandensein eines **beherrschenden Einflusses**.⁴⁹ Dieser kann nach dem Absatz 5 der Norm wiederum durch gemeinsames Wirtschaften wie bei Syndikatsverträgen entstehen.

Dabei existiert **keine sektorale Beschränkung**. Grundsätzlich muss jeder Investor aus einem Drittstaat den Erwerb dem Wirtschaftsministerium melden, wenn er 25 Prozent oder mehr der Stimmrechtsanteile eines Unternehmens erwirbt, das in einem Geschäftsbereich tätig ist, welcher **die öffentliche Sicherheit und Ordnung**⁵⁰ betrifft. Unternehmen, die dieser Kategorie unterfallen, sind insbesondere solche der Verteidigungsindustrie, der Sicherheitsdienste, des Gesundheitswesens, des Feuerwehrwesens und Katastrophenschutzes, der Energieversorgung (Strom, Gas), der Wasserversorgung, der Telekommunikation, des Verkehrs (Eisenbahn, Luftfahrt, Schifffahrt, Bundesstrassen) sowie der Bildung (Universitäten, Fachhochschulen).⁵¹

⁴² § 25a Absatz 1 Aussenwirtschaftsgesetz; P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, *ecolex* 2012, S. 51, S. 52.

⁴³ Beim *Asset-Deal* werden im Rahmen eines Unternehmenskaufs einzelne Wirtschaftsgüter des Unternehmens übertragen; I. Braun & Ph. Baubin, in B.A. Facey, *Foreign Investment Regulation Review*, 3. Aufl., London 2015, Austria, S. 14.

⁴⁴ Beim *Share-Deal* erwirbt der Käufer vom Verkäufer die Anteile an der zum Verkauf stehenden Gesellschaft; I. Braun & Ph. Baubin, in B.A. Facey, *Foreign Investment Regulation Review*, 3. Aufl., London 2015, Austria, S. 14.

⁴⁵ A. Birkner, Schutzgesetz mit scharfen Zähnen, *Der Standard* 2014/12/08, Wirtschaft und Recht, 20.03.2014; I. Braun & Ph. Baubin, in B.A. Facey, *Foreign Investment Regulation Review*, 3. Aufl., London 2015, Austria, S. 13 f.

⁴⁶ Das sind gemäss der §§ 189 ff. Unternehmensgesetzbuch (UGB) solche Unternehmen, die einen Jahresumsatz von mehr als 700'000 Euro zu verzeichnen haben; § 25a Absatz 2 Zahl 1 Aussenwirtschaftsgesetz; A. Birkner, Schutzgesetz mit scharfen Zähnen, *Der Standard* 2014/12/08, Wirtschaft und Recht, 20.03.2014.

⁴⁷ P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, *ecolex* 2012, S. 51, S. 52; A. Birkner, Schutzgesetz mit scharfen Zähnen, *Der Standard* 2014/12/08, Wirtschaft und Recht, 20.03.2014.

⁴⁸ Unter einem Syndikatsvertrag versteht man eine rechtsgeschäftliche Bindung zukünftigen Abstimmungsverhaltens zwischen den Gesellschaftern eines Unternehmens; § 25a Absatz 4 Satz 2 Zahl 4 Aussenwirtschaftsgesetz.

⁴⁹ § 25a Absatz 5 Satz 1 Aussenwirtschaftsgesetz.

⁵⁰ § 25a Absatz 2 Zahl 2 Aussenwirtschaftsgesetz; Artikel 52 und 65 Absatz 1 Vertrag über die Arbeitsweise der Europäischen Union (AEUV).

⁵¹ P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, *ecolex* 2012, S. 51, S. 52.

Genehmigungspflichtig ist **der direkte Erwerb durch Personen oder Gesellschaften aus Drittstaaten**.⁵² Besteht jedoch der begründete Verdacht einer Umgehung der Genehmigungspflicht und einer Gefährdung der Interessen der öffentlichen Sicherheit und Ordnung, werden auch **mittelbare Erwerbsvorgänge** durch Angehörige aus der Schweiz, Liechtenstein, Norwegen und Island erfasst. Der Umgehungsverdacht muss sich darauf beziehen, dass eine Konstruktion zur Umgehung der Genehmigungspflicht gewählt wurde. Dies können mehrstufige Beteiligungsstrukturen sein, die dem wirtschaftlichen Eigentümer die Möglichkeit geben, wie im Fall eines Direkterwerbs denselben Einfluss auf das zu erwerbende Unternehmen auszuüben. Ein solches **Umgebungsgeschäft** könnte beispielsweise auch über eine zwischengeschaltete Holdinggesellschaft⁵³ vorgenommen werden. Für die Bewertung des Umgehungsverdachts ist der tatsächliche wirtschaftliche Gehalt der Transaktion massgeblich.⁵⁴ Darüber hinaus muss auch hierbei der begründete Verdacht bestehen, dass durch den Vorgang eine Gefährdung von Interessen der öffentlichen Sicherheit und Ordnung zu befürchten ist. Eine Genehmigungspflicht schreibt der Wirtschaftsminister in diesem Fall **von Amts wegen** vor.⁵⁵ In der Praxis haben die vergangenen Jahre gezeigt, dass trotz der intensiven gesetzlichen Bemühungen immer noch **Ausweichstrategien** gesucht und gefunden werden können, um ein Überprüfungsverfahren zu vermeiden.⁵⁶

Einschränkungen findet die Genehmigungspflicht jedoch **durch Pflichten der Europäischen Union sowie durch völkerrechtliche Verträge**. Diese dürfen seit der Novelle des Aussenwirtschaftsgesetzes von 2013 einer Genehmigungspflicht grundsätzlich nicht entgegenstehen.⁵⁷ Zu den unionsrechtlichen Verpflichtungen zählen insbesondere der Vertrag über die Europäische Union (EUV), der Vertrag über die Arbeitsweise der Europäischen Union (AEUV), das Abkommen über den Europäischen Wirtschaftsraum (EWR-Vertrag) sowie bilaterale Vereinbarungen zwischen der Europäischen Union und der Schweiz.⁵⁸ Völkerrechtliche Verpflichtungen stellen insbesondere das Allgemeine Abkommen über den Handel mit Dienstleistungen (*General Agreement on Trade in Services*, GATS), Freihandelsabkommen zwischen der Europäischen Union und Drittstaaten sowie rechtliche Verpflichtungen aus Mitgliedschaften bei der Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (*Organisation for Economic Co-operation and Development*, OECD) dar. Stehen diese Verpflichtungen der Genehmigungspflicht des § 25a Aussenwirtschaftsgesetz entgegen, so besteht keine Pflicht zur Antragstellung und Genehmigung.

⁵² Die Genehmigungspflicht bezieht sich damit auf Personen oder Gesellschaften ohne Staatsbürgerschaft oder auf solche mit Sitz in der Europäischen Union, dem Europäischen Wirtschaftsraum oder der Schweiz.

⁵³ Eine Holdinggesellschaft ist eine Gesellschaft, die nicht selbst produziert, aber andere Gesellschaften dadurch beeinflusst oder beherrscht, dass sie Aktien dieser anderen Gesellschaften besitzt.

⁵⁴ A. Birkner, Schutzgesetz mit scharfen Zähnen, Der Standard 2014/12/08, Wirtschaft und Recht, 20.03.2014.

⁵⁵ I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 16; A. Birkner, Schutzgesetz mit scharfen Zähnen, Der Standard 2014/12/08, Wirtschaft und Recht, 20.03.2014.

⁵⁶ P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51, S. 52.

⁵⁷ § 25a Absatz 2 Aussenwirtschaftsgesetz; A. Birkner, Schutzgesetz mit scharfen Zähnen, Der Standard 2014/12/08, Wirtschaft und Recht, 20.03.2014.

⁵⁸ I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 11.

2.2. Meldeverfahren

Bereits vor Abschluss des Vertrages über den Erwerb, also **ex-ante**, ist ein **Genehmigungsantrag** zu stellen.⁵⁹ Gleiches gilt im Fall der Veröffentlichung eines öffentlichen Angebotes, welches auf den vorherigen Genehmigungsantrag folgen muss.⁶⁰ Der Genehmigungsantrag ist an das **Wirtschaftsministerium** zu richten.⁶¹ Er soll neben dem Namen, der Anschrift und einem Zustellungsbevollmächtigten in Österreich auch eine Beschreibung der Geschäftstätigkeit und eine Darstellung des geplanten Erwerbsvorganges beinhalten.⁶²

Wird gegen die Meldepflicht verstossen, so gelten alle genehmigungspflichtigen Erwerbe als unter der **aufschiebenden Bedingung** abgeschlossen, dass die Genehmigung erteilt wird.⁶³ Dies bedeutet, dass sie erst mit der erteilten Genehmigung wirksam werden können.⁶⁴

3. Überprüfungsprozess

3.1. Auslösung des Prüfungs- und Begutachtungsprozesses

Innerhalb eines Monats nach Erhalt des Antrages hat der Wirtschaftsminister auf Basis einer **ersten Analyse** zu entscheiden, ob Bedenken gegen den Erwerb bestehen und daher ein vertieftes Prüfungsverfahren eingeleitet werden soll. Entweder ergeht ein **Bescheid an den Antragsteller über die Einleitung eines vertieften Prüfverfahrens** oder aber der Erwerb wird unmittelbar genehmigt oder abgelehnt.⁶⁵ Ohne Bescheid tritt eine **Genehmigungsfiktion** ein.⁶⁶

Dies stellt im Allgemeinen die **erste Phase des zweistufigen Genehmigungsverfahrens** dar.⁶⁷

Das Prüfverfahren beim Umgehungsgeschäft wird dagegen ohne vorherige Meldung von Amts wegen eingeleitet.⁶⁸

⁵⁹ § 25a Absatz 6 Zahl 1 Aussenwirtschaftsgesetz.

⁶⁰ § 25a Absatz 6 Zahl 2 Aussenwirtschaftsgesetz.

⁶¹ § 25a Absatz 2 Aussenwirtschaftsgesetz; I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 16.

⁶² § 25a Absatz 7 Aussenwirtschaftsgesetz; P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51, S. 52.

⁶³ § 25a Absatz 2, Absatz 11 Aussenwirtschaftsgesetz; I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 13.

⁶⁴ P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51, S. 52.

⁶⁵ § 25a Absatz 8 Aussenwirtschaftsgesetz; I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 15.

⁶⁶ § 25a Absatz 8 Satz 2 Aussenwirtschaftsgesetz.

⁶⁷ I. Braun & Ph. Baubin, in B.A. Facey, Foreign Investment Regulation Review, 3. Aufl., London 2015, Austria, S. 15.

⁶⁸ § 25a Absatz 11 Aussenwirtschaftsgesetz.

3.2. Auswahl- und Überprüfungsentscheidung

Die nationale Sicherheit steht im Fokus der Überprüfung. Dabei orientiert sich die Entscheidung generell daran, ob eine **schwerwiegende Gefährdung massgeblicher Interessen der öffentlichen Sicherheit und Ordnung**⁶⁹ zu befürchten ist.⁷⁰

Es besteht eine Ermächtigung des Wirtschaftsministers, **Ausnahmen von der Genehmigungspflicht** generell mit einer Verordnung zu definieren.⁷¹

Im Übrigen wird **Transparenz** gewährleistet durch die **Veröffentlichungspflicht des Wirtschaftsministeriums**, die sich nach den Erfordernissen der Notwendigkeit und Verhältnismässigkeit richtet.⁷² Dabei sind in der Veröffentlichung neben den erwerbenden Personen oder Gesellschaften und dem erworbenen Unternehmen auch der Umstand anzugeben, ob der Vorgang als unbedenklich angesehen wurde, Auflagen vorgeschrieben wurden oder der Vorgang untersagt wurde.

3.3. Verfahren der Auswahl oder Überprüfung

Findet ein **vertieftes Überprüfungsverfahren** statt, ist in der **zweiten Phase des Genehmigungsverfahrens** nach zwei Monaten ab Zustellung des Einleitungsbescheides eine Entscheidung zu treffen.⁷³ Der Erwerb ist durch das **Wirtschaftsministerium** zu genehmigen oder zu verweigern. Wird innerhalb der Frist kein Bescheid ausgestellt, so tritt nach dem Gesetzeswortlaut des § 25a Absatz 9 Aussenwirtschaftsgesetz erneut eine **Genehmigungsfiktion** ein. Der Erwerb gilt also mit Ablauf der Frist als genehmigt. Daneben kann ein Erwerb auch mit **Auflagen** versehen genehmigt werden.⁷⁴ Intern zuständig ist der **Bundesminister für Wirtschaft, Familie und Jugend**.⁷⁵ Für das amtswegige Verfahren beim mittelbaren Erwerb gilt aufgrund der fehlenden Meldung direkt die Zweimonatsfrist für das Überprüfungsverfahren.⁷⁶

Sowohl administrativ als auch gerichtlich sollte es möglich sein, sich gegen den ergangenen Bescheid im Wege des üblichen nationalen **Rechtsmittelverfahrens** zu wehren.

Wird ein Erwerb ohne erforderliches Genehmigungsverfahren durchgeführt, gegen erteilte Auflagen verstossen oder die Genehmigung durch falsche oder unvollständige Angaben erschlichen, steht dies unter **gerichtlicher Strafe**.⁷⁷ Diese kann bis zu drei Jahre Freiheitsstrafe betragen. Bei gewerbsmässiger Begehung oder bei Begehung durch Urkunden- und Datenfälschung oder durch ein anderes falsches Beweismittel beträgt der Strafrahmen sechs Monate bis zu fünf Jahre Freiheitsstrafe.⁷⁸ Wird fahrlässig

⁶⁹ Interessen der öffentlichen Sicherheit und Ordnung im Sinne der Artikel 52 und 65 Absatz 1 Vertrag über die Arbeitsweise der Europäischen Union (AEUV); § 25a Absatz 2 Zahl 2 Aussenwirtschaftsgesetz.

⁷⁰ § 25a Absatz 3 Aussenwirtschaftsgesetz; P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51. Zu den betroffenen Bereichen siehe oben unter Punkt 2.1. in diesem Gutachten.

⁷¹ § 25a Absatz 13 Aussenwirtschaftsgesetz.

⁷² § 25a Absatz 14 Satz 1 Aussenwirtschaftsgesetz.

⁷³ § 25a Absatz 9 Aussenwirtschaftsgesetz; *Braun & Baubin*, in *Facey*, Foreign Investment Regulation Review, Third Edition, London 2015, Austria, S 15 f.

⁷⁴ § 25a Absatz 9 Satz 1 Zahl 2 Aussenwirtschaftsgesetz.

⁷⁵ Siehe § 25a Absatz 8 Satz 1, Absatz 11 Satz 1 Aussenwirtschaftsgesetz.

⁷⁶ P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, ecolex 2012, S. 51, S. 52.

⁷⁷ § 79 Absatz 1 Zahlen 25, 26 Aussenwirtschaftsgesetz.

⁷⁸ § 79 Absatz 2 in Verbindung mit Absatz 1 Zahlen 25, 26 Aussenwirtschaftsgesetz.

gegen die Genehmigungspflicht verstossen, so beträgt die Strafe bis zu einem Jahr Freiheitsstrafe oder Geldstrafe bis zu 360 Tagessätzen. Der Verstoss gegen die Genehmigungspflicht hat auch die **zivilrechtliche Unwirksamkeit des Erwerbs** zur Folge.⁷⁹ Das bedeutet, dass das zugrundeliegende Rechtsgeschäft nicht gültig ist, solange keine Genehmigung erteilt wurde. Im Ergebnis wird damit die Rückgängigmachung der Investition riskiert.

4. Bewertung der tatsächlichen Praxis des Investitionsschutzprozesses

Angaben dazu, wie viele genehmigungspflichtige Investitionen keine solche Genehmigung erhielten, konnten wir keine finden. Die österreichische Nationalbank veröffentlicht jedoch Statistiken unter anderem über die Bestände passiver Direktinvestitionen, über Transaktionen passiver Direktinvestitionen sowie über das Einkommen aus passiven Direktinvestitionen.⁸⁰ Demnach lag der Wert der von ausländischen Investoren am Jahresende gehaltenen Bestände an Direktinvestitionen in Österreich in 2017 bei knapp 161 Milliarden Euro, wobei rund 99 Milliarden Euro auf Mitgliedstaaten der Europäischen Union (EU) und des Europäischen Wirtschaftsraumes (EWR) plus die Schweiz entfielen und rund 36 Milliarden Euro auf BRICS⁸¹-Staaten. Alle diese Werte stellen Höchstwerte seit 2009 dar. Im Hinblick auf im Zusammenhang mit strategischen Unternehmensbeteiligungen getätigten Transaktionen durch ausländische Investoren in Österreich ergeben sich die folgenden Werte am Ende des Jahres 2017: global betrachtet rund 9,8 Milliarden Euro, bei rund 7 Milliarden aus EU, EWR und der Schweiz sowie über 8 Milliarden Euro aus BRICS-Staaten. Auch hierbei handelt es sich um Höchstwerte seit 2009, teilweise um ein Vielfaches der Vorjahre. Das Einkommen ausländischer Direktinvestoren aus ihren Beteiligungen in Österreich belief sich Ende des Jahres insgesamt auf rund 11,6 Milliarden Euro, davon rund 7,7 Milliarden Euro aus den Staaten der EU und des EWR sowie aus der Schweiz und knapp 1,8 Milliarden Euro aus den BRICS-Staaten.

⁷⁹ § 89 Aussenwirtschaftsgesetz; P. Huber, Kontrolle sensibler Unternehmensverkäufe, Neue Genehmigungspflicht nach dem Aussenwirtschaftsgesetz – Auswirkungen auf M&A-Transaktionen, *ecolex* 2012, S. 51, S. 52.

⁸⁰ Die ausführlichen Tabellen sowie einige weitere sind verfügbar unter <https://www.oenb.at/Statistik/Standardisierte-Tabellen/aussenwirtschaft/direktinvestitionen/passive-direktinvestitionen.html> (01.10.2018).

⁸¹ Brasilien, China (inklusive Hongkong und Macao), Indien, Russland und Südafrika.

C. CANADA

1. Introduction

Le présent rapport, produit pour le compte de l'Institut suisse de droit comparé, dresse un portrait du régime canadien relatif à l'admission de l'investissement direct étranger. Le rapport s'intéressera d'abord aux exigences de notification que le droit canadien impose aux investisseurs étrangers qui effectuent ou souhaitent effectuer un investissement au Canada. L'attention sera ensuite portée sur les processus d'examen pouvant être entrepris par le gouvernement canadien à l'égard de certains investissements étrangers. Enfin, nous dresserons un portrait sommaire de la pratique canadienne décisionnelle récente en matière d'admission d'investissement étranger.

Il y a lieu de le reconnaître d'emblée, le Canada perçoit d'un œil favorable la venue d'investissement étranger sur son territoire. De nombreuses agences tant au niveau fédéral, provincial que régional font ainsi la promotion du Canada ou d'une région de celui-ci et cherchent à attirer de nouveaux capitaux et ainsi stimuler la croissance économique⁸². Au niveau juridique, l'admission de ces investissements étrangers est régie par le cadre normatif mis en place par le gouvernement fédéral. Ce cadre juridique est articulé autour d'une loi principale, à savoir la *Loi concernant l'investissement au Canada*⁸³ (la « Loi » ou la « LIC »), laquelle est complétée par deux règlements⁸⁴.

Fondamentalement, la LIC poursuit un objectif double qui peut être ainsi résumé : « examiner les investissements étrangers importants afin de déterminer s'ils représenteront vraisemblablement un avantage économique net pour le Canada, et examiner les investissements susceptibles de porter atteinte à la sécurité nationale. »⁸⁵ Ces concepts feront l'objet d'une discussion plus approfondie dans le cadre de la partie III, qu'il ne suffise pour l'instant de retenir qu'il s'agit de la principale loi qui régit l'admission d'investissements étrangers sur le territoire canadien.

2. Exigences de notifications relatives aux investissements étrangers

Les non-Canadiens, c'est-à-dire les personnes physiques qui ne sont pas citoyennes ou résidentes permanentes du Canada ainsi que les personnes morales ou autres entités qui ne sont pas contrôlées en droit ou en fait par des Canadiens, **doivent fournir un avis d'investissement** si elles souhaitent constituer **une nouvelle entreprise** au Canada. La *Loi* ne prescrit à cet égard **aucun seuil minimal quant à la valeur** de l'entreprise **ou le secteur** dans lequel la nouvelle entreprise est constituée; **l'avis d'investissement doit être fourni par l'investisseur étranger en toutes circonstances**.

S'agissant de l'acquisition du contrôle – directe ou indirecte – d'une entreprise canadienne par un investisseur étranger, deux cas de figure sont susceptibles de se présenter en fonction des seuils applicables au cas particulier : soit un avis d'investissement est requis, soit l'investissement est sujet à

⁸² Au niveau fédéral on retrouve notamment l'agence Investir au Canada <http://www.investircanada.ca/a-propos>; au niveau provincial, on recense notamment Investissement Québec <http://www.investquebec.com/international/fr>; au niveau régional, on retrouve notamment Montréal International <http://www.montrealinternational.com/> ainsi que Québec International <http://www.quebecinternational.ca/services/>

⁸³ LRC 1985, c 28 (1er supp)

⁸⁴ *Règlement sur Investissement Canada*, DORS/85-611; *Règlement sur les investissements susceptibles de porter atteinte à la sécurité nationale (examen)*, DORS/2009-271.

⁸⁵ Innovation, Sciences et Développement économique Canada, *Rapport annuel : Loi sur Investissement Canada 2016-2017*, en ligne : https://www.ic.gc.ca/eic/site/ica-lic.nsf/fra/h_lk81126.html.

examen par le ministre chargé de l'application de la LIC (le Ministre de l'Innovation, des Sciences et du Développement économique, le « Ministre »), auquel cas l'investissement ne sera autorisé que si ce dernier est d'avis que l'investissement sera vraisemblablement **à l'avantage net du Canada**⁸⁶. Le seuil applicable varie en fonction de la situation de l'investisseur étranger. Ainsi, l'investisseur étranger privé – qui n'est pas une entreprise d'État – qui peut être qualifié **d'investisseur OMC**, c'est-à-dire qu'il est un ressortissant d'un membre de l'OMC dans le cas d'une personne physique ou qu'il est dans les autres cas une entité contrôlée par un tel investisseur, verra son investissement faire **l'objet d'un examen uniquement si la valeur d'affaires de l'entreprise canadienne de laquelle il se porte acquéreur est égale ou supérieure à 1 milliard de dollars canadiens**⁸⁷. Quant aux **investisseurs OMC qui sont des entreprises d'État**, le seuil déclencheur d'examen est fixé à **398 millions de dollars** pour l'année 2018. Les investisseurs qui sont des **investisseurs privés au sens de certains accords commerciaux** conclus par le Canada bénéficient quant à eux d'un **seuil d'examen de 1,5 milliard de dollars**. Pour un **investisseur étranger qui ne peut se qualifier** dans une des deux catégories précédemment mentionnées, toute acquisition d'une entreprise canadienne dont **la valeur d'affaire est égale ou supérieure à 5 millions de dollars dans le cas d'une acquisition directe et de 50 millions de dollars dans le cas d'une acquisition indirecte** est sujette à examen⁸⁸.

Il est à noter que, sans égard à la qualification de l'investisseur, **toute acquisition d'une entreprise culturelle**⁸⁹ dont la valeur d'affaire est égale ou supérieur à 5 millions de dollars dans le cas d'une acquisition directe et de 50 millions de dollars dans le cas d'une acquisition indirecte est susceptible de faire l'objet d'un examen d'avantages nets pour le Canada. Dans ce cas, l'examen est conduit non pas par le ministre responsable de l'application de la LIC, mais **par le ministre du Patrimoine canadien**.

Procédure de notification

Lorsqu'un avis d'investissement est requis, l'investisseur peut le déposer **en tout temps avant d'effectuer l'investissement ou au maximum trente jours après l'avoir effectué**. Cependant, lorsqu'un examen est requis, le processus doit nécessairement être complété avant que l'investissement ne puisse avoir lieu. En d'autres termes, **pour pouvoir effectuer l'investissement, l'investisseur doit donc avoir reçu la confirmation** – explicite ou présumée – de la part du Ministre énonçant qu'il est d'avis que l'investissement sera vraisemblablement à l'avantage net du Canada.

Il est à noter que tant l'avis d'investissement que la demande d'examen sont déposés auprès du Directeur des investissements (un fonctionnaire de haut niveau nommé par le Ministre). Lorsque la demande d'examen est dûment soumise, le directeur envoie un accusé de réception à l'investisseur et renvoie alors les renseignements au Ministre. Le Ministre dispose alors de **quarante-cinq jours pour compléter son examen**. Ce délai peut toutefois être **prolongé de trente jours si** avant l'expiration du

⁸⁶ Lorsque l'investissement est sujet à un tel examen, l'investisseur doit déposer une demande d'examen conformément à l'article 17 de la *Loi*.

⁸⁷ Voir art 14 (1) (2) de la *Loi*; Il est à noter que les acquisitions indirectes d'entreprises canadienne par les investisseurs OMC ne font pas l'objet d'un examen, mais doivent toutefois faire l'objet d'un avis.

⁸⁸ Les méthodes de calculs de la valeur à prendre en compte afin de déterminer si un examen est sujet ou non à examen sont prévues dans le *Règlement sur investissement Canada*.

⁸⁹ En vertu de l'article 14.6 de la *Loi concernant l'investissement au Canada*, les entreprises culturelles sont celles qui œuvrent dans la publication, la distribution ou la vente de livres, de revues, de périodiques ou de journaux; dans la production, la distribution, la vente ou la présentation de films ou d'enregistrements vidéo ou d'enregistrements de musique audio ou vidéo; l'édition, la distribution ou la vente de compositions musicales sous forme imprimée ou assimilable par une machine; les radiocommunications dont les transmissions sont destinées à être captées directement par le grand public, notamment les activités de radiodiffusion, de télédiffusion et de câblodistribution et les services de programmation et de diffusion par satellite.

délai d'examen, le Ministre fait parvenir un avis à l'investisseur lui **indiquant qu'il ne sera pas en mesure de compléter l'examen** dans les quarante-cinq jours **ou si l'investissement est visé par un examen relatif à la sécurité nationale** (examen dont nous traiterons plus en détails dans la section suivante). Notons que **si le Ministre n'envoie pas l'avis dans le délai** prévu par la *Loi*, **il est alors réputé être d'avis que l'investissement sera vraisemblablement à l'avantage net** du Canada. Il importe par ailleurs de souligner que la *Loi* prévoit que tous les délais susmentionnés peuvent être prolongés avec le consentement de l'investisseur.

Conséquence du défaut de notification

En cas de défaut du dépôt par l'investisseur soit de l'avis d'investissement ou de la demande d'examen, selon le cas, la *Loi* prévoit tout d'abord que **le Ministre** peut faire émettre une mise en demeure à l'égard de cet investisseur le **sommant de mettre fin à la contravention et de se conformer à la *Loi*** soit immédiatement ou à l'intérieur du délai précisé dans la mise en demeure⁹⁰. Lorsque l'investisseur fait défaut de se conformer à la mise en demeure, une demande d'ordonnance judiciaire peut alors être présentée au nom du Ministre. Une telle ordonnance peut notamment prévoir que l'investisseur étranger **doive se départir soit du contrôle de l'entreprise canadienne**, soit de son investissement dans l'unité, selon les modalités que la cour estime justes et raisonnables **ou encore une pénalité pécuniaire d'au plus 10 000 \$CAN par jour** au cours desquels se commet ou se continue la contravention. Le défaut de se conformer à l'ordonnance peut entraîner une condamnation pour outrage au tribunal par la même cour qui a rendu l'ordonnance⁹¹.

Autres restrictions en matière d'investissement étranger

Le régime d'admission de l'investissement étranger dont nous avons discuté jusqu'à présent s'applique à tous les secteurs de l'économie. Il est cependant à noter que le gouvernement fédéral et les gouvernements provinciaux imposent des **restrictions à la propriété dans certains secteurs jugés stratégiques ou plus sensibles**. Ainsi, on retrouve de telles restrictions dans **le secteur bancaire** où une approbation ministérielle est requise pour qu'un étranger puisse se porter acquéreur de **plus de 10% de l'actionnariat** d'une banque canadienne. De même, **les activités de radio et télédiffusion** ainsi que celles se rapportant aux **services de télécommunication** sont, de façon générale, **réservées** aux compagnies possédées et contrôlées par des Canadiens. On retrouve des limitations similaires dans le domaine du **transport aérien** relativement à la possibilité d'exploiter une ligne aérienne à l'intérieur du Canada.

3. Processus d'examen des investissements étrangers

Comme nous l'avons vu à la section précédente, un investissement en sol canadien par un investisseur étranger peut potentiellement donner lieu au déclenchement de deux types d'examen distincts par les autorités canadiennes, à savoir l'examen d'avantage net (général et celui relatif aux entreprises culturelles) ainsi que celui relatif à la sécurité nationale.

S'agissant de l'examen visant à déterminer si l'investissement est vraisemblablement à l'avantage net du Canada, cet **examen est déclenché automatiquement** dès que le seuil applicable à la situation dans laquelle l'investisseur étranger se trouve est atteint ou surpassé. Débutons par l'examen d'avantage

⁹⁰ Il est à noter que l'article 16 de la *Loi* prévoit qu'« [i]l est interdit à un non-Canadien d'effectuer un investissement sujet à l'examen au titre de la [partie IV de la *Loi*] sauf si cet investissement a été examiné en conformité avec la présente partie et si le ministre est d'avis ou est réputé être d'avis que l'investissement sera vraisemblablement à l'avantage net du Canada. »

⁹¹ Voir art 40 (4) de la *Loi*.

net s'appliquant à tous les investissements autres que ceux dans une entreprise culturelle. La LIC prévoit en son **article 20 les six critères qui doivent guider le Ministre dans son examen**, à savoir :

- a) l'effet de l'investissement sur le **niveau et la nature de l'activité économique** au Canada, notamment sur **l'emploi, la transformation des ressources, l'utilisation de pièces et d'éléments produits et de services rendus au Canada et sur les exportations canadiennes**;
- b) **l'étendue et l'importance de la participation de Canadiens dans l'entreprise** canadienne ou la nouvelle entreprise canadienne en question **et dans le secteur industriel** canadien dont cette entreprise ou cette nouvelle entreprise fait ou ferait partie;
- c) l'effet de l'investissement sur **la productivité, le rendement industriel, le progrès technologique, la création de produits nouveaux et la diversité des produits** au Canada;
- d) l'effet de l'investissement sur **la concurrence dans un ou plusieurs secteurs** industriels au Canada;
- e) **la compatibilité** de l'investissement **avec les politiques nationales** en matière industrielle, économique et culturelle, **compte tenu des objectifs** de politique industrielle, économique et culturelle qu'ont énoncés le gouvernement ou la législature d'une province sur laquelle l'investissement **aura vraisemblablement des répercussions appréciables**;
- f) **la contribution** de l'investissement à **la compétitivité canadienne sur les marchés mondiaux**.

Il est à noter que **lorsque l'investisseur étranger est une société d'État**, le Ministre sera également guidé par **les lignes directrices particulières** relatives à l'évaluation des avantages nets des investissements effectués par une société d'État étrangère⁹². Ainsi, **en plus** d'appliquer les critères prévus à l'article 20 de la LIC, le Ministre **analysera** si l'entreprise canadienne qui doit être acquise par une société d'État étrangère **fonctionnera vraisemblablement sur une base commerciale**, notamment en ce qui concerne ce qui suit :

- où exporter;
- où transformer;
- la participation des Canadiens à ses activités au Canada et ailleurs;
- l'effet de l'investissement sur la productivité et le rendement industriel au Canada;
- le soutien de l'innovation, de la recherche et du développement en cours au Canada;
- le niveau de dépenses d'immobilisations permettant de maintenir la société canadienne dans une position concurrentielle à l'échelle mondiale

Cet examen particulier applicable aux sociétés d'État étrangères **peut donner lieu à ce que des engagements spécifiques soient requis** de l'investisseur étranger. Ainsi, il pourrait être par exemple requis de cet investisseur qu'il nomme des administrateurs canadiens indépendants au sein de la société canadienne à être acquise ou encore que la société à être constituée soit formée en personne morale.

Des spécificités s'appliquent également à l'examen des investissements étrangers liés **aux industries culturelles**. À titre de responsable de la conduite de cet examen, le ministre du Patrimoine canadien a publié des principes directeurs pouvant guider les investisseurs étrangers dans la formulation de leur plan d'activités et dans leur prise d'engagements qui pourraient permettre de rendre l'investissement

⁹² Voir *Lignes directrices sur les investissements au Canada par des entreprises d'état étrangères — évaluation des avantages nets*, en ligne : <https://www.ic.gc.ca/eic/site/ica-lic.nsf/fra/lk00064.html#p2>

projeté plus susceptible de recevoir une évaluation favorable de la part du ministre⁹³. Ainsi, l'investisseur s'engageant à offrir des contributions philanthropiques ou des dons de biens aux établissements d'enseignement, à des études, et à des initiatives dans le domaine culturel visant à renforcer la vie communautaire au Canada ou encore à distribuer et à commercialiser de produits culturels canadiens et de créateurs canadiens verra ses chances que le ministre détermine qu'il s'agit d'un investissement qui est vraisemblablement à l'avantage net du Canada augmenter.

Examen des investissements susceptibles de porter atteinte à la sécurité nationale

L'examen des investissements susceptibles de porter atteinte à la sécurité nationale **peut avoir lieu à l'égard de toute constitution d'une nouvelle entreprise ou de toute acquisition – directe ou indirecte** – d'une entreprise canadienne par un investisseur étranger. Ainsi, aucun seuil minimum n'est requis pour que la tenue d'un tel examen puisse être déclenchée. Le Ministre dispose de **45 jours** pour informer l'investisseur qu'il a des motifs raisonnables de croire que l'investissement pourrait porter atteinte à la sécurité nationale. Le point de départ pour le calcul du délai de 45 jours est, selon le cas soit le moment où il reçoit l'avis d'investissement, le moment où il reçoit la demande d'examen ou encore le moment à partir duquel l'investissement est porté pour sa première fois à sa connaissance dans le cas d'un investissement ne faisant ni l'objet d'un avis, ni d'une demande d'examen⁹⁴

En envoyant cet avis, l'examen peut dès lors être déclenché dans les 45 jours de cet avis par la prise d'un décret à cet effet par le gouvernement sur recommandation du Ministre, lequel doit avoir préalablement consulté le ministre de la Sécurité publique et de la Protection civile. L'envoi de cet avis par le Ministre a également pour effet d'empêcher l'investisseur étranger qui n'a pas encore effectué l'investissement d'effectuer ledit investissement tant et aussi longtemps que l'examen relatif à la sécurité nationale n'est pas complété.

Il est à noter que si le Ministre n'envoie pas l'avis à l'investisseur pour l'informer qu'il a des motifs raisonnables de croire que l'investissement pourrait porter atteinte à la sécurité nationale, un décret permettant le déclenchement d'examen de l'investissement pour des considérations de sécurité nationale peut tout de même être pris par le gouvernement. Cependant, lorsqu'aucun avis n'est envoyé à l'investisseur, le décret doit être pris dans le délai de 45 jours qui serait autrement applicable pour l'envoi de l'avis à l'investisseur. Une fois ce décret pris, le Ministre en informe l'investisseur et l'informe de son droit de lui présenter des observations.

Le processus d'examen relatif à la sécurité nationale

La prise du décret d'examen relatif à la sécurité nationale par le gouvernement déclenche un **processus d'examen pouvant durer jusqu'à 45 jours**. Notons que si à l'intérieur de ce délai de 45 jours, le Ministre fait parvenir à l'investisseur un avis à cet effet, le délai **peut être prolongé de 45 jours ou de tout autre délai** sur lequel le Ministre et l'investisseur s'entendent. Notons par ailleurs que pour mener à bien son examen, le Ministre peut requérir de l'investisseur étranger que ce dernier lui fournisse tout renseignement réglementaire ou tout autre renseignement qu'il estime nécessaire à l'examen. Dans le cadre de son examen, **le Ministre tient compte de la nature du bien ou des activités commerciales et des parties à la transaction**, notamment la possibilité d'une influence par un tiers. Le Ministre peut

⁹³ Gouvernement du Canada, *Engagements à l'avantage net et politiques culturelles canadiennes*, en ligne : <https://www.canada.ca/fr/patrimoine-canadien/services/examen-investissements-secteur-culturel/avantage-net.html>

⁹⁴ *Loi* art 25.2 (1); *Règlement sur les investissements susceptibles de porter atteinte à la sécurité nationale (examen)* art 2.

également tenir compte de la **liste non-exhaustive de facteurs** publiée dans les *Lignes directrices sur l'examen relatif à la sécurité nationale des investissements*⁹⁵ :

1. Les effets potentiels de l'investissement sur les capacités et les intérêts en matière de défense du Canada;
2. Les effets potentiels de l'investissement sur le **transfert de technologies** de nature délicate ou de savoir-faire à l'extérieur du Canada;
3. La participation à la recherche, à la fabrication ou à la vente de biens ou de technologies visés par l'article 35 de la *Loi sur la production de défense [armement militaire]*;
4. L'incidence possible de l'investissement sur **la sécurité des infrastructures essentielles** du Canada. (On entend par infrastructures essentielles **l'ensemble des processus, des systèmes, des installations, des technologies, des réseaux, des biens et des services nécessaires pour assurer la santé, la sûreté, la sécurité ou le bien-être économique** des Canadiens et des Canadiennes ainsi que l'efficacité du gouvernement.)
5. L'incidence possible de l'investissement sur **l'approvisionnement de biens et de services essentiels** aux Canadiens, ou l'approvisionnement de biens et de services au gouvernement du Canada;
6. La mesure dans laquelle l'investissement risque de permettre la surveillance ou l'espionnage par des intervenants étrangers;
7. La mesure dans laquelle l'investissement pourrait compromettre des activités actuelles ou à venir de représentants du renseignement ou des forces de l'ordre;
8. La mesure dans laquelle l'investissement pourrait influencer sur **les intérêts internationaux** du Canada, y compris les relations internationales;
9. La mesure dans laquelle l'investissement pourrait mettre en jeu ou faciliter les **activités d'acteurs illicites**, tels que des terroristes, des organisations terroristes ou le crime organisé. (Références omises).

Après examen et consultation du ministre de la Sécurité publique et de la Protection civile, **le Ministre doit, renvoyer la question au gouvernement** en lui présentant ses conclusions **et recommandations** lorsqu'il est convaincu que l'investissement porterait atteinte à la sécurité nationale. De même, le **Ministre, renvoie la question au gouvernement** en lui présentant ses conclusions **et recommandations** lorsqu'il n'est pas en mesure de déterminer, sur le fondement des renseignements disponibles, si l'investissement porterait atteinte à la sécurité nationale. Lorsqu'il est ainsi saisi par le Ministre, le gouvernement peut alors prendre par décret toute mesure relative à l'investissement qu'il estime indiquée pour préserver la sécurité nationale, dont d'ordonner à l'investisseur étranger de ne pas effectuer l'investissement. **Le gouvernement peut également décider d'autoriser** cet investisseur à effectuer **l'investissement à condition que ce dernier prenne les engagements que le gouvernement estime nécessaire** et de respecter les conditions précisées au décret, ou encore d'exiger que cet investisseur se départisse du contrôle de l'entreprise canadienne ou de son investissement dans l'unité. Enfin, lorsqu'il est convaincu que cet investissement ne porterait pas atteinte à la sécurité nationale, le Ministre doit faire parvenir à l'investisseur étranger un avis l'informant qu'aucune mesure supplémentaire ne sera prise.

Notons en définitive que les décisions du Ministre et du gouvernement ainsi les décrets qui sont pris en vertu de la *Loi* et qui se rapportent à l'examen des investissements susceptibles de porter atteinte à la sécurité nationale sont définitifs et exécutoires et **ne sont pas susceptibles d'appel ou de révision en justice**. Il est cependant possible de présenter une demande de contrôle judiciaire dans les trente

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Gouvernement du Canada, *Lignes directrices sur l'examen relatif à la sécurité nationale des investissements* : <http://www.ic.gc.ca/eic/site/ica-lic.nsf/fra/lk81190.html>

jours de la communication de la décision⁹⁶. Dans un tel cas, la Cour ne pourra annuler la décision ou la renvoyer à l'instance qui l'a prise selon les instructions qu'elle estime appropriées que si cette dernière est convaincue que l'instance décisionnelle intimée a agi d'une manière qui donne ouverture à ce recours, c'est-à-dire essentiellement dans les cas où il est déterminé qu'il y a eu manquement à la procédure ou que la décision est fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire⁹⁷.

4. Pratique récente en matière d'admission des investissements étrangers au Canada

Dans la pratique récente du Canada en matière d'admission des investissements étrangers au Canada, on peut distinguer du peu d'information publique disponible à cet égard une **différence dans le traitement des investissements assujettis à l'examen des avantages nets de ceux assujettis à l'examen relatif à la sécurité nationale**. S'agissant d'abord des investissements faisant l'objet d'un **examen relatif aux avantages nets, les refus par le gouvernement canadien sont exceptionnels**; il n'y aurait à ce jour qu'un refus définitif et deux refus provisoires, dont un qui a finalement été approuvé⁹⁸. Pour mettre les choses en perspective, il y a eu depuis mars 2009 134 demandes d'examens qui ont été déposés par des investisseurs étrangers. Le seul investissement définitivement refusé sur la base qu'il n'était pas à l'avantage net du Canada a été la tentative d'acquisition de la firme MacDonald, Dettwiler and Associates, laquelle est notamment derrière le programme de satellite Radarsat – qui est employé dans la défense du Nord canadien – ainsi que du Bras spatial canadien, par une firme américaine⁹⁹.

Quant aux examens relatifs à la sécurité nationale, on recense depuis 2009 la tenue de 13 examens. Pour mettre le tout en perspective, il y a eu durant cette même période **5074 avis d'investissement** en plus des 134 demandes d'examens dont nous avons fait mention ci-haut. Tous les examens entrepris ont débouché sur un ou l'autre des résultats suivants : **ordonner à l'investisseur étranger de ne pas effectuer l'investissement** (dans trois cas), ordonner à l'investisseur non canadien de se **départir du contrôle** de l'entreprise canadienne (dans quatre cas) et **autoriser** un investissement assorti de conditions atténuant les risques pour la sécurité nationale à un niveau acceptable (dans quatre cas). **Un investissement a été retiré** avant qu'un décret final n'ait été déposé.

⁹⁶ Voir *Loi sur les Cours fédérales* LRC 1985, c. F-7, art 18.1 (2).

⁹⁷ Les motifs en vertu desquels la Cour fédérale peut intervenir dans le cadre d'une demande de contrôle judiciaire sont prévus à l'art 18.1 (4) *Loi sur les Cours fédérales*.

⁹⁸ Voir Stikeman Elliot, *La Loi sur Investissement Canada : foire aux questions*, en ligne : <https://www.stikeman.com/fr-ca/savoir/guides/La-Loi-sur-Investissement-Canada-foire-aux-questions>

⁹⁹ Voir CBC News, *Federal government blocks sale of MDA space division*, en ligne : <https://www.cbc.ca/news/business/federal-government-blocks-sale-of-mda-space-division-1.703999>

D. FRANCE

1. Introduction

Le droit français pose le **principe de liberté des investissements**¹⁰⁰. En effet, l'article L151-1 du Code monétaire et financier (ci-après CMF) dispose que les « relations financières entre la France et l'étranger sont libres ». Toutefois, pour assurer la **défense des intérêts nationaux**, une **autorisation préalable** peut être requise pour la constitution et la liquidation des investissements étrangers en France (article L151-2 CMF).

Le droit français traite plus favorablement les investisseurs **européens et assimilés** que les investisseurs des **Etats tiers**.

L'**investisseur ou l'entreprise cible** peut **saisir par écrit le ministre** chargé de l'économie afin de savoir si leur investissement est soumis à autorisation préalable ou non.

Le **ministre** chargé de l'économie dispose, à l'issue de la procédure d'instruction d'un dossier de demande d'autorisation préalable, de **trois possibilités** :

- **Autoriser l'opération** (si l'opération soumise ne nécessite pas de condition particulière pour assurer la préservation des intérêts du pays);
- **Autoriser l'opération sous des conditions** permettant d'assurer la préservation des intérêts du pays ;
- **Refuser l'opération** dans des **conditions limitatives**.

Il est à noter qu'une **autorisation de l'Autorité de la concurrence** est nécessaire pour réaliser certaines opérations de **concentration** en France.

Doivent être notifiées, les opérations atteignant les **seuils** suivants : 150 millions d'euros du chiffre d'affaires mondial pour l'ensemble des parties et 50 millions d'euros du chiffre d'affaires réalisé en France par au moins deux parties à l'opération (article L. 430-2 du Code de commerce). Des seuils spécifiques, plus bas, sont prévus pour les opérations de concentration dans le secteur de la distribution de détail.

Un projet de loi relatif à la croissance et la transformation des entreprises, adopté par l'Assemblée nationale et actuellement soumis au Sénat (**projet de loi PACTE**)¹⁰¹, envisage de modifier les règles applicables au contrôle des investissements étrangers. Il vise notamment à **renforcer les pouvoirs étatiques** dans des activités jugées stratégiques. Une fois cette loi promulguée, un **décret** suivra pour détailler sa mise en œuvre. Il est prévu que ce décret **élargisse les secteurs d'activités** soumis à autorisation préalable.

Dans les lignes suivantes, nous exposerons le droit actuellement en vigueur avant d'indiquer les innovations apportées par le projet de loi PACTE.

¹⁰⁰ Article L151-1 CMF : « Les relations financières entre la France et l'étranger sont libres ».

¹⁰¹ Ce projet de loi est accessible sous <https://www.senat.fr/leg/pjl18-028.html>
Le dossier législatif de ce projet de loi est disponible sous <https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000037080861&type=general&typeLoi=proj&legislature=15>
L'article 55 de ce projet de loi porte sur le contrôle des investissements étrangers.

2. Le droit actuel : les déclarations et les autorisations préalables

Traditionnellement, le droit français consacre un système **dualiste** : certains investissements sont simplement soumis à **déclaration** tandis que d'autres sont soumis à une **autorisation préalable**¹⁰².

2.1. Les déclarations

Deux types de déclarations coexistaient jusqu'à ce que le décret de 2017 allège sensiblement le mécanisme des déclarations¹⁰³.

2.1.1. La déclaration administrative

Avant son abrogation par le décret de 2017, l'article R152-5 CMF prévoyait que **tout investissement direct ou indirect** de la part d'un étranger en France devait faire l'objet d'une déclaration administrative. Cette déclaration, devant être accomplie **pendant** la réalisation de l'opération, devait être envoyée à la **direction générale du Trésor**. Toutefois, ce principe de déclaration était assorti de **huit exceptions**. Ainsi, les opérations d'investissements directs réalisés entre des sociétés appartenant toutes au même groupe n'avaient pas besoin d'être déclarées. La raison est que ces opérations sont considérées comme n'ayant aucune influence significative sur les intérêts nationaux¹⁰⁴.

Le **décret de 2017** a créé l'article R153-13 CMF qui prévoit que la réalisation d'un investissement soumis à autorisation préalable doit faire l'objet d'une déclaration. Cette **déclaration** est établie par l'investisseur et adressée dans les **deux mois suivants la réalisation de l'opération** au ministère chargé de l'Économie¹⁰⁵. La violation de cette obligation est passible d'une **amende** égale au montant maximum applicable aux contraventions de 4ème classe (art. R165-2 CMF) qui est de 750 euros.

Ainsi, le système de la déclaration administrative a été supprimé en tant que régime autonome et a été **déplacé pour ne subsister que concernant les opérations autorisées**¹⁰⁶. En d'autres termes, les opérations qui devaient autrefois être déclarées ont été libérées de cette contrainte, mais les opérations qui devaient être autorisées sont désormais astreintes à cette formalité (alors qu'elles ne l'étaient pas avant le décret de 2017)¹⁰⁷.

2.1.2. Les déclarations statistiques

Avant le décret de 2017, **deux types de déclarations statistiques** existaient selon l'opération concernée. Dès que certains seuils étaient dépassés, les investissements devaient faire l'objet de déclarations à la Banque de France et/ou à la direction générale du Trésor. Le manquement à ces déclarations statistiques était sanctionné par une peine d'emprisonnement et une amende.

Le **décret de 2017** a **supprimé** la déclaration statistique à la **direction générale du Trésor**, mais a **maintenu** la déclaration statistique à la **Banque de France** (ainsi que les sanctions en cas de

¹⁰² O. Cachard, Droit du commerce international, Paris 2018, n° 89.

¹⁰³ Sur ce décret, V. C. Barrillon, Le nouveau mécanisme de contrôle des investissements étrangers en France, Bull. Joly Sociétés nov. 2017, p. 708.

¹⁰⁴ Barillon, le nouveau mécanisme, art. préc., n° 7.

¹⁰⁵ V. le site du Ministère de l'économie et des Finances :

https://www.tresor.economie.gouv.fr/Ressources/14837_declarations-d-investissement-etranger

¹⁰⁶ La déclaration permettra au Ministère de l'économie de savoir si une opération autorisée a été menée à bien par l'investisseur étranger ou si elle a été abandonnée.

¹⁰⁷ Barillon, le nouveau mécanisme, art. préc., n° 26.

V. aussi Lienhardt et Rambaud, le contrôle des investissements étrangers art. préc.

manquement). Cette déclaration concerne Les **investissements directs** en France ayant pour effet de conférer à l'investisseur au moins 10 % du capital ou des droits de vote, des acquisitions ou cessions d'entreprises non résidentes par des résidents, des acquisitions ou cessions de biens immobiliers à l'étranger par des résidents et en France par des non-résidents, dont le montant dépasse 15 millions d'euros.

2.2. Les autorisations préalables

Les formalités du mécanisme d'autorisation, plus contraignant que celui des déclarations, doivent être accomplies **antérieurement** à l'opération.

L'article **L151-3 CMF** dispose que :

« I. – Sont soumis à **autorisation préalable du ministre chargé de l'économie** les investissements étrangers dans une activité en France qui, même à titre occasionnel, participe à **l'exercice de l'autorité publique** ou relève de l'un des **domaines suivants** :

- a) Activités de nature à porter atteinte à **l'ordre public**, à la **sécurité publique** ou aux **intérêts de la défense nationale** ;
- b) Activités de recherche, de production ou de commercialisation **d'armes, de munitions, de poudres et substances explosives**.

Un décret en Conseil d'Etat définit la nature des activités ci-dessus ».

Plusieurs **décrets**, incorporés au CMF, ont détaillé cette disposition concernant **le champ des opérations** soumises à autorisation préalable, la **procédure d'autorisation** préalable, le **suivi des conditions** assortissant une autorisation et les **sanctions**. La **tendance récente** (décret de 2017 et projet de loi PACTE) consiste à **renforcer** le mécanisme d'autorisation.

2.2.1. Le champ des opérations soumises à autorisation préalable

D'emblée, il convient de préciser que l'autorisation est réputée acquise lorsque l'investissement est réalisé entre des entreprises appartenant toutes au même groupe, c'est-à-dire étant détenues à plus de 50 % du capital ou des droits de vote, directement ou indirectement par le même actionnaire (art. R153-6 CMF).

En cas de doute, **l'investisseur** ou **l'entreprise cible** (depuis le décret du 29 novembre 2018) peut **saisir le ministre** chargé de l'économie d'une demande écrite **aux fins de savoir si cet investissement est soumis à une procédure d'autorisation**. Un arrêté du ministre chargé de l'économie fixe la composition du dossier de la demande (art. R153-7 CMF). Le ministre répond dans un délai de **deux mois**. L'absence de réponse ne vaut pas dispense de demande d'autorisation (art. R153-8 CMF).

2.2.1.1. Les types d'investissements relevant de la procédure d'autorisation

Le droit français se montre **plus ouvert quant aux investissements européens et assimilés**.

Relèvent de la procédure d'autorisation, les investissements **européens** consistant en **l'acquisition du contrôle d'une entreprise** dont le siège social est établi en France ainsi que **l'acquisition de tout ou partie d'une branche d'activité d'une entreprise** dont le siège social est établi en France (art. R153-3 CMF).

Concernant les investissements provenant **d'Etats tiers**, relèvent également de la procédure d'autorisation le fait de **franchir le seuil de 33,33 % de détention du capital** ou des droits de vote d'une entreprise dont le siège social est établi en France (art. R153-1 CMF).

Est également soumise au régime de l'autorisation préalable **l'acquisition, par certaines entreprises de droit français**, de tout ou partie d'une branche d'activité d'une entreprise dont le siège social est établi en France et qui exerce une des activités énumérées du 8° au 14° de l'article R153-2 CMF (art. R153-5-1 CMF).

Pour que cet investissement nécessite une autorisation, il doit être accompli par une entreprise de droit français **contrôlée** par une **personne physique** ressortissante d'un Etat **autre que la France**, par une entreprise dont le **siège social se situe hors de France** ou par une personne physique **de nationalité française résidant hors de France**, dans l'une des activités énumérées concernant les investissements provenant des Etats membres de l'Union européenne. Un tel contrôle existe notamment lorsqu'une personne détient directement ou indirectement la majorité des droits de vote ou détermine en fait, par les droits de vote dont il dispose, les décisions de la société. Cette personne est présumée exercer ce contrôle lorsqu'elle d'une fraction des droits de vote supérieure à 40 % (L233-3 du code de commerce).

2.2.1.2. Les secteurs d'activités relevant de la procédure d'autorisation

A la suite de **l'affaire Alstom** (acquisition par *General Electric* de la branche "énergie" d'*Alstom*), le décret de 2014 (aussi connu sous le nom de décret *Montebourg* du nom du ministre de l'économie de l'époque) a étendu la liste des activités relevant de la procédure d'autorisation. Ces activités relèvent des secteurs des **transports**, de **l'énergie**, des **télécommunications**, de **l'eau**, de la **santé** et de la **défense**.

La réglementation actuelle, d'après le décret n° 2018-1057 du 29 novembre 2018 qui entrera en vigueur le 1^{er} janvier 2019, identifie **quatorze** secteurs d'activité dans lesquels les investissements étrangers sont soumis à autorisation préalable (art. R. 153-2 CMF). Le périmètre du champ couvert est relativement plus restreint concernant les investisseurs européens et assimilés (art. R153-4 et R153-5 CMF).

Les secteurs sont les suivants :

- Activités dans le secteur des **jeux d'argent** (à l'exception des casinos) ;
- Activités réglementées de **sécurité privée** ;
- Activités destinées à faire face à l'utilisation illicite, dans le cadre d'activités terroristes, **d'agents pathogènes ou toxiques** ;
- Activités portant sur les matériels conçus pour l'interception des correspondances et la détection à distance des conversations, centres agréés pour l'évaluation et la certification de la **sécurité des systèmes d'information** ;
- Activités relatives à la sécurité des systèmes d'information d'une entreprise liée par contrat passé avec un opérateur public ou privé gérant des installations d'importance vitale, activités relatives aux biens et technologies à double ;
- **Cryptologie** ;
- Activités exercées par les entreprises dépositaires de **secrets de la défense nationale**, production, commerce d'armes, de munitions, de poudres et substances explosives destinées à des fins militaires ou de matériels de guerre ;
- Activités exercées par les entreprises ayant conclu un contrat d'étude ou de fourniture d'équipements au profit du **ministère de la défense** ;
- Autres activités portant sur des matériels, des produits ou des prestations de services, y compris celles relatives à la **sécurité et au bon fonctionnement des installations et équipements, essentielles à la garantie des intérêts du pays** en matière d'ordre public, de sécurité publique ou de défense nationale (**électricité, gaz, hydrocarbures ; eau ; réseaux**

- et des services de transport ; réseaux et des services de communications électroniques ; protection de la santé publique) ;
- Certaines activités de recherche et de développement en matière de **cybersécurité, intelligence artificielle**, robotique, fabrication additive, **semi-conducteurs** ;
- Certaines activités **d'hébergement de données**.

Des auteurs écrivent que cette liste donne tout au plus une indication s'agissant des secteurs d'activité concernés et non, au sein de ces secteurs, celles des activités qui sont soumises à ce régime. Ils en déduisent que les **contours de l'autorisation préalable sont mal définis**, ce qui **confère au ministre de l'économie un large pouvoir** pour soumettre un investissement à autorisation préalable¹⁰⁸.

2.2.2. La procédure d'autorisation préalable

2.2.2.1. Contenu de la demande d'autorisation

La demande d'autorisation doit contenir **trois types d'informations**¹⁰⁹ : des informations relatives à l'investisseur, à l'entreprise objet de l'investissement et à l'opération d'investissement.

- **En ce qui concerne l'investisseur**, le dossier de demande devra contenir les nom et adresse du (des) investisseur(s) ainsi que toute information permettant de déterminer qui le **contrôle** en dernier ressort.

Si l'investisseur est une **personne morale**, il conviendra de fournir les renseignements permettant de déterminer les personnes ou les collectivités publiques **qui la contrôlent en dernier ressort**.

Dans le cas où l'investisseur serait une société cotée, la demande d'autorisation devra fournir l'identité des **principaux actionnaires** connus détenant une participation supérieure à 5% ainsi que la liste des membres du conseil d'administration et leur lieu de résidence.

Dans le cadre d'une opération réalisée par un fonds d'investissement, il conviendra de préciser l'identité du ou des gestionnaires de ce fonds et préciser par qui ils sont contrôlés.

Si l'investisseur est une personne physique, il conviendra de fournir tout document d'identité ainsi que les informations relatives à son lieu de résidence.

- **En ce qui concerne l'entreprise objet de l'investissement**, le dossier de demande devra contenir les informations permettant d'identifier l'entreprise cible (c'est-à-dire sa raison sociale, son adresse, copie de son extrait K-bis). Le dossier devra également contenir une description précise de l'activité exercée et notamment faire mention des données suivantes: chiffre d'affaires du dernier exercice clos ; résultat du dernier exercice clos ; nombre de salariés; description des principaux clients.
- **En ce qui concerne l'investissement**, le dossier devra contenir une description des modalités de l'opération dont : le montant total de l'opération ; la répartition du capital et des droits de vote avant et après l'opération déclarée ; mention d'une option éventuelle sur le solde du capital ; information sur les modalités de règlement (transfert ou non de fonds de l'étranger vers la France ou utilisation d'un autre moyen de règlement) ; des schémas décrivant la détention du capital et des droits de vote avant et après la réalisation de l'opération.

¹⁰⁸ Lienhardt et Rambaud, le contrôle des investissements étrangers art. préc.

¹⁰⁹ Ces développements sont tirés du site du Ministère de l'économie et des finances : https://www.tresor.economie.gouv.fr/Ressources/4204_Operation-soumise-a-autorisation-prealable-que-faire-

2.2.2.2. La durée de la procédure

Le ministre chargé de l'économie se prononce dans un délai de **deux mois à compter de la date de réception de la demande** d'autorisation. A défaut, l'autorisation est réputée acquise (art. R153-8 CMF).

2.2.2.3. L'instruction et l'issue de la procédure

Les autorités administratives compétentes pour instruire l'autorisation peuvent recourir à la **coopération internationale** pour **vérifier l'exactitude des informations** qui leur sont fournies par les investisseurs étrangers, notamment celles relatives à **l'origine des fonds** (art. R153-12 CMF).

Une fois l'instruction menée, le ministre chargé de l'économie¹¹⁰ dispose de **trois possibilités** :

- **Autoriser** l'opération (si l'opération soumise ne nécessite pas de condition particulière quant à la préservation des intérêts du pays).
- **Autoriser l'opération sous conditions**, permettant d'assurer la préservation des intérêts du pays. Les conditions sont fixées dans le respect du principe de proportionnalité (art. R153-9 CMF). Ces décisions n'ont pas à faire l'objet d'une motivation¹¹¹.
- **Refuser l'opération par décision motivée**, dans des conditions limitatives, **(i)** si les conditions ne permettent pas de garantir **les intérêts du pays** en matière d'ordre public, de sécurité publique et de défense nationale, le Ministre peut refuser l'autorisation préalable d'investissement ou **(ii)** si des doutes pèsent sur la **moralité ou l'honorabilité de l'investisseur** (art. R153-10 CMF), c'est-à-dire lorsqu'il y a un risque que l'investisseur commette des infractions liées, entre autres, au blanchiment d'argent, à la corruption et au terrorisme.

Il semblerait qu'en pratique, ces dispositions n'ont **jamais été actionnés formellement** pour bloquer un investissement étranger. Lorsqu'un investisseur ne répond pas aux critères, le Ministère de l'économie lui fait comprendre, **de manière informelle**, que son offre n'a aucune chance d'aboutir ou lui impose des conditions, par exemple sur l'emploi ou le dépôt des brevets, qu'il ne pourra pas tenir¹¹².

Il est à noter que ces décisions peuvent faire l'objet d'un recours **devant les juridictions administratives**.

2.2.3. Le suivi des conditions assortissant une autorisation

Le suivi des conditions dont est éventuellement assortie l'autorisation est coordonné par la **direction générale du Trésor**, qui associe l'ensemble des administrations intéressées. Il repose, au cas par cas et selon les conditions imposées, sur les éléments suivants : une analyse des rapports annuels, des **réunions de suivi avec l'entreprise**, un partage d'informations entre administration, les relations avec les points de contacts désignés par l'entreprise, la mise en œuvre de la protection du patrimoine scientifique et technique de la Nation, les liens avec les clients et les donneurs d'ordre, les visites de

¹¹⁰ Selon le magazine Challenges (A. Izambard, La vérité sur le ... « pillage » des Chinois, Challenges n° 558 - 22 mars 2018, p. 64-65), l'entité qui s'occupe des autorisations préalables est « Multicom 2 » qui comprend une quarantaine de personnes.

Selon le Journal du Dimanche (<https://www.lejdd.fr/economie/comment-la-france-surveille-les-investissements-chinois-3477320>), l'examen des demandes d'autorisation préalable concernant les investissements des Etats tiers est réalisé par le « Multicom 3 », un service de la direction du Trésor composé d'une dizaine de hauts fonctionnaires.

¹¹¹ Lienhardt et Rambaud, le contrôle des investissements étrangers art. préc.

¹¹² Ce sont des propos d'un ancien cadre du Ministère de l'économie qui sont rapportés chez : A. Izambard, La vérité sur le ... « pillage » des Chinois, Challenges n° 558 - 22 mars 2018, p. 64-65.

sites par les administrations centrales ou les DIRECCTE (Directions régionales des entreprises, de la concurrence, de la consommation, du travail et de l'emploi)¹¹³.

2.2.4. Les sanctions

Une opération réalisée **sans autorisation** préalable est **nulle de plein droit** (art. L151-4 CMF).

Dans le cas où un investisseur étranger n'aurait pas respecté la réglementation, soit en n'obtenant pas l'autorisation préalable requise, soit en ne respectant pas les conditions dont était assortie l'autorisation, le ministre dispose d'un **pouvoir d'injonction**. Il peut ainsi enjoindre à l'investisseur **de ne pas donner suite à l'opération**, de la **modifier** ou de faire **rétablir à ses frais la situation antérieure** (art. L151-3 CMF). Le **délai** imparti à l'investisseur pour rétablir la situation antérieure ne peut excéder **douze mois** (art. R153-11 CMF).

En cas de non-respect de l'injonction, le ministre peut prononcer une **sanction pécuniaire** pouvant aller jusqu'au **double du montant de l'investissement irrégulier** (art. L151-3 CMF).

Ces décisions sont susceptibles d'un **recours** devant les juridictions administratives (recours de plein contentieux).

3. Les réformes envisagées par le projet de Loi PACTE

Les réformes envisagées par le projet de loi PACTE ont notamment pour but de renforcer les prérogatives du ministre chargé de l'économie, de durcir les sanctions et de rendre possible la régularisation d'une opération effectuée sans autorisation.

3.1. Le renforcement des mesures de police administrative du ministre chargé de l'économie

3.1.1. L'hypothèse d'une opération réalisée sans autorisation

Lorsqu'une opération a été réalisée **sans autorisation**, le ministre pourra obtenir le **dépôt d'une demande d'autorisation**, la **modification de l'opération** ou le **rétablissement de la situation antérieure**.

Il pourra également **désigner un mandataire chargé de veiller à la protection des intérêts nationaux**. Ce mandataire peut faire obstacle à toute décision des organes sociaux de nature à porter atteinte à ces intérêts.

Si la protection des intérêts nationaux est compromise ou susceptible de l'être, le ministre chargé de l'économie pourra prendre **des mesures conservatoires** qui lui apparaissent nécessaires. Il pourra entre autres :

- **Suspendre les droits de vote** attachés à la fraction des actions ou des parts sociales dont la détention par l'investisseur aurait dû faire l'objet d'une autorisation préalable
- **Interdire ou limiter la distribution des dividendes** ou des rémunérations attachés aux actions ou aux parts sociales dont la détention par l'investisseur aurait dû faire l'objet d'une autorisation préalable ;

¹¹³ Etude d'impact sur le projet de loi relatif à la croissance et la transformation des entreprises, 20 juin 2018, p. 461. Cette étude est disponible sous <http://www.assemblee-nationale.fr/15/projets/pl1088-ei.asp>

- Suspendre, restreindre ou interdire temporairement la libre disposition de tout ou partie des actifs.

3.1.2. L'hypothèse du non-respect des conditions de l'autorisation

Lorsqu'un investisseur **ne respecte pas les conditions de l'autorisation**, le ministre chargé de l'économie pourra prendre **une ou plusieurs** des mesures suivantes :

- 1° **Retrait de l'autorisation.**
- 2° **Injonction** à l'investisseur auquel incombait l'obligation non exécutée de respecter dans un **délai** qu'il fixe les conditions figurant dans l'autorisation.
- 3° Injonction à l'investisseur auquel incombait l'obligation non exécutée d'exécuter dans un délai qu'il fixe des prescriptions en **substitution de l'obligation non exécutée**, y compris le rétablissement de la situation antérieure au non-respect de cette obligation ou la cession de tout ou partie des activités en cause.

Ces injonctions peuvent être assorties d'une **astreinte**. Le ministre chargé de l'économie pourra également prendre les **mesures conservatoires** nécessaires.

3.2. Le durcissement des sanctions

Dans le système actuel, **l'absence de véritables sanctions** quand les investisseurs étrangers manquent à leurs engagements, en termes d'emplois ou d'investissements est généralement considérée comme étant la **principale faille du système** français de contrôle des investissements étrangers¹¹⁴. C'est pour cela que le projet de loi PACTE prévoit de modifier le quantum de la sanction et d'élargir les manquements pouvant faire l'objet d'une sanction administrative.

3.2.1. La modification du quantum de la sanction

En l'état actuel, en cas de non-respect d'une injonction prononcée par le ministre de l'économie, celui-ci peut prononcer une sanction pécuniaire d'un montant égal au maximum au **double du montant de l'investissement**. Ce quantum ne semble pas adapté pour les opérations réalisées pour un faible montant.

L'option retenue par le projet de loi PACTE consiste à adjoindre au plafond actuel (double du montant de l'investissement) **deux autres plafonds** : **l'un en valeur absolue** (un million pour les **personnes physiques** et cinq millions pour les **personnes morales**) et **l'autre équivalent à 10 % du chiffre d'affaires annuel de la société cible**. Ce dernier plafond permettrait de sanctionner plus lourdement les investisseurs ayant procédé à des investissements dans des entreprises françaises génératrices d'un fort chiffre d'affaires.

3.2.2. L'élargissement des manquements pouvant faire l'objet d'une sanction administrative

En l'état du droit, **seul le non-respect d'une injonction** peut aujourd'hui faire l'objet d'une sanction administrative pécuniaire. Le projet de loi PACTE envisage d'élargir les manquements pouvant faire l'objet d'une sanction administrative par le ministre de l'économie. Ainsi, pourront être également sanctionnés : la réalisation d'un investissement **sans autorisation préalable**, l'obtention par **fraude** d'une autorisation préalable, la méconnaissance des conditions dont est assortie l'autorisation.

¹¹⁴ C'est du moins l'opinion d'un responsable français dont les propos sont rapportés chez : A. Izambard, La vérité sur le ... « pillage » des Chinois, Challenges n° 558 - 22 mars 2018, p. 64-65.

Avant d'infliger la sanction pécuniaire, le ministre doit mettre l'investisseur à même de **présenter ses observations** sur les faits qui lui sont reprochés dans un délai minimal de quinze jours.

3.3. La possibilité de régulariser une opération effectuée sans autorisation

Selon le cadre juridique actuel du traitement des opérations réalisées sans autorisation préalable, une telle opération est nulle de plein droit, sans possibilité de régularisation. Ainsi, un tiers intéressé pourrait se prévaloir de cette nullité s'il a connaissance du manquement au regard de la réglementation des investissements étrangers en France, alors même que l'Etat n'aurait pas estimé utile de solliciter le rétablissement de la situation antérieure, mais préféré protéger ses intérêts en imposant des conditions.

Le projet de loi PACTE vise à rendre possible la délivrance par le Ministre d'une **autorisation *a posteriori***, lui permettant de fixer des conditions, **tout en pouvant sanctionner l'investisseur** qui n'aurait pas sollicité d'autorisation préalable.

3.4. Création d'une délégation parlementaire à la sécurité économique

Le projet de loi PACTE prévoit de constituer une **délégation parlementaire à la sécurité économique**, commune à l'Assemblée nationale et au Sénat. Cette délégation est composée de huit députés et de huit sénateurs.

Cette délégation parlementaire à la sécurité économique aura, entre autres, pour mission de **suivre l'action du Gouvernement en matière de contrôle des investissements**. À cette fin, le Gouvernement lui transmettra chaque année un rapport comportant des informations relatives à la procédure d'autorisation préalable des investissements étrangers, comprenant notamment des éléments détaillés relatifs au **nombre de demandes d'autorisation préalables** adressées au ministre chargé de l'économie, **de refus d'autorisation, d'opérations autorisées, d'opérations autorisées assorties de conditions**, ainsi que des éléments relatifs à l'exercice par le ministre du **pouvoir de sanction**, à l'exclusion des éléments permettant l'identification des personnes physiques ou morales concernées par la procédure d'autorisation préalable des investissements étrangers.

Cette délégation parlementaire pourra **entendre le Premier ministre**, les ministres compétents, le commissaire à l'information stratégique et à la sécurité économiques et les directeurs des administrations centrales concernées, accompagnés des collaborateurs de leur choix.

Il est à noter que les **travaux** de la délégation parlementaire à la sécurité économique ne sont **pas rendus publics**.

4. La pratique française du contrôle des investissements étrangers

Nous n'avons pas trouvé de statistiques précises sur le nombre d'autorisations préalables refusées. Le ministre de l'économie Bruno Le Maire a déclaré en janvier 2018 qu'il « bloquait beaucoup » d'investissements chinois dans les secteurs stratégiques dont il avait qualifié certains de « **pillage** »¹¹⁵. Néanmoins, un député a déclaré : « A ma connaissance il n'en a jamais bloqué aucun »¹¹⁶. Il reproche,

¹¹⁵ A. Izambard, La vérité sur le ... « pillage » des Chinois, Challenges n° 558 - 22 mars 2018, p. 64-65.

¹¹⁶ M. Kagni, Loi pacte : vers un contrôle accru des investissements étrangers en France ? Article disponible sous <http://lcp.fr/actualites/loi-pacte-vers-un-controle-accru-des-investissements-etrangers-en-france>

en tout cas, au ministère de l'économie sa « **doctrine floue** » sur le contrôle des investissements étrangers¹¹⁷. C'est pour cela que ce député souhaite l'instauration d'un contrôle parlementaire pour avoir l'assurance que les pouvoirs que la loi confie au ministre de l'Economie sont effectivement exercés¹¹⁸ (ce que prévoit le projet de loi PACTE). Cela dit, il semblerait que même si le décret de 2014 n'est pas mis en œuvre, il permettrait en revanche aux autorités françaises de **négocié**¹¹⁹.

V. aussi les affirmations d'un président du Think Tank *Asia Centre* selon lequel « il n'y a pas de doctrine claire sur la notion d'intérêt stratégique. Du coup, on n'a jamais empêché une opération avec le décret » de 2014.

Ces affirmations sont rapportées chez : B. Basini, Comment la France surveille les investissements chinois, *Le Journal du Dimanche* 29 oct. 2017, disponible sous <https://www.lejdd.fr/economie/comment-la-france-surveille-les-investissements-chinois-3477320>

¹¹⁷ Olivier Marleix, Investissements étrangers : la doctrine floue de Bercy, *Les Echos*, no. 22755 Idées & Débats, mercredi 8 août 2018, p. 7. Disponible sous https://nouveau.europresse.com/Link/lausanneAT_1/news%c2%b720180808%c2%b7EC%c2%b70302085996943

¹¹⁸ M. Kagni, Loi PACTE, art. préc.

¹¹⁹ L. Martinet, Investissements chinois: comment la France fait le tri, *L'Express* 10 janvier 2018, disponible sous https://lexpansion.lexpress.fr/actualite-economique/investissements-chinois-comment-la-france-fait-le-tri_1974856.html

E. GERMANY

1. Einleitung

Auch Deutschland bildet keine Ausnahme im aktuellen Trend verstärkter Investitionskontrollen. Traditionell eine sehr liberale Marktwirtschaft und grundsätzlich dem in § 1 des **Aussenwirtschaftsgesetzes** verankerten Grundsatz der Freiheit des Aussenwirtschaftsverkehrs verschrieben, entwickeln sich Praxis und Gesetz insbesondere seit dem letzten Jahr hin zu erweiterten Befugnissen der Behörden und zu gründlicheren Kontrollen. Das Aussenwirtschaftsgesetz wird durch die **Aussenwirtschaftsverordnung** konkretisiert, welche die Investitionskontrollverfahren regelt. Diese wurde zuletzt im Dezember 2018 dahingehend verändert, dass die Prüfeintrittsschwelle bei ausländischen Investitionen herabgesenkt und die Kontrollbefugnisse der Behörden mithin erweitert wurden.¹²⁰

Im deutschen Recht werden zwei Investitionskontrollverfahren unterschieden, die beide bundeseinheitlich im Aussenwirtschaftsgesetz und der Aussenwirtschaftsverordnung geregelt sind. Sie orientieren sich an den Vorgaben des **Gemeinschaftsrechts der Europäischen Union (EU)**, insbesondere zur Niederlassungs- und Kapitalverkehrsfreiheit.¹²¹ Seit 2004 gibt es die **sektorspezifische Investitionskontrolle**, welche allein im militärbezogenen Sektor beim Erwerb bestimmter Rüstungs-, Kryptotechnologie- und Sicherheitsunternehmen Anwendung findet und die wesentlichen Sicherheitsinteressen und auswärtigen Beziehungen der Bundesrepublik, sowie das friedliche Zusammenleben der Völker schützen soll.¹²² Sie erfasst jeden vollständigen oder anteiligen Erwerb eines inländischen Unternehmens durch einen Ausländer.

Im Jahr 2009 wurde die **sektorübergreifende Investitionskontrolle** eingeführt, welche branchenunabhängig Anwendung findet und Gefahren für die öffentliche Ordnung oder Sicherheit der Bundesrepublik abwenden soll.¹²³ Sie umfasst grundsätzlich nur vollständige oder anteilige Erwerbe inländischer Unternehmen durch Ausländer ausserhalb der EU und der Europäischen Freihandelsassoziation (EFTA)¹²⁴.

Die Verfahren unterscheiden sich in Bezug auf die Meldepflichten, die zivilrechtlichen Auswirkungen der Investitionsprüfung, die Verfahrensfristen, sowie die massgeblichen Kriterien. Dabei ist die

¹²⁰ Pressemitteilung des Bundesministerium für Wirtschaft und Energie vom 19.12.2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2018/20181219-staerkung-unserer-nationalen-sicherheit-durch-verbesserte-investitionspruefung.html> (20.12.2018); Zwölfte Verordnung zur Änderung der Aussenwirtschaftsverordnung, beschlossen am 19.12.2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zwoelfte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=4 (20.12.2018).

¹²¹ Begründung des Regierungsentwurfs zum 13. Gesetz zur Änderung des Aussenwirtschaftsgesetzes und der Aussenwirtschaftsverordnung, Bundestags-Drucksache 16/10730 vom 30.10.2008, verfügbar unter <http://dip21.bundestag.de/dip21/btd/16/107/1610730.pdf> (21.11.2018), S. 10 f.

¹²² § 4 Absätze 1 Nummer 1-3 Aussenwirtschaftsgesetz (AWG), verfügbar unter https://www.gesetze-im-internet.de/awg_2013/_4.html (21.11.2018) und §§ 60-62 Aussenwirtschaftsverordnung (AWV), verfügbar unter https://www.gesetze-im-internet.de/awv_2013/BJNR286500013.html#BJNR286500013BJNG002100000 (29.11.2018).

¹²³ § 4 Absatz 1 Nummer 4 Aussenwirtschaftsgesetz (AWG), verfügbar unter https://www.gesetze-im-internet.de/awg_2013/_4.html (21.11.2018) und §§ 55-59 Aussenwirtschaftsverordnung (AWV), verfügbar unter https://www.gesetze-im-internet.de/awv_2013/BJNR286500013.html#BJNR286500013BJNG002000000 (29.11.2018).

¹²⁴ EU- und EFTA-Ausländer sind gleichgestellt, § 55 Absatz 2 Aussenwirtschaftsverordnung (AWV).

sektorspezifische Kontrolle das in den ihm unterliegenden Sektoren stets vorrangig anwendbare, speziellere Verfahren.¹²⁵

Beide Investitionskontrollverfahren haben einen **zweistufigen Aufbau**. In der **ersten Phase** informiert sich das **Bundesministerium für Wirtschaft und Energie** (im Folgenden Wirtschaftsministerium) über den Erwerb und **entscheidet**, ob es von seiner Prüfungsbefugnis Gebrauch machen und ein Prüfverfahren eröffnen möchte. In der **zweiten Phase** findet die eigentliche Prüfung statt und das Wirtschaftsministerium **entscheidet, ob der Erwerb untersagt oder mit Auflagen versehen werden muss**.¹²⁶ Der genaue Prüfungsablauf hängt vom anwendbaren Verfahren ab.

2. Die sektorspezifische Investitionskontrolle

2.1. Meldepflicht (Antrag auf Genehmigung)

Die sektorspezifische Investitionskontrolle wird angewandt, wenn ein ausländischer Investor unmittelbar oder mittelbar mindestens 10% der Stimmrechte an einem inländischen Unternehmen erwirbt, das in einem besonders sensiblen Bereich der Rüstungs-, Sicherheits- und Kryptotechnologie tätig ist, etwa in der Herstellung oder Entwicklung von Kriegswaffen. Diesem Verfahren unterliegen **auch Investoren aus dem EU-Ausland**.¹²⁷

2.1.1. Meldepflichtiger Schwellenwert

Im Bereich der sektorspezifischen Investitionskontrolle besteht eine **generelle Meldepflicht**.¹²⁸ Bisher musste jeder ausländische Erwerbsvorgang an einem inländischen, im Rüstungs- oder verteidigungsrelevanten IT-Sicherheitsbereich tätigen Unternehmen, der zu einer mittelbaren oder unmittelbaren Kontrolle von mehr als 25 % der Stimmrechte führte, gemeldet werden.¹²⁹ Nach neuester Regulierung wurde dieser Schwellenwert auf 10 %¹³⁰ der Stimmrechte gesenkt.¹³¹

2.1.2. Meldeverfahren

Meldepflichtig ist ausschliesslich der **unmittelbare Erwerber**.¹³² In der Meldung sind der geplante Erwerb, der Erwerber und das zu erwerbende inländische Unternehmen, sowie ihre jeweiligen

¹²⁵ M. Mauschi-Liotto, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 55 Rn. 6.

¹²⁶ M. Mauschi-Liotto, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 55 Rn. 9 und § 60 Rn. 5.

¹²⁷ §§ 60 ff. Aussenwirtschaftsverordnung (AWV).

¹²⁸ §§ 60-62 Aussenwirtschaftsverordnung (AWV); formell-gesetzliche Grundlage sind die § 4 Absatz 1 Nr. 1 bis 3 Aussenwirtschaftsgesetz (AWG).

¹²⁹ § 60 Absatz 3 Aussenwirtschaftsverordnung (AWV). Dieser verweist auf die abschliessende Auflistung der besonders sensiblen Bereiche in § 60 Absatz 1 Aussenwirtschaftsverordnung (AWV).

¹³⁰ § 60 a Aussenwirtschaftsverordnung (AWV).

¹³¹ Siehe Verordnung der Bundesregierung vom 19.12.2018, Zwölfte Verordnung zur Änderung der Aussenwirtschaftsverordnung, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zwoelfte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=4 (20.12.18); weitere Informationen in der Pressemitteilung des Bundeswirtschaftsministeriums vom 19.12.2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2018/20181219-staerkung-unserer-nationalen-sicherheit-durch-verbesserte-investitionspruefung.html> (20.12.2018).

¹³² § 60 Absatz 3 Aussenwirtschaftsverordnung (AWV).

Geschäftsfelder in den Grundzügen schriftlich und in deutscher Sprache¹³³ darzustellen. Die Meldung ist *ex ante*, also vor dem Vertragsschluss vorzunehmen. Es sind **keine Sanktionen** gegen einen Verstoss gegen die Meldepflicht vorgesehen.¹³⁴

2.2. Überprüfungsprozess

2.2.1. Auslösung des Prüfungs- und Begutachtungsprozesses

Die **Prüfungsbefugnis** im sektorspezifischen Verfahren setzt voraus, dass ein Ausländer ein sektorspezifisches Unternehmen oder eine Beteiligung an diesem erwirbt und dadurch wesentliche Sicherheitsinteressen der Bundesrepublik gefährdet sind.

Die Eröffnung des vertieften Prüfverfahrens ist **binnen drei Monaten ab Mitteilung des Erwerbers** über den Vertragsschluss möglich.¹³⁵ Phase 1 beginnt also mit Meldung durch den unmittelbaren Erwerber. Wenn der Erwerb nicht gemeldet wird, wird auch die Frist nicht in Gang gesetzt und das Wirtschaftsministerium kann von Amts wegen jederzeit eine Prüfung vornehmen. Der schuldrechtliche Vertrag bleibt bis zur Freigabe des Erwerbs durch das Ministerium **schwebend unwirksam**.¹³⁶ Wenn das Wirtschaftsministerium innerhalb der drei Monate nicht tätig wird indem es ein förmliches Prüfverfahren einleitet, dann greift eine **Genehmigungsfiktion** und der Erwerb gilt als freigegeben.¹³⁷

2.2.2. Auswahl- und Überprüfungsentscheidung

Im **sektorspezifischen Verfahren** ist der Prüfungsmassstab allein der **Schutz der wesentlichen Sicherheitsinteressen**, der **Schutz der auswärtigen Beziehungen**, sowie der **Schutz des friedlichen Zusammenlebens der Völker**.¹³⁸ Die Beeinträchtigung **wirtschaftlicher, arbeitsmarktpolitischer** oder **finanzieller Interessen** des Staates genügen hingegen nicht.

Der Begriff der «wesentlichen Sicherheitsinteressen» ist ein dem EU-Recht entlehnter unbestimmter Rechtsbegriff. Wesentliche Sicherheitsinteressen gelten vor allem dann als gefährdet, wenn die **sicherheitspolitischen Interessen** oder die **militärische Sicherheitsvorsorge** der Bundesrepublik beeinträchtigt würden. Insbesondere darf die Veräusserung nicht die Verfügungsmöglichkeiten über **Kernfähigkeiten der deutschen Rüstungswirtschaft** oder die Vertrauenswürdigkeit der vom Staat in sicherheitskritischen Bereichen eingesetzten **Kryptosysteme** gefährden.¹³⁹

Das Wirtschaftsministerium verfügt bei der Ausübung sowohl der Prüfungsbefugnis, als auch der Untersagungs- und Anordnungsbefugnis über einen weiten Beurteilungsspielraum. Bei der Auslegung

¹³³ § 23 Verwaltungsverfahrensgesetz (VwVfG) und § 55 Absatz 4, § 60 Absatz 3 Aussenwirtschaftsverordnung (AWV).

¹³⁴ J. Bonhage & V. Jungkind, Germany, in C.S. Goldman QC (Hrsg.), The Foreign Investment Regulation Review, 8. Aufl., London 2018, S. 82 ff., S. 92.

¹³⁵ § 61 Satz 2 Aussenwirtschaftsverordnung (AWV). Vor der Gesetzesänderung 2017 belief sich die Frist auf einen Monat.

¹³⁶ Bundesministerium für Wirtschaft und Energie, FAQ zur ausenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?blob=publicationFile&v=4> (21.11.2018), S. 4.

¹³⁷ § 61 Satz 2 Aussenwirtschaftsverordnung (AWV).

¹³⁸ § 4 Absatz 1 Nr. 1-3 Aussenwirtschaftsgesetz (AWG), § 60 Absatz 1 Aussenwirtschaftsverordnung (AWV).

¹³⁹ Siehe dazu die Begründung zum Gesetzentwurf der Bundesregierung eines Elften Gesetzes zur Änderung des Aussenwirtschaftsgesetzes und der Aussenwirtschaftsverordnung, Bundesrats-Drucksache 5/04, vom 02.01.2004, verfügbar unter <http://dipbt.bundestag.de/dip21/brd/2004/0005-04.pdf> (21.11.2018), S. 5.

des Begriffs einer Gefährdung wesentlicher Sicherheitsinteressen Deutschlands muss eine umfangreiche Prognose erstellt werden, bei der keine sachfremden, willkürlichen oder sonst unsachlichen Erwägungen berücksichtigt werden dürfen.¹⁴⁰

2.2.3. Verfahren der Auswahl oder Überprüfung

Im sektorspezifischen Verfahren kann sich das Wirtschaftsministerium in Abstimmung mit dem Auswärtigen Amt¹⁴¹ und dem Verteidigungsministerium¹⁴² innerhalb von **drei Monaten** ab Eingang der Meldung dazu entschließen, eine vertiefte Prüfung einzuleiten. Über die Nichteinleitung eines förmlichen Prüfverfahrens werden die am Erwerb Beteiligten in der Regel schriftlich nur informiert, wenn ein Antrag auf Freigabe gestellt wurde.¹⁴³

Die vertiefte Prüfung stellt die **zweite Phase** der Prüfverfahrens dar. Mit Eingang der vollständigen Unterlagen über den Erwerbsvorgang beginnt die **Untersagungsfrist** zu laufen. Massgeblicher Zeitpunkt ist also das letzte Einreichen von Unterlagen, auf das keine Nachforderung mehr folgt. Im sektorspezifischen Verfahren läuft die Untersagungsfrist **drei Monate** nach Eingang aller Unterlagen ab.¹⁴⁴ Nach Ablauf der Untersagungsfristen greift eine **Genehmigungsfiktion** und der Erwerb gilt als freigegeben. Für den Fall, dass das Wirtschaftsministerium mit dem Erwerber in **Verhandlungen über den Abschluss eines öffentlich-rechtlichen Vertrages** tritt, ist der Fristablauf für die Dauer der Verhandlungen gehemmt.¹⁴⁵ Nach Verhandlungsabschluss setzt sich der Fristablauf fort.

Das vertiefte Prüfverfahren endet im sektorspezifischen Verfahren immer entweder durch **Freigabe**, durch **Wegfall der Eingriffsbefugnis** oder durch **Untersagung**.¹⁴⁶ Die Eingriffsbefugnis fällt insbesondere zeitlich bedingt durch Ablauf der Eingriffsfrist weg. Die Freigabe kann gegebenenfalls nach vorherigem Abschluss eines öffentlich-rechtlichen Vertrages oder versehen mit Auflagen erlassen werden. In diesem Verfahren kann das Ministerium Transaktionen allein, ohne Zustimmung der Bundesregierung oder Beteiligung anderer Ministerien, untersagen, beziehungsweise unter Auflagen genehmigen.

Im sektorspezifischen Verfahren gelten Erwerbe zunächst als **schwebend unwirksam**. Sie sind unter der aufschiebenden Bedingung geschlossen, dass die Genehmigung noch erteilt werden wird. Erst durch die Freigabe werden sie wirksam. Durch die Untersagung wird die Unwirksamkeit bestätigt.

¹⁴⁰ M. Mauschi-Liotto, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 60 Rn. 26.

¹⁴¹ So der Name des deutschen Bundesministeriums für auswärtige Angelegenheiten.

¹⁴² M. Mauschi-Liotto, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 60 Rn. 5.

¹⁴³ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?blob=publicationFile&v=4> (21.11.2018), S. 5.

¹⁴⁴ § 62 Absatz 1 Aussenwirtschaftsverordnung (AWV).

¹⁴⁵ § 59 Absatz 2 Aussenwirtschaftsverordnung (AWV), M. Mauschi-Liotto, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 62, Rn. 10.

¹⁴⁶ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?blob=publicationFile&v=4> (21.11.2018), S. 7.

3. Die sektorübergreifende Investitionskontrolle

3.1. Meldepflicht (Antrag auf Genehmigung)

Die **sektorübergreifende Investitionskontrolle** betrifft alle Investoren, die ihren Sitz weder in der EU noch in der EFTA haben und die unmittelbar oder mittelbar mindestens 25 % der Stimmrechte an einem inländischen Unternehmen, beziehungsweise 10 % der Stimmrechte an einem inländischen Unternehmen, das in einer kritischen Infrastruktur tätig ist, erwerben. Dabei gilt keine sektorale Beschränkung, die Kontrolle ist **branchenunabhängig**.¹⁴⁷

Dieses Verfahren ist **ausnahmsweise auch auf Erwerbe durch EU-/EFTA-Mitglieder anwendbar**, wenn es Anzeichen dafür gibt, dass eine **missbräuchliche Gestaltung** oder ein **Umgehungsgeschäft** vorgenommen wurden.¹⁴⁸ Dabei genügt es, wenn dies nur unter anderem in der Absicht geschieht, einer Investitionskontrolle zu entgehen. Als Anzeichen für ein solches Umgehungsgeschäft gilt insbesondere, wenn der unmittelbare Erwerber mit Ausnahme des in Frage stehenden Erwerbs keiner nennenswerten eigenständigen Wirtschaftstätigkeit nachgeht oder in der EU keine auf Dauer angelegte eigene Präsenz in Gestalt von Geschäftsräumen, Personal oder Ausrüstungsgegenständen unterhält. Zweigniederlassungen und Betriebsstätten eines unionsfremden Erwerbers gelten nicht als unionsansässig. Trifft eines der Beispiele zu, ist die Vermutung eines Umgehungsgeschäftes nicht widerlegbar. Andere Umstände können ebenfalls Anzeichen für eine rechtsmissbräuchliche Gestaltung sein. Sie sind dann jedoch der Gegendarstellung zugänglich, also widerlegbar.¹⁴⁹

3.1.1. Meldepflichtiger Schwellenwert

Eine Meldepflicht besteht im **sektorübergreifenden Verfahren** grundsätzlich für alle Erwerbsvorgänge, durch die der unionsfremde Investor unmittelbar oder mittelbar die Kontrolle über mindestens 25 % der Stimmrechte an einem inländischen Unternehmen erlangt.¹⁵⁰ Bei einem Unternehmen, das eine näher definierte **kritische** oder **andere zivile sicherheitsrelevante Infrastruktur** betreibt oder **bestimmte Leistungen im Zusammenhang mit dem Betrieb einer solchen Infrastruktur erbringt**,¹⁵¹ wurde der Schwellenwert im Dezember 2018 auf **10 % der Stimmrechte** herabgesenkt.¹⁵² Zu diesen für die öffentliche Ordnung oder Sicherheit besonders relevanten Unternehmen gehören solche der Sektoren Energie, Informationstechnik und Telekommunikation, Transport und Verkehr, öffentliche Gesundheit, Wasser, Ernährung sowie Finanz- und Versicherungswesen. Nach der neuesten Regelung

¹⁴⁷ §§ 55 ff. Aussenwirtschaftsverordnung (AWV).

¹⁴⁸ § 55 Absatz 2 Aussenwirtschaftsverordnung (AWV).

¹⁴⁹ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=4 (21.11.2018), S. 8.

¹⁵⁰ § 56 Absatz 1 Nummer 2 Aussenwirtschaftsverordnung (AWV).

¹⁵¹ § 55 Absatz 4, Absatz 1 Satz 2 Aussenwirtschaftsverordnung (AWV). Bundestags-Drucksache 18/13417 vom 25.08.2017, verfügbar unter <http://dip21.bundestag.de/dip21/btd/18/134/1813417.pdf> (21.11.2018), S. 10. Der Begriff «kritische Infrastrukturen» ist dem Gesetz über das Bundesamt für Sicherheit in der Informationstechnik (BSIG) entlehnt und wird in der zugehörigen Verordnung zur Bestimmung Kritischer Infrastrukturen (BSI-KritisV) näher definiert.

¹⁵² § 56 Absatz 1 Nummer 1 Aussenwirtschaftsverordnung (AWV); siehe Verordnung der Bundesregierung, Zwölfte Verordnung zur Änderung der Aussenwirtschaftsverordnung, https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zwoelfte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?__blob=publicationFile&v=4 (20.12.18).

werden auch ausländische Investitionen in Unternehmen der Medienwirtschaft als eine potentielle Gefährdung der öffentlichen Ordnung oder Sicherheit eingestuft.¹⁵³

Erweitert wird dieser Kreis insbesondere um Unternehmen, die **branchenspezifisch Software für diese Unternehmen** herstellen, sowie näher bestimmte *Cloud-Computing*-Anbieter und mit der Telematikinfrastruktur beschäftigte Unternehmen.¹⁵⁴ Betroffen sind jedoch nur solche Hersteller, deren *Software* speziell für den Einsatz in einer kritischen Infrastruktur erstellt oder entsprechend modifiziert wurde.¹⁵⁵ Im Übrigen besteht keine Genehmigungs- oder Anmeldepflicht für Investoren.¹⁵⁶

3.1.2. Meldeverfahren

Im sektorübergreifenden Verfahren ist **nicht näher definiert, wer der Meldepflicht** nachkommen muss.¹⁵⁷ Die Meldung kann daher sowohl vom Zielunternehmen, als auch vom Erwerber oder Dritten vorgenommen werden. Es sind **keine Sanktionen** gegen einen Verstoß gegen die Meldepflicht vorgesehen.¹⁵⁸

3.2. Überprüfungsprozess

3.2.1. Auslösung des Prüfungsprozesses

Die **Prüfungsbefugnis** im sektorübergreifenden Verfahren setzt voraus, dass ein Unternehmensbeziehungsweise Beteiligungserwerb durch einen EU/EFTA-Ausländer ein inländisches Unternehmen betrifft und die **öffentliche Ordnung oder Sicherheit** der Bundesrepublik **gefährdet**.

Die Eröffnung eines sektorübergreifenden Prüfverfahrens ist grundsätzlich **binnen drei Monaten ab positiver Kenntnis des Wirtschaftsministeriums vom Vertragsschluss** möglich, längstens aber innerhalb **von fünf Jahren ab Vertragsschluss**.¹⁵⁹

Eine verkürzte Frist von nur **zwei Monaten** gilt, wenn der Erwerber einen **Antrag auf Ausstellung einer Unbedenklichkeitsbescheinigung** stellt.¹⁶⁰

Innerhalb dieser Frist von entweder zwei oder drei Monaten kann das Wirtschaftsministerium auf Basis einer ersten Analyse entscheiden, ob es den Erwerb unter dem Gesichtspunkt einer Gefährdung der öffentlichen Ordnung oder Sicherheit prüfen möchte (Phase 1). An eine schriftliche Meldung des

¹⁵³ Siehe Verordnung der Bundesregierung, Zwölfte Verordnung zur Änderung der Aussenwirtschaftsverordnung, supra; § 55 Absatz 1 Nummer 6 Aussenwirtschaftsverordnung (AWV).

¹⁵⁴ § 55 Absatz 1 Aussenwirtschaftsverordnung (AWV).

¹⁵⁵ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=4 (21.11.2018), S. 2.

¹⁵⁶ Die Aufzählung der Fallgruppen in § 55 Absatz 1 Aussenwirtschaftsverordnung ist bezüglich der Meldefrist abschliessend. Als Konkretisierung des Begriffs „öffentliche Ordnung oder Sicherheit“ ist sie hingegen lediglich beispielhaft. Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=4 (21.11.2018), S. 3.

¹⁵⁷ § 55 Absatz 4 Aussenwirtschaftsverordnung (AWV). Auch diese Meldung muss schriftlich und in deutscher Sprache verfasst sein. Id.

¹⁵⁸ J. Bonhage & V. Jungkind, Germany, in C.S. Goldman QC (Hrsg.), The Foreign Investment Regulation Review, 8. Aufl., London 2018, S. 82 ff., S. 92.

¹⁵⁹ § 55 Absatz 3 Satz 1 und Satz 6 Aussenwirtschaftsverordnung (AWV).

¹⁶⁰ § 58 Absatz 2 Aussenwirtschaftsverordnung (AWV).

Erwerbs schliesst sich daher nicht automatisch die Einleitung des Investitionsprüfverfahrens an. Vielmehr entscheidet das Wirtschaftsministerium in **Abstimmung mit den fachlich betroffenen Ressorts** der Bundesregierung auf Grundlage der vorliegenden Informationen jeden **Einzelfall**.¹⁶¹ In den meisten Fällen wird kein Prüfverfahren eröffnet.

Entschliesst sich das Ministerium aber zur Eröffnung eines vertieften Prüfverfahrens (Phase 2), muss es dem unmittelbaren Erwerber und dem betroffenen inländischen Unternehmen die Eröffnung des Prüfverfahrens innerhalb der Frist mitteilen. Mit dieser Mitteilung ist die Prüfung eröffnet. Nach Ablauf der Dreimonatsfrist (oder der Fünfjahresfrist) darf das Wirtschaftsministerium die Transaktion nicht mehr prüfen oder verbieten.¹⁶²

Ab Eröffnung der formellen Prüfung sind der Erwerber sowie alle anderen betroffenen Personen oder Unternehmen verpflichtet, dem Ministerium **vollständige Unterlagen** über den Erwerb zu übermitteln.¹⁶³ Die zu übermittelnden Unterlagen bestimmt das Ministerium per im Bundesanzeiger veröffentlichter **Allgemeinverfügung**. Dazu gehören insbesondere detaillierte Informationen über den Käufer, das Zielunternehmen, seine Geschäftstätigkeit, Beteiligungen, Kunden, Verträge mit öffentlichen Stellen und Marktanteile.¹⁶⁴ Das Ministerium kann zudem ergänzende Informationen nachfordern. Bestätigungen über den Zugang von Unterlagen erteilt es ausschliesslich auf entsprechende Aufforderung hin.¹⁶⁵

Daneben hat der Erwerber die Möglichkeit, das **Prüfverfahren zu beschleunigen**, indem er die vollständigen Unterlagen einreicht und einen schriftlichen Antrag auf Ausstellung einer **Unbedenklichkeitsbescheinigung** stellt.¹⁶⁶ Der Antrag unterliegt keiner Frist und kann schon früh gestellt werden, nämlich sobald der Erwerber die verlangten Unterlagen vorlegen kann. Dies ist in der Regel der Fall, wenn die Vertragsverhandlungen ein fortgeschrittenes Stadium erreicht haben. Spätere Abweichungen des tatsächlichen Erwerbsvorganges von den Darstellungen im Antrag gehen zu Lasten des Antragstellers.¹⁶⁷ In dem Antrag sind der geplante Erwerb, der Erwerber und das zu erwerbende inländische Unternehmen, sowie ihre jeweiligen Geschäftsfelder in den Grundzügen darzustellen.¹⁶⁸ Ein Antrag auf Ausstellung einer Unbedenklichkeitsbescheinigung beinhaltet automatisch auch eine Mitteilung im Sinne der gesetzlichen Meldepflicht.

¹⁶¹ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=4 (21.11.2018), S. 4.

¹⁶² § 55 Absatz 3 Satz 1 Aussenwirtschaftsverordnung (AWV).

¹⁶³ Vor der Reform 2017 war das Wirtschaftsministerium lediglich berechtigt, von dem Erwerber Informationen zu verlangen. Dieser musste die Informationen dann regelmässig bei den verschiedenen Beteiligten, insbesondere dem Verkäufer erfragen. § 57 Aussenwirtschaftsverordnung (AWV).

¹⁶⁴ § 57 Aussenwirtschaftsverordnung (AWV) und die Allgemeinverfügung zu den gemäss § 57 der Aussenwirtschaftsverordnung einzureichenden Unterlagen (sektorübergreifende Prüfung), Amtlicher Teil des Bundesanzeigers (BAnz AT) vom 06.09.2013.

¹⁶⁵ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=4 (21.11.2018), S. 5.

¹⁶⁶ § 58 Absatz 1 Aussenwirtschaftsverordnung (AWV).

¹⁶⁷ Bundesministerium für Wirtschaft und Energie, FAQ zur aussenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?__blob=publicationFile&v=4 (21.11.2018), S. 7.

¹⁶⁸ § 55 Absatz 4 Aussenwirtschaftsverordnung (AWV).

Das Wirtschaftsministerium führt auf einen Antrag auf Unbedenklichkeitsbescheinigung hin eine **kursorische Vorprüfung** durch. Wenn keine Bedenken im Hinblick auf eine Gefährdung der öffentlichen Ordnung oder Sicherheit der Bundesrepublik bestehen beziehungsweise die Beteiligungsschwelle von 25 % nicht überschritten ist, dann hat der Erwerber einen Rechtsanspruch auf Ausstellung einer Unbedenklichkeitsbescheinigung.¹⁶⁹ Üblicherweise lässt das Wirtschaftsministerium die Frist auch nicht einfach verstreichen, um die Genehmigungsfiktion auszulösen, sondern stellt frühzeitig eine Unbedenklichkeitsbescheinigung aus. Dies gilt insbesondere dann, wenn keine offensichtlichen Bedenken bestehen, wenn also das Zielunternehmen in keinem für die öffentliche Ordnung oder Sicherheit relevanten Bereich aktiv ist.

Eröffnet das Ministerium nicht innerhalb von **zwei Monaten** nach Eingang des Antrags ein Prüfverfahren, so greift zu Gunsten des Erwerbers eine **Genehmigungsfiktion** und die Unbedenklichkeitsbescheinigung gilt als erteilt.¹⁷⁰ Damit ist die Frist zur Prüfungseinleitung kürzer als die dreimonatige Aufgreiffrist im Verfahren von Amts wegen, die zudem durch Kenntnissnahme durch das Wirtschaftsministerium und damit unabhängig von den Betroffenen ausgelöst wird. Die Unbedenklichkeitsbescheinigung ist ein Verwaltungsakt und grundsätzlich verbindlich. Die Bescheinigung dient der Rechtssicherheit für die beteiligten Parteien. Widerruf und Rücknahme sind nur ausnahmsweise in den allgemein für Verwaltungsakte gesetzlich vorgesehenen Fällen möglich.¹⁷¹

Kommt das Ministerium jedoch innerhalb der Frist von zwei Monaten¹⁷² zu dem Schluss, dass die beantragte Unbedenklichkeitsbescheinigung nicht erteilt werden kann, eröffnet es das **vertiefte Prüfverfahren**. Die bloße Eröffnung dieses Prüfverfahrens stellt **noch keine Versagung der Unbedenklichkeitsbescheinigung** dar.

3.2.2. Auswahl- und Überprüfungsentscheidung

Die Entscheidung im **sektorübergreifenden Verfahren orientiert sich** allein daran, ob eine **Gefährdung der öffentlichen Ordnung oder Sicherheit** des Landes vorliegt.¹⁷³ Letzteres gibt dem Wirtschaftsministerium einen **Beurteilungsspielraum**, setzt aber jedenfalls im Einklang mit EU-Recht voraus, dass eine **tatsächliche und hinreichend schwere Gefährdung vorliegt, die ein Grundinteresse der Gesellschaft berührt**, nämlich das Funktionieren des Staates und seiner Einrichtungen.¹⁷⁴ Auch im sektorübergreifenden Verfahren genügen mithin weder rein **wirtschaftliche, arbeitsmarktpolitische oder finanzielle Interessen** des Staates.

Das Wirtschaftsministerium unterliegt bei der Entscheidung, ob es sein Prüfrecht ausübt, den üblichen rechtlichen Grenzen der Ermessensausübung, unter anderem also auch dem Grundsatz der **Verhältnismässigkeit**. Dabei sind die Anforderungen an das Entschliessungsermessen, das heisst die Entscheidung, das Prüfverfahren zu eröffnen, weniger streng als diejenigen an das Auswahlermessen, das heisst die spätere Untersagung oder Auflagenerteilung. **An eine Untersagung** sind auf Grund der

¹⁶⁹ M. Mausch-Liotto, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 58 Rn. 6. Siehe auch J. Bonhage & V. Jungkind, Germany, in C.S. Goldman QC (Hrsg.), The Foreign Investment Regulation Review, 8. Aufl., London 2018, S. 82 ff.

¹⁷⁰ Vor der Reform im Jahr 2017 schrieb die Aussenwirtschaftsverordnung eine einmonatige Frist vor. § 58 Absatz 2 Aussenwirtschaftsverordnung (AWV).

¹⁷¹ Widerruf und Rücknahme richten sich nach §§ 48 und 49 des Verwaltungsverfahrensgesetzes (VwVfG).

¹⁷² § 58 Absatz 2 Aussenwirtschaftsverordnung (AWV).

¹⁷³ § 4 Absatz 1 Aussenwirtschaftsgesetz (AWG), § 55 Absatz 1 Aussenwirtschaftsverordnung (AWV).

¹⁷⁴ Interessen der öffentlichen Sicherheit und Ordnung im Sinne der Artikel 36, 52 und 65 Absatz 1 Vertrag über die Arbeitsweise der Europäischen Union (AEUV); § 5 Absatz 2 Aussenwirtschaftsgesetz (AWG).

Eingriffsschwere **sehr hohe Anforderungen** zu stellen. Insbesondere darf es kein milderes Mittel geben, um die öffentliche Sicherheit oder Ordnung zu gewährleisten.¹⁷⁵

Über die Nichteinleitung eines förmlichen Prüfverfahrens werden die am Erwerb Beteiligten in der Regel schriftlich nur informiert, wenn ein Antrag auf Unbedenklichkeitsbescheinigung gestellt wurde.¹⁷⁶

3.2.3. Verfahren der Auswahl oder Überprüfung

Die vertiefte Prüfung stellt die **zweite Phase** der Prüfverfahrens dar. Mit Eingang der vollständigen Unterlagen über den Erwerbsvorgang beginnt die **Untersagungsfrist** zu laufen. Massgeblicher Zeitpunkt ist also das letzte Einreichen von Unterlagen, auf das keine Nachforderung mehr folgt. Im sektorübergreifenden Verfahren kann das Wirtschaftsministerium einen Erwerb bis zum Ablauf von **vier Monaten** nach Eingang der vollständigen Unterlagen gegenüber dem unmittelbaren Erwerber **untersagen** oder **Anordnungen** erlassen, um die öffentliche Ordnung oder Sicherheit der Bundesrepublik zu gewährleisten.

Für den Fall, dass das Wirtschaftsministerium mit dem Erwerber in **Verhandlungen über den Abschluss eines öffentlich-rechtlichen Vertrages** tritt, ist der Fristablauf für die Dauer der Verhandlungen gehemmt.¹⁷⁷ Nach Verhandlungsabschluss setzt sich der Fristablauf fort. Nach Ablauf der Untersagungsfristen greift erneut eine **Genehmigungsfiktion** und der Erwerb gilt als freigegeben.

Im sektorübergreifenden Verfahren muss das Wirtschaftsministerium die relevanten Fachministerien an der Prüfung beteiligen. Sowohl der Erlass von Anordnungen als auch die Untersagung des Erwerbs bedürfen in diesem Verfahren der **Zustimmung der Bundesregierung**.¹⁷⁸

Das vertiefte Prüfverfahren endet immer entweder durch Erteilung der Unbedenklichkeitsbescheinigung beziehungsweise der Freigabe, durch Wegfall der Eingriffsbefugnis oder durch Untersagung.¹⁷⁹ Die Eingriffsbefugnis fällt insbesondere zeitlich bedingt durch Ablauf der Eingriffsfrist weg. Sowohl die Unbedenklichkeitsbescheinigung als auch die Freigabe können gegebenenfalls nach vorherigem Abschluss eines öffentlich-rechtlichen Vertrages oder versehen mit Auflagen erlassen werden.

Die **Folgen der Untersagung** hängen davon ab, welches Prüfverfahren einschlägig ist. Der Kaufvertrag ist während der sektorübergreifenden Prüfverfahrens schwebend wirksam. Der Eintritt der Rechtswirkungen steht also unter der auflösenden Bedingung, dass das Wirtschaftsministerium den Erwerb innerhalb der Frist untersagt. Im Fall der Untersagung endet die schwebende Wirksamkeit und durch den Eintritt der auflösenden Bedingung wird das Rechtsgeschäft unwirksam.

¹⁷⁵ M. Mausch-Liotta, in E. Hocke *et al.* (Hrsg.), Kommentar zum Aussenwirtschaftsrecht, 1. Aufl., München 2017, § 59, Rn. 15.

¹⁷⁶ Bundesministerium für Wirtschaft und Energie, FAQ zur ausenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?blob=publicationFile&v=4> (21.11.2018), S. 5.

¹⁷⁷ § 59 Abs. 2 Aussenwirtschaftsverordnung (AWV).

¹⁷⁸ Begründung des Regierungsentwurfs zum 13. Gesetz zur Änderung des Aussenwirtschaftsgesetzes und der Aussenwirtschaftsverordnung, Bundestags-Drucksache 16/10730 vom 30.10.2008, verfügbar unter <http://dip21.bundestag.de/dip21/btd/16/107/1610730.pdf> (21.11.2018), S. 17.

¹⁷⁹ Bundesministerium für Wirtschaft und Energie, FAQ zur ausenwirtschaftlichen Investitionsprüfung, Stand Januar 2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Downloads/F/faq-zur-aussenwirtschaftsrechtlichen-investitionspruefung.pdf?blob=publicationFile&v=4> (21.11.2018), S. 7.

4. Rechtsschutz und Öffentlichkeitsbeteiligung

Die Untersagung kann als Verwaltungsakt mit den Mitteln des Verwaltungszwanges durchgesetzt werden. Die Aussenwirtschaftsverordnung sieht keine eigenen **Rechtsmittel** für Erwerber und Zielunternehmen gegen Untersagungen oder den Erlass von Anordnungen durch das Wirtschaftsministerium vor. Da diese **Verwaltungsakte** im Sinne des Verwaltungsverfahrensgesetzes (VwVfG Bund) sind, greifen die in der Verwaltungsgerichtsordnung (VwGO) vorgesehenen Rechtsmittel. Ein **Widerspruchsverfahren**, der sogenannte administrative Rekurs, findet nicht statt, da der Verwaltungsakt von einer obersten Bundesbehörde erlassen wurde.¹⁸⁰ Es steht daher allein der **gerichtliche Rekurs**, insbesondere die Anfechtungsklage zur Verfügung. Dritte wie zum Beispiel Konkurrenten können grundsätzlich nicht gegen die Entscheidung vorgehen. Derzeit scheint es noch keine relevante Rechtsprechung zu Investitionskontrollen zu geben.

Insgesamt kann das Prüfverfahren von der ersten Analyse und bis zum Abschluss des vertieften Prüfverfahrens **bis zu sechs Monate** dauern. Hinzu kommt der Zeitraum, den die Parteien für das Zusammenstellen aller vom Ministerium angeforderten Dokumente und Informationen benötigen, sowie gegebenenfalls die Dauer von möglichen Verhandlungen. In der Praxis kommt es zudem durch nachgereichte Informationsanfragen durch das Ministerium zu Verzögerungen. Während des Prüfverfahrens gibt es keine Rechtssicherheit für die Beteiligten bezüglich der Zulässigkeit des Erwerbs.

Das Prüfverfahren ist **nicht öffentlich** und beinhaltet keine Anhörung oder Beteiligung der Öffentlichkeit. **Formale Entscheidungen** über die Freigabe oder das Verbot einer Transaktion werden **grundsätzlich nicht veröffentlicht**, können aber von den betroffenen Parteien an die Öffentlichkeit getragen werden, zum Beispiel im Rahmen einer Mitteilung über den Geschäftsabschluss, oder bei besonderem öffentlichen oder politischem Interesse.¹⁸¹

5. Bewertung der tatsächlichen Praxis des Investitionsschutzprozesses

Mit der 2009 eingeführten branchenunabhängigen sektorübergreifenden Prüfung sollte das Wirtschaftsministerium vor allem verhindern können, dass bestimmte ausländische Staats- und Hedgefonds Einfluss auf inländische Unternehmen mit strategischer Bedeutung beziehungsweise in kritischen Bereichen gewinnen.¹⁸² Sowohl Bundesregierung als auch Wirtschaftsministerium gingen bei Einführung des neuen Prüfverfahrens davon aus, dass das «offene Investitionsregime» gewahrt und nur in wenigen Einzelfällen Prüfungen und Beschränkungen ausländischer Investitionen erforderlich sein würden.¹⁸³ Diese Regelungen wurden 2017 verschärft und haben seither an **praktischer Bedeutung gewonnen**. Die Änderungen führten durch eine Verlängerung der Prüffristen, die Einführung einer Meldepflicht für Erwerbe kritischer Infrastrukturen, sowie präzisere Regeln im Bereich des Missbrauchs und der Umgehung der Regelungen zu einer weiteren Verschärfung des

¹⁸⁰ § 68 Abs. 1 Nr. 1 Verwaltungsgerichtsordnung (VwGO).

¹⁸¹ J. Bonhage & V. Jungkind, Germany, in C.S. Goldman QC (Hrsg.), *The Foreign Investment Regulation Review*, 8. Aufl., London 2018, S. 82 ff., S.95.

¹⁸² M. Mausch-Liotta, in E. Hocke *et al.* (Hrsg.), *Kommentar zum Aussenwirtschaftsrecht*, 1. Aufl., München 2017, § 55 Rn. 2.

¹⁸³ Begründung des Regierungsentwurfs zum 13. Gesetz zur Änderung des Aussenwirtschaftsgesetzes und der Aussenwirtschaftsverordnung, Bundestags-Drucksache 16/10730 vom 30.10.2008, verfügbar unter <http://dip21.bundestag.de/dip21/btd/16/107/1610730.pdf> (21.11.2018), S. 16.

Investitionskontrollrechts.¹⁸⁴ Dieser Trend setzte sich zuletzt im Dezember 2018 fort, indem der Kreis der kritischen Infrastrukturen um Medienunternehmen erweitert und der Schwellwert der Meldepflicht für kritische Infrastrukturen und andere zivile sicherheitsrelevante Infrastrukturen, sowie verteidigungsrelevante Unternehmen auf 10 % der Stimmrechte herabgesetzt wurden.¹⁸⁵

Während im Jahr 2016 noch 42 Prüfverfahren durchgeführt wurden, von denen 16 chinesische Investoren betrafen, stieg diese Zahl im Jahr 2017 bereits auf 66, davon 29 chinesische Investoren. Um Bedenken bezüglich einer Gefährdung der öffentlichen Ordnung und Sicherheit auszuräumen hat die Bundesregierung in sieben Fällen die von Erwerbern angeforderte Unbedenklichkeitsbescheinigung erst nach Abschluss eines öffentlich-rechtlichen Vertrages, also nach Verpflichtungszusagen, und in vier Fällen unter Erteilung von Auflagen bescheinigt.¹⁸⁶

Im August 2018 hat die Bundesregierung das Wirtschaftsministerium erstmals ermächtigt, einen Erwerb durch einen ausländischen Investor zu untersagen.¹⁸⁷ Die Bundesregierung wollte die Übernahme von **Leifeld Metal Spinning** (produziert Metalle für die Auto- und Nuklearindustrie) durch das französische Unternehmen Manoir Industries das von der chinesischen Yantai Taihai Corporation kontrolliert wurde, verbieten.¹⁸⁸ Letztere hatte zuvor bereits einen Zulieferer der Nuklearindustrie übernommen. Daraufhin trat Yantai Taihai vom Vorhaben zurück. Zudem steht derzeit ein Gesetzesentwurf in der Diskussion, der die Eingriffsschwelle in kritischen Infrastrukturen auf 15 % der Stimmrechte senken würde.¹⁸⁹ Hintergrund dieser Diskussion ist insbesondere der Fall **50Hertz** aus dem Sommer 2018. Das chinesische Staatsunternehmen State Grid wollte 20% der Anteile des Netzbetreibers 50Hertz übernehmen. Um dies zu verhindern, hat die Bundesregierung unter Verweis auf eine mangelnde Eingriffskompetenz die deutsche Staatsbank KfW angewiesen, den fraglichen Anteil zu übernehmen.¹⁹⁰

Anträge auf Ausstellung einer **Unbedenklichkeitserklärung** werden häufig gestellt und sind seit 2009 auch regelmässig erteilt worden. Die neuere Praxis des Wirtschaftsministeriums und der Bundesregierung deutet jedoch auch hier auf eine intensivere Prüfung und höhere Interventionsraten hin,

¹⁸⁴ D. Slobodenjuk, Verschärfte Investitionskontrolle nach der Außenwirtschaftsverordnung – ein Überblick, Betriebsberater (BB) 2017, S. 2306 ff., S. 2306; J. Bonhage & V. Jungkind, Germany, in C.S. Goldman QC (Hrsg.), The Foreign Investment Regulation Review, 8. Aufl., London 2018, S. 82 ff., S. 101.

¹⁸⁵ Zwölfte Verordnung zur Änderung der Aussenwirtschaftsverordnung, beschlossen am 19.12.2018, verfügbar unter <https://www.bmwi.de/Redaktion/DE/Downloads/XYZ/zwoelfte-verordnung-zur-aenderung-der-aussenwirtschaftsverordnung.pdf?blob=publicationFile&v=4> (20.12.2018).

¹⁸⁶ Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten K. Andreae, K. Dröge, A. Hajduk, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN, Bundestags- Drucksache 19/1103, verfügbar unter <http://dipbt.bundestag.de/doc/btd/19/011/1901103.pdf> (23.11.2018), S. 7 und 8.

¹⁸⁷ Siehe auch D. Wiedmann & C. Stresing, Investitionskontrolle – Chinesische Mauer für Deutschland?, Private Equity Magazin vom 29.05.2018, verfügbar unter <http://www.pe-magazin.de/investitionskontrolle-chinesische-mauer-fuer-deutschland/> (23.11.2018).

¹⁸⁸ J. Dammann de Chaptot & N. Brüggemann, Aktuelle Entwicklungen im Investitionskontrollrecht – Der „Fall Leifeld“ und die öffentliche Sicherheit, Neue Zeitschrift für Kartellrecht (NZKart) Ausgabe 9/2018, S. 412-416.

¹⁸⁹ Siehe auch N. Doll & T. Kaiser, Bund will Einfluss chinesischer Investoren gesetzlich begrenzen, Die Welt vom 07.08.2018, verfügbar unter <https://www.welt.de/wirtschaft/article180694182/Firmenuebernahmen-Bund-will-Einfluss-chinesischer-Investoren-gesetzlich-begrenzen.html> (23.11.2018).

¹⁹⁰ D. Heide, Nach 50Hertz – Bundesregierung wehrt sich gegen weitere Übernahme aus China, in: Handelsblatt, 29.07.2018, <https://www.handelsblatt.com/politik/deutschland/sicherheitsbedenken-nach-50hertz-bundesregierung-wehrt-sich-gegen-weitere-uebernahme-aus-china/22858764.html> (23.11.2018).

insbesondere im Bereich kritischer Infrastrukturen.¹⁹¹ Das grundsätzlich der Rechtssicherheit dienende Instrument der Unbedenklichkeitsbescheinigung kann nur unter den gesetzlichen Voraussetzungen zurückgenommen oder widerrufen werden. An sich ist die praktische Bedeutung von Widerruf und Rücknahme gering, da nach dem Ablauf von drei Monaten seit Kenntnis vom Vertrag die nachträgliche Eröffnung des Prüfverfahrens durch Fristablauf unmöglich geworden und Rücknahme oder Widerruf der Unbedenklichkeitsbescheinigung dadurch praktisch sinnlos sind.¹⁹² Im Fall des deutschen Produzenten für Chipanlagen zur Herstellung von **LED Aixtron** hat das Ministerium 2017 dennoch eine bereits erteilte Unbedenklichkeitsbescheinigung für das Übernahmeangebot eines chinesischen Investors unter Hinweis auf neu bekannt gewordene sicherheitsrelevante Informationen widerrufen. Der chinesische Investor kam einem möglichen Erwerbsverbot zuvor, indem er sein Angebot zurücknahm.¹⁹³ Fraglich ist, wie sich dies auf die Praxis auswirken wird.

¹⁹¹ J. Bonhage & V. Jungkind, Germany, in C.S. Goldman QC (Hrsg.), *The Foreign Investment Regulation Review*, 8. Aufl., London 2018, S. 82 ff., S. 101.

¹⁹² M. Mausch-Liotta, in E. Hocke *et al.* (Hrsg.), *Kommentar zum Aussenwirtschaftsrecht*, 1. Aufl., München 2017, § 58 Rn. 15.

¹⁹³ M. Mausch-Liotta, in E. Hocke *et al.* (Hrsg.), *Kommentar zum Aussenwirtschaftsrecht*, 1. Aufl., München 2017, § 58 Rn. 15.

F. EUROPEAN UNION

1. Introduction

“Investment” was a notion alien to European Community (EC) and European Union (EU) primary law. The 1957 Treaty of Rome avoided the use of the term “investment”, instead distinguishing between “movement of capital” and “right of establishment”.¹⁹⁴ The 1992 Treaty of Maastricht did not change that distinction, but it included a tangential insertion of the term “direct investment” in Art. 57 of the Treaty Establishing the European Community (TEC). This provision concerned possible exceptions to the general principle of free movement of capital.¹⁹⁵

Only in the 2007 Treaty of Lisbon did the term “foreign direct investment” (FDI) enter into EU law. The Treaty on the Functioning of the EU (TFEU) included FDI within the matters covered by the common commercial policy, but without any further guidance or definition. Since then, the European Commission (hereinafter “the Commission”) and the Member States (MS) – as part of the European Council – have been battling to determine who should regulate FDI.¹⁹⁶

Pursuant to Art. 207(1) TFEU, FDI is now included in the list of matters falling under the common commercial policy, granting the EU exclusive competence to legislate and adopt binding legal rules over it, in accordance with Art. 3(1)(e) of TFEU.

While the Commission and the European Parliament have always advanced the maximalist view that the EU’s FDI competence covers all investment law and arbitration issues, the MS have largely defended a restrictive reading of the text, arguing that the EU’s competence is limited to FDI, while all other issues such as non-direct or portfolio foreign investments and the dispute resolution mechanisms fall within the mixed or even exclusive competence of MS.¹⁹⁷

In May 2017, the Court of Justice of the EU (CJEU) regarding the EU’s investment law and arbitration competence as one of “mixed exclusivity”,¹⁹⁸ excluding non-direct foreign investments and investor-State dispute settlement from the exclusive competence of the EU.

The interpretation of Art. 207 TFEU has led to a new approach in the treatment of admission and establishment of foreign investment in both internal EU law and in the more recent FTAs concluded by the EU. One of the main examples for this change is the current proposal for establishing a framework for screening of FDI into the EU.

¹⁹⁴ The Treaty of Rome devoted separate Chapters to the question of the movement of capital (Chapter 4 “Capital and payments”) on the one hand and that of the conditions of establishment (Chapter 2 “Right of establishment”) on the other. Xavier Fernández-Pons, Rodrigo Polanco & Ramon Torrent, *CETA on investment: The definitive surrender of EU law to GATS and NAFTA/BITS*, 54 COMMON MARKET LAW REVIEW 1319–1358, 1328–1329 (2017).

¹⁹⁵ The Treaty of Maastricht amended the Chapter “Capital and payments” by substituting Arts 73b to 73g for Arts. 67 to 73 (then renumbered Arts. 56–60 EC).

¹⁹⁶ See Arts. 206 (ex 131 TEC, as amended) and 207 TFEU (ex 133 EC, as amended).

¹⁹⁷ Lavranos, *supra* note 3 at 5–6.

¹⁹⁸ Lavranos, *supra* note 3 at 8.

Screening Proposal

In May 2017, the Commission published its “Reflection Paper on Harnessing Globalisation”, stressing the need for the EU to maintain an open investment environment but acknowledged increasing concerns about changing FDI patterns and the need to defend the EU’s essential interests.¹⁹⁹

In September 2017, the Commission followed up by publishing a legislative proposal to establish an EU-wide screening framework for FDI that may affect **security or public order in the EU or in a Member State** (hereinafter “the Proposal”). The Proposal was closely based on an initiative put forward by Germany, France and Italy in July 2017.²⁰⁰ In addition to laying down the **framework for reviews carried out by MS** that already have or wish to adopt such mechanism, the proposal includes the **possibility for the Commission to review specific investments**. For this purpose, “**screening mechanism**” is defined as “an **instrument of general application**, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures for the screening of FDIs **on grounds of security or public order**”.²⁰¹

On 28 May 2018, the European Parliament’s Committee on International Trade (INTA) adopted its report as well as the decision to enter into inter-institutional negotiations, on this issue. As there were no requests for a vote in the European Parliament, INTA was authorized to start negotiations based on the INTA report. On 13 June 2018, the permanent representatives of the EU MS agreed on the Council’s position.²⁰²

Although it was initially reported that EU Nordic members as well as Greece, Portugal and Spain would oppose the Commission’s proposal,²⁰³ on 20 November 2018, the European Council and the

¹⁹⁹ European Commission, REFLECTION PAPER ON HARNESSING GLOBALISATION EUROPEAN COMMISSION (2017), https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf (last visited Nov 27, 2018).

²⁰⁰ UNCTAD, WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES 84 (2018). France, Germany and Italy proposal on a “Common Approach to Investment Control”, considered the introduction of new EU legislation to cover the acquisition by non-EU investors of “sufficient voting rights” in an EU-resident company for the first time or the increase of an existing stake above this threshold. It also envisaged the extension of investment reviews to acquisitions by EU-investors controlled by non-EU parties, provided that the investment is abusive and made with the purpose of circumventing the due diligence acquisition review. Moreover, it also considered a consultative and monitoring role for the Commission, while the decision on whether an intervention should be made would still lie with the Member State concerned. Lourdes Catrain & Eleni Theodoropoulou, THE EVOLVING EU RULES ON FOREIGN DIRECT INVESTMENT SCREENING: A BALANCE EXERCISE SET IN MOTION THE LAW REVIEWS (2018), <https://thelawreviews.co.uk/edition/the-foreign-investment-regulation-review-edition-6/1174700/eu-overview> (last visited Nov 26, 2018).

²⁰¹ European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A FRAMEWORK FOR SCREENING OF FOREIGN DIRECT INVESTMENTS INTO THE EU. COM/2017/0487 FINAL - 2017/0224 (COD) EUR-LEX (2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:487:FIN> (last visited Nov 26, 2018). Art. 2.4.

²⁰² Franck Proust, SCREENING OF FOREIGN DIRECT INVESTMENT IN STRATEGIC SECTORS EUROPEAN PARLIAMENT LEGISLATIVE TRAIN SCHEDULE (2018), <http://www.europarl.europa.eu/legislative-train> (last visited Nov 27, 2018).

²⁰³ Fabrizio Di Benedetto, *A European Committee on Foreign Investment?*, 214 COLUMBIA FDI PERSPECTIVES (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082725 (last visited Nov 28, 2018).

Commission announced that they have reached a political agreement on an EU framework for screening FDI.²⁰⁴

Other restrictions

It is important to note that besides the Proposal, some type of investment screening or similar mechanism currently exists in other areas, like mergers, energy, and financial services.²⁰⁵ These will not be analyzed here.

2. Definition of FDI covered by the regulation

Roughly half (14) of the EU MS have a national FDI screening mechanism in place that allows the government to review FDI, mainly on grounds of national security or public order, in line with their commitments under international and EU law. The proposed EU-wide screening mechanism would exist in parallel to domestic MS screening mechanisms.

In the Proposal, FDI is defined to cover both the so-called “greenfield investments” and control acquisitions.²⁰⁶ Article 2(1) says:

*“investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity”.*²⁰⁷

The scope may go beyond that of MS mechanisms by virtue of this definition.²⁰⁸ In addition, the Proposal **does not propose monetary thresholds or a control threshold** to trigger the FDI screening mechanism (which is a feature of some MS and third country regimes). Neither does it explicitly state that qualifying investments should be limited to acquisitions of undertakings rather than, for example, bare assets.²⁰⁹

²⁰⁴ European Commission, COMMISSION WELCOMES AGREEMENT ON FOREIGN INVESTMENT SCREENING FRAMEWORK PRESS RELEASES (2018), http://europa.eu/rapid/press-release_IP-18-6467_en.htm (last visited Nov 27, 2018).

²⁰⁵ European Commission, *supra* note 12 at 8.

²⁰⁶ Valentin Günther, *Der Vorschlag der Europäischen Kommission für eine Verordnung zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Europäischen Union*, 157 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT 1–47, 35 (2018).

²⁰⁷ European Commission, *supra* note 12. Art. 2.1

²⁰⁸ It remains unclear, for example, what kind of corporate relationships are considered to have “lasting and direct links”, causing some to argue that it would go beyond the acquisition of at least 25 percent of the voting rights, required for a cross-sectoral investment under section 56 of the German Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung – AWV). Roland Stein & Simon Maturana, DEVELOPMENTS IN GERMAN AND EUROPEAN FOREIGN INVESTMENT CONTROL – A NEW SECURITY-BASED MERGER CONTROL? OXFORD LAW FACULTY (2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/04/developments-german-and-european-foreign-investment-control-new> (last visited Nov 27, 2018).

²⁰⁹ Some would see this as implicit, however. Kyriakos Fountoukakos & Molly Herron, MERGER CONTROL AND THE PUBLIC INTEREST: EUROPEAN SPOTLIGHT ON FOREIGN DIRECT INVESTMENT AND NATIONAL SECURITY COMPETITION POLICY INTERNATIONAL (2017), <https://www.competitionpolicyinternational.com/merger-control-and-the->

3. Definition of the nationality of the investor: Does the regulation distinguish between different groups of countries?

Art. 2(2) of the Proposal defines an investor as “foreign” if it is a natural person of a third country or an undertaking of a third country. For these purposes, “undertakings” are those entities constituted or otherwise organized under the laws of a MS which carry out an economic activity.

The **proposal** does not distinguish between different groups of countries and therefore **applies irrespective of the nationality** of the non-EU investor. This is in line with Art. 63 TFEU, which prohibits any restriction on capital movements and payments between MS and between MS and third countries. Furthermore, Art. 3(1) of the Proposal states that the **screening processes of MS shall not discriminate** between third countries.

4. Does the regulation distinguish between state-controlled and other companies? Is there a definition of state-controlled?

In its May 2017 Paper on “Harnessing Globalisation”, the Commission recognized that there have been some concerns about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons, and that EU investors often do not enjoy the same rights to invest in the country from which the investment originates.²¹⁰ In his State of the Union speech on 13 September 2017, President Juncker called for full transparency in acquisitions of European firms by foreign investors, especially those by foreign state-owned companies in certain sectors.²¹¹

The **Proposal distinguishes** between companies that are under state control, and those who are not. This does not mean that **additional requirements will apply** to the state-owned foreign investor. Rather, the status as state controlled is **a factor to consider** in determining whether to subject the investor to a screening process: according to Art. 4(2), in determining whether a FDI is likely to affect security or public order – and therefore might be subject to screening – MS and the Commission may consider whether the foreign investor is “controlled” by the government of a third country. There is no definition of state-controlled in the Proposal. It does mention that significant funding implies that an investor is controlled, but the meaning of the term “significant funding” remains unclear.²¹²

5. Design / degree of complexity of the notification / screening process

To examine the design and degree of complexity of the screening process, it is important to consider that the Proposal establishes a different framework for the screening by the MS and the Commission of FDI in the EU.

public-interest-european-spotlight-on-foreign-direct-investment-and-national-security/ (last visited Nov 28, 2018).

²¹⁰ European Commission, *supra* note 10 at 15.

²¹¹ Jean-Claude Juncker, STATE OF THE UNION ADDRESS 2017 EU (2017), http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm. (last visited Nov 26, 2018).

²¹² Stein and Maturana, *supra* note 19.

5.1. Design of the Screening Process

The Proposal **does not require MS to adopt or maintain a screening mechanism** for FDI. It seeks to create an **enabling framework** for MS that already have or wish to put a screening mechanism in place, and to ensure that any such screening mechanism meets certain **basic requirements**.²¹³ This could be interpreted as a reaction to the concerns that have been raised regarding the compatibility of existing FDI screening mechanisms with current EU law.²¹⁴ The framework of the screening process can be seen as a **cooperation scheme** where MS and the Commission will be able to exchange information and raise specific concerns.²¹⁵

According to Art. 8 of the Proposal, MS would be required to inform other MS and the Commission about any FDI they are screening. Another MS can raise concerns and provide comments if it considers that an FDI planned or completed in another Member State is likely to affect its security or public order. The Commission could also issue a nonbinding opinion on such FDI screening measures if the investment is likely to affect security or public order in one or more MS. This opinion is to be communicated to the other MS. Both other MS and the Commission can require from the MS doing the screening any information necessary to provide comments.²¹⁶

Under the Proposal the Commission could also have a screening mechanism for FDI concerning several MS or for an investment that is likely to affect projects or programs of interest of the whole EU. This screening may only be undertaken on the grounds of security or public order. According to Art. 3 of the Proposal, projects or programmes of EU interest shall include those which involve a substantial amount or a significant share of EU funding, or which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs. An indicative list of projects or programmes of EU's interest is included in Annex 1 of the Proposal.²¹⁷

Under Art. 9 of the Proposal, the **Commission may issue a nonbinding opinion** addressed to the Member State where the FDI is planned or has been completed. For that purpose, it could request from that Member State, any information necessary to issue the opinion. The Member State in question is not directly bound by the Commission's opinion, but it would have to "take utmost account" of it and provide an explanation to the Commission in case its opinion is not followed.²¹⁸

Related to this point, the Commission is reportedly completing a detailed analysis of the FDI flows into the EU and has set up a **coordination group** with MS to help identify joint strategic concerns and solutions in the area of FDI.²¹⁹

²¹³ European Commission, *supra* note 15 (the Proposal "will not affect the Member State's ability to maintain their existing review mechanisms, to adopt new ones or to remain without such national mechanisms").

²¹⁴ Günther, *supra* note 18.

²¹⁵ *Id.*

²¹⁶ Laura Fraedrich & Chase D. Kaniecki, FOREIGN INVESTMENT CONTROL HEATS UP: A GLOBAL SURVEY OF EXISTING REGIMES AND POTENTIAL SIGNIFICANT CHANGES ON THE HORIZON JONES DAY 15 (2018), <https://www.jonesday.com/files/upload/Foreign%20Investment%20Control%20Heats%20Up.pdf> (last visited Nov 27, 2018).

²¹⁷ These projects and programmes include: European GNSS programmes (Galileo & EGNOS), Copernicus, Horizon 2020, Trans-European Networks for Transport (TEN-T), Trans-European Networks for Energy (TEN-E), and Trans-European Networks for Telecommunications.

²¹⁸ Fraedrich and Kaniecki, *supra* note 29.

²¹⁹ European Commission, *supra* note 15.

5.2. Complexity of the Notification/Screening Process

The notification process of the screening mechanism and of the screening process undertaken by a MS to the EU is **simple and straightforward**. It is important to note that here is no explicit notification requirement for investors vis-à-vis the EU.

With respect to the screening mechanism, under Art. 7 of the Proposal, MS shall notify to the Commission their existing screening mechanisms by 30 days of the entry into force of the Regulation at the latest. Similarly, MS shall notify to the Commission any amendment to an existing screening mechanism or any newly adopted screening mechanism within 30 days of entry into force of the screening mechanism at the latest.

MS that maintain screening mechanisms also shall provide the Commission with an annual report on the application of their screening mechanisms. According to Art. 7 of the Proposal, for each reporting period, the report shall include in particular information on FDI screened and undergoing screening, screening decisions prohibiting FDI, screening decisions subjecting FDI to conditions or mitigating measures, and the sectors, origin, and value of FDI screened and undergoing screening.

With respect to the screening process, according to Art. 8 of the Proposal, MS shall inform the Commission and the other MS of any FDI that are undergoing screening within the framework of their screening mechanisms, within 5 working days from the start of the screening. Comments or opinions by either other MS or the Commission, shall be addressed to the Member State where the FDI is planned or has been completed within a “reasonable period of time”, and in any case no later than 25 working days following receipt of the information required by other MS or the Commission. In cases where the opinion of the Commission follows comments from other MS, the Commission shall have 25 additional working days for issuing its opinion. Where additional information is needed to issue an opinion, the 25-day period shall run from the date of receipt of the additional information.

Regarding the Commission screening process, under Art. 9 of the Proposal, the **Commission shall address its opinion to the Member State concerned** “within a reasonable period of time”, and in any case **no later than 25 working days following receipt of the information** requested by the Commission.

6. Which sectors are in focus? Which sectors are defined as “critical infrastructure” or “key technologies”?

In screening an FDI on the grounds of security or public order, MS and the Commission may consider the potential effects of several factors. The Proposal names different industry sectors in which foreign investments may endanger security or the public order. Art. 4 provides that a **threat may exist, in particular**, in the following cases:

- a) “**critical infrastructure**”, which is defined as including energy, transport, communications, data storage, space or financial infrastructure as well as sensitive facilities;
- b) “**critical technologies**”, which includes artificial intelligence (AI), robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology;
- c) the security of **supply of “critical inputs”**; and
- d) access to “**sensitive information**” or the ability to control sensitive information.

Some commentators have pointed out that Art. 4 of the Proposal has some legal ambiguities, e.g. the term “semiconductors” is very vague. Moreover, it remains unclear what the terms “critical inputs” and “sensitive information” mean.²²⁰

Coincidentally, the focus of Chinese investment flows in the EU includes advanced industrial machinery and equipment, information and communications technology, utilities, transport and infrastructure and energy.²²¹

7. Are the test criteria (on which the final approval of the FDI is based) clearly defined? If “national security” is the approval criteria, do further instructions to the authorities exist what to consider?

According to the Commission, the Proposal is in line with the best practices of the OECD as enshrined in its Guidelines for Recipient Country Investment Policies Relating to national security. This is without prejudice to the sole responsibility of the MS for the maintenance of national security.²²² However, the Proposal does not set forth formal test criterion. These must be inferred from the general EU law and case law.

7.1. Test Criteria

As mentioned, under Art. 63 TFEU, FDI is considered a movement of capital, being prohibited any restriction to capital movements and payments between MS and between MS and third countries. However, investment screening mechanisms could be implemented as a restriction on the free movement of capital which, if justified, when they are necessary and proportionate for the achievement of the objectives defined in the TFEU, including on public security and public policy grounds (Art. 65 TFEU) or for “overriding reasons relating to the general interest”, as defined by the CJEU, to the extent that there are no EU harmonizing measures providing for measures necessary to ensure the protection of those interests²²³ and as long as the measures do not go beyond what is necessary.

Under the case law of the CJEU, public security grounds for derogating from the freedom of movement of capital and payments been held to include the objective of ensuring a minimum supply of petroleum products at all times,²²⁴ and the safeguarding of energy supplier in the event of a crisis.²²⁵

The CJEU has decided that the general interest includes, among others, the interest in environmental protection, town and country planning and consumer protection. Purely economic objectives cannot constitute an overriding reason.²²⁶

The CJEU has also held that the scope of the public security exception must be interpreted strictly and cannot be unilaterally determined by the MS without any control by the EU institutions. MS may rely

²²⁰ S tein and Maturana, *supra* note 19.

²²¹ Catrain and Theodoropoulou, *supra* note 11.

²²² European Commission, *supra* note 12 at 10, 17.

²²³ Case C-112/05, *Commission of the EU Communities v. Federal Republic of Germany*, Judgment of the Court (Grand Chamber), 23 October 2007, at Paragraph 72.

²²⁴ Case 483/99, *Commission v. France*, Judgment of the Court, 4 June 2002, at Paragraph 47.

²²⁵ Case 503/99, *Commission v. Belgium*, Judgment of the Court, 4 June 2002, at Paragraph 45.

²²⁶ Case C-400/08, *European Commission v. Kingdom of Spain*, Judgment of the Court (Second Chamber), 24 March 2011, at Paragraph 74.

on this exception only in the presence of a “genuine and sufficiently serious threat to a fundamental interest of society”.²²⁷

7.2. National Security

Under Art. 346 TFEU, a Member State “can take such measures as it considers necessary for the protection of the essential interests of its security that are connected with the production of or trade in arms, munitions and war material”, on the condition that the measures do not “adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes”.

Art. 65 TFEU provides a derogation from the general prohibition on restriction of capital movements, allowing MS to take measures that are justified on grounds of public policy or public security. The invocation of public policy and public security reasons must not constitute “a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63”.

8. How transparent are the procedures?

According to Art. 6(1) of the Proposal, MS screening mechanisms shall be transparent. In particular, MS shall set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules.

Similarly, Art. 10 of the Proposal considers a minimum level of information that MS shall provide to other MS or the Commission, when they request information about an FDI that is subject to domestic screening. This information includes:

- a) The **ownership structure** of the foreign investor and of the undertaking in which the FDI is planned or has been completed, including information on the ultimate controlling shareholder or shareholders;
- b) The **value** of the FDI;
- c) The **products, services and business operations** of the foreign investor and of the undertaking in which the FDI is planned or has been completed ;
- d) The **MS** in which the foreign investor and the undertaking in which the FDI is planned or has been completed conduct business operations; and
- e) The **funding** of the investment, on the basis of information available to the Member State.

The same provision establishes that MS shall ensure that the information requested by the Commission and other MS is made available to them “without undue delay”, but there is no precision on what that term means.

According to Art. 6(2) **MS shall establish timeframes** for issuing screening decisions. Such timeframes shall allow them to consider the comments of MS and the opinion of the Commission as referred above. Interestingly there is **no such timeframes for the screening that could be undertaken by the Commission**.

²²⁷ Case 463/00, *Commission of the EU Communities v. Kingdom of Spain*, at Paragraph 72.

Under Art. 5 of the Proposal, MS may maintain, amend or adopt measures necessary to prevent circumvention of the screening mechanisms and screening decisions. However, the scope or type of these measures is not detailed. In any case, in Art. 6(4) it is expressly recognized that foreign investors and undertakings concerned shall have the possibility to seek judicial redress against screening decisions of the national authorities.

The Commission has declared that the Proposal considers the need to operate under short business-friendly deadlines and strong confidentiality requirements.²²⁸ Under Art. 11 of the Proposal, information received as a result of the application of this Regulation shall be used only for the purpose for which it was requested. At the same time, MS and the Commission shall ensure the **protection of confidential information** acquired in application of this Regulation. According to Art. 6(3) of the same Proposal, Confidential information, including commercially-sensitive information, made available by foreign investors and undertaking concerned shall be protected.

9. Future developments

The analysis of the EU Proposal reveals that the Commission had opted for a path that is a minimally invasive, coordinating framework that completely leaves the decision-making powers for the admission of FDI to the MS and complements existing national FDI screening mechanisms with individual information and information obligations.²²⁹ Therefore, the degree of restriction in the movement of capital seems to be minimal, which is consistent with the already existing EU law.

Although the regulation on EU investment screening is on the verge of being approved, it is important to note that its **implementation could generate legal uncertainty**, if the regulation is implemented with more political than legal discretion. Critical tones have already been heard from China and the United Kingdom. Even some EU MS (including Germany) have been worried that the proposal would create an impression of protectionism or of additional bureaucratic hurdles. The proposal aims to avoid that so the EU does not lose competitiveness vis-à-vis other countries outside the Union, but if that effectively will happen is yet to be seen.²³⁰

According to the Commission, the proposal encourages international cooperation on investment screening policies, including sharing experience, best practices and information regarding investment trends.²³¹ The proposal does not explicitly mention these topics, although perhaps these are implicit tasks for the points of contact established by Art. 12.

Similarly, the Commission has reaffirmed that “national security interests are the responsibility of MS”, and that they keep “the last word whether a specific operation should be allowed or not in their territory”.²³² In that context, under Art. 7(2)(c) of the Proposal, MS could subject screened FDI to “conditions or mitigating measures”, but there is no clarity or definition about what type of measures could be included here.

²²⁸ European Commission, *supra* note 15.

²²⁹ Günther, *supra* note 18.

²³⁰ *Id.*

²³¹ European Commission, *supra* note 15.

²³² *Id.*

Finally, it is important to note that the overall interpretation of the Proposal, once it becomes formally an EU regulation, will be subject to the interpretation not only of the MS or the Commission, but also – and probably most important – to the control of the CJEU.

G. THE NETHERLANDS

1. Introduction

A traditionally open economy, the Netherlands does have a few restrictions on foreign investors. More significantly, recent years have witnessed a movement toward greater restriction of investments that are considered a threat to national security interests. The Netherlands' current stance on the European Commission's proposal reflects this trend.²³³ The Dutch Parliament voted in favor of the proposal,²³⁴ which would establish a general framework for screening foreign direct investments into the EU, but only insofar as it would not enable common economic policy to override the Netherlands' sovereign competence to safeguard its own national security interests through sector-specific legislation.

Current restrictions

Currently, the Netherlands applies sector-specific restrictions on foreign direct investments and a general screening process for foreign investors who apply for a residence permit in the Netherlands.

While the general screening has a limited scope, it might deter some foreign investors, as the outcome is uncertain and there are differences amongst sectors and within measures, which renders "one size fits all" criteria opaque, inefficient and exclusionary.

The Dutch sector-specific restrictions on foreign direct investments apply to economic areas considered by the Ministry of Internal Affairs to be of vital importance to national economic security. These include: finance; drinking water supply; energy; food; health; surface water management; telecommunications and ICT; public order and safety; legal order; public administration; chemical and nuclear industry. In line with article 8.2.c of the Netherlands' Law on the Intelligence and Security Services 2017²³⁵ national economic security interests concern "interests which, according to the judgment of the relevant Ministry, are vital for the preservation of social life". The Working Group on Economic Security under the Dutch Ministry of Justice, in National Security Interests in Foreign Acquisitions and Investments, points out that the list of twelve sectors is non-limitative. It may also include other top-sectors of the Dutch economy such as agri-food, life sciences, health, horticulture and logistics. In line with this, a recent letter from the Minister of Foreign Affairs indicates that the government is examining whether a protective regime is also necessary for agricultural land and certain regional infrastructural works.²³⁶

Future Plans

The Dutch government plans to introduce new general restrictions on foreign direct investment. According to the letter of the Minister of Economic Affairs, a draft bill is being prepared which will

²³³ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework for screening of foreign direct investments into the European Union, COM/2017/0487 final - 2017/0224 (COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1539860677426&uri=CELEX:52017PC0487> (20.12.18)

²³⁴ 19 Stemmingen moties Bedrijven beter beschermen tegen overnames, Handelingen tweede Kamer der Staten-Generaal, Vergaderjaar 2017-2018, Vergaderingnummer 74 (17 april 2018). Available at <https://zoek.officielebekendmakingen.nl/h-tk-20172018-74-19.html> (20.12.18).

²³⁵ Wet op de Inlichtingen- en Veiligheidsdiensten 2017. Available at <https://wetten.overheid.nl/BWBR0039896/2018-05-01> (20.12.18).

²³⁶ Brief van de Minister van Buitenlandse Zaken, Vergaderjaar 2017-2018, Kamerstuk 22112 nr. 2437 (published 6 December 2017). Available at <https://zoek.officielebekendmakingen.nl/kst-22112-2437.html> (20.12.18).

introduce four new barriers to the free flow of foreign direct investment into the Netherlands.²³⁷ First, it intends to create a **consultation period of one year** for hostile take-overs of listed companies (to balance and weigh in interests of relevant stakeholders). Second, it introduces an **ex-ante permission analysis** for all significant foreign direct investments into **vital sectors**. Third, it makes it **obligatory** to **report any acquisition of more than 1 % in a listed company** to The Dutch Authority for the Financial Markets. Finally, it intends to create a new global **level-playing field** with all extra-EU countries whose economies are not open or whose investments into the Netherlands are primarily state-driven.

According to a recent report on national security from the Ministry of Justice, the main rationale behind this increased desire for protection against foreign direct acquisitions and investments is the need for continuity, trustworthiness, integrity and exclusivity of vital economic sectors.

Parts of the government's proposed draft are currently open for public consultation until February 2019. Once this consultation is over, the draft will be finalized and placed before Parliament for consideration.

In the wake of a recent series of hostile take-over attempts, the Dutch government adopted a more critical stance regarding foreign direct investment.²³⁸ The strategy set forth in the latest Coalition Agreement aims to further curb undesirable foreign direct investment in the twelve aforementioned vital sectors. To that end, new sector-specific legislation is introduced under the umbrella of essential security interests, a sovereign competence per article 4.2 of the Treaty on the Functioning of the European Union. It is construed within the margins of national security protection, which excepts it from WTO commitments by virtue of article XIV bis 1(b) GATS – a security exception rarely invoked amongst WTO Members.²³⁹ A recent example of this reinvigorated desire for protection is the upcoming Bill on Undesirable Control Telecommunications, expected to be placed in Parliament in 2019.²⁴⁰ This type of sector-specific legislation is the Netherlands' preferred *modus operandi* for ensuring the continuity of vital processes, the integrity and exclusivity of knowledge and information and strategic independence.³

Legal regimes restricting foreign direct investments in the Netherlands' vital economic sectors electricity, gas, space activities, finance, and telecommunications are discussed *infra* as examples of how the restrictions are structured.

²³⁷ Brief van de Minister van Economische Zaken en Klimaat, Vergaderjaar 2017-2018, Kamerstuk 30821 nr. 41 (published 14 December 2017). Available <https://zoek.officielebekendmakingen.nl/kst-30821-41.html> (20.12.18).

²³⁸ Some high-profile examples are the attempted take-over of Royal Dutch KPN by América Móvil, NXP Semiconductors by Qualcomm Inc, AkzoNobel by the Carlyle Group, Unilever by Kraft Heinz and PostNL by Bpost

²³⁹ Panagiotis Delimatsis and Thomas Cottier, "Article XIVbis GATS: Security Exceptions." (2008): p. 332 – the Court of Justice of the EU confirmed that national security interests may bar the free movement of capital in C-212/09. ³ The risk-categories have been communicated by the Dutch Minister of Justice through a letter to Parliament.

²⁴⁰ Brief van de Staatssecretaris van Economische Zaken en Klimaat, Vergaderjaar 2017-2018, Kamerstuk 32637 nr. 311 (18 April 2018). Available at <https://zoek.officielebekendmakingen.nl/kst-32637-311.html> (20.12.18).

2. Notification requirements (restrictions imposed on investors or investments)

General notification requirements

The general screening of foreign direct investors is codified in article 2.2 of the Aliens Circular 2000.²⁴¹ It indicates that every foreign investor who wishes to obtain a **residence permit** for investment purposes, first needs to notify the Netherlands Enterprise Agency.²⁴² The Netherlands Enterprise Agency, which falls under Dutch Ministry of Economic Affairs, will then screen the investor and determine whether the investment is **sufficiently innovative and of added value** to the Dutch economy for the residence permit to be granted.

Sector-specific notification requirements - examples regarding electricity, gas and space activities

The Netherlands applies sector-specific notification requirements with respect to foreign direct investments in nearly all twelve essential sectors. Examples of these notification requirements can be found in article 86f of the Electricity Act 1998,²⁴³ article 2 of the Regulation on Notification of Changes in Control - Electricity Act 1998²⁴⁴ and article 66e of the Gas Act.²⁴⁵ **Even changes in significant ownership control of space activities need to be notified** to the Minister of Economic Affairs (article 10 of the Law on Space Activities²⁴⁶).

Every electricity company with a capacity of more than 250 megawatt and every company liquefying natural gas must **notify** the Minister of Economic Affairs of **changes in control four months in advance**. Control in the Electricity and Gas Act implies the possibility to effectuate legal or factual power which grants decisive influence over the activities of the company (article 26 Competition Act, article 86f Electricity Act, article 66e Gas Act).

The notification must identify all relevant parties involved, the suggested change in control, the financial position, intentions, strategy and background of the acquirer. Under the same articles, the Minister of Economic Affairs has the authority to either prohibit the change in control or to allow it under specific conditions.

The **failure to fulfill the obligation to notify** the Minister of Economic Affairs of significant changes in ownership control may result in **severe sanctions**: administrative fines, coercion and penalties. Article 15.4 of the Telecommunications Act, gives a prime indication of how severe these penalties can be: the Netherlands Authority Consumer and Market can fine companies who do not adhere to its supervisory mandate a fine of up to € 900.000 or one per cent of the revenue of the company, whichever is higher.

Sector-specific notification requirements (financial sector)

The Netherlands' regime for screening foreign direct investment in the financial sector is codified in the Financial Supervision Act (FSA).²⁴⁷ The FSA covers nearly all 'financial undertakings' (per article

²⁴¹ Available at <https://wetten.overheid.nl/BWBR0012289/2018-10-01> (20.12.18).

²⁴² Article 3.29a under 2 of the Aliens Decree 2000.

²⁴³ Available at <https://wetten.overheid.nl/BWBR0009755/2018-07-28> (20.12.18).

²⁴⁴ Available at <https://wetten.overheid.nl/BWBR0032058/2012-10-09> (20.12.18).

²⁴⁵ Available at <https://wetten.overheid.nl/BWBR0011440/2018-07-28> (20.12.18).

²⁴⁶ Available at <https://wetten.overheid.nl/BWBR0021418/2014-01-25> (20.12.18).

²⁴⁷ Wet op het financieel toezicht. Available at https://wetten.overheid.nl/BWBR0020368/2018-10-01#Titeldeel2_Hoofdstuk2.2_Afdeling2.2.7_Paragraaf2.2.7.2_Artikel2:70 (20.12.18).

1:1). It applies *inter alia* to credit institutions; assurance, insurance or reinsurance undertakings; investment firms; and financial companies in the payment and securities industry.

Financial supervision of foreign direct investment into the Netherlands is based on a "functional supervision model". Different types of supervision are distinguished through the function ascribed to them. One of these different types is **conduct supervision** (under article 1:25 of the FSA). Conduct supervision pursues, in the interest of stability of the financial system, orderly and transparent financial market processes, clear relationships between market parties and careful treatment of clients. Conduct supervision is the exclusive competence of The Dutch Authority for the Financial Markets. The other type of supervision is **prudential supervision** of (foreign) direct investment in the financial sector (stipulated in article 1:24 of the FSA). This type of supervision focuses on the solidity of financial companies and the stability of the financial system. The competent supervisor within this field is either the Dutch Central Bank (De Nederlandsche Bank – a wholly state-owned enterprise) or the European Central Bank (likely where it concerns banks whose management might pose systemic risks to the euro-system).

Conduct supervision obliges every shareholder or holder of voting rights in securities issuers who is about to actively reach, exceed or fall below control thresholds specified in article 5:38 of the FSA to notify The Dutch Authority for the Financial Markets of the **upcoming changes**. Article 5:39 of the FSA extends the **notification obligation** to the passive activation of threshold margins – changes generated through the actions of securities issuers. Any person who obtains or loses decision shares, votes or financial instruments which have a short position with respect to shares, is obliged to notify The Dutch Authority for the Financial Markets **if specific thresholds are reached**, exceeded or lost. These thresholds are set at 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 or 95 per cent of, respectively, the total number of shares, the total number of votes or the company's capital.

An example of prudential supervision can be found in article 3:95 of the FSA. It stipulates that, except for financial institutions whose supervision falls within the scope of Directive 2007/44/EC,²⁴⁸ every ownership, acquisition or expansion above specific thresholds of qualifying holdings requires a specific declaration of no objection (DNO) from the Dutch Central Bank. Direct or indirect ownership of **10 % or more of issued share capital, voting rights or voting power** in companies, qualify holdings for prudential supervision. Under the regime of article 3:102 of the FSA, the thresholds for renewal of DNOs are 20 per cent, 33 per cent, 50 per cent and 100 per cent. This regime implies that every foreign direct investment in financial companies which results in a holding stake of more than 10 per cent falls under the indirect discretion of the Ministry of Finance (the Dutch Central Bank is a wholly state-owned enterprise). Article 138 of the Regulation Prudential Rules Wft stipulates that every application for a DNO must furnish all information with respect to the size of the qualifying holding, the reliability of the applicant or the holder of a DNO, the financial position and the group structure.

New notification requirements on Telecommunications

The 2018 Bill on Undesirable Control Telecommunications - once it is ratified – will introduce extensive notification requirements for the telecommunications sector in the Netherlands. It was drafted in the wake of the failed takeover of KPN by the Mexican telecommunications company América Móvil in 2011. América Móvil tried to expand its equity stake from 4.8 per cent to 28 per cent. The management of KPN discouraged shareholders from accepting the offer of América Móvil because the underlying motives of América Móvil remained unclear. In the course of 2012, América

²⁴⁸ Stated as per example - Directive 2007/44/EC is repealed and re-codified into Directive 2014/65/EU and Directive (EU) 2016/1034 on markets in financial instruments. The directive is the legal framework of the European Central Bank for the prudential assessment of acquisitions and increases of a qualifying holding in a credit institution, assurance, insurance or reinsurance undertaking or an investment firm.

Móvil eventually acquired 27.7 per cent of the shares of KPN. In 2013 América Móvil made an offer on all outstanding shares of KPN. By that time América Móvil had acquired a stake of 29.78 per cent. Eventually the hostile take-over was foiled. Stichting Preferente Aandelen exercised its option on all of their preferential shares (nearly 50 per cent). América Móvil's stake in KPN is currently around 21 per cent.

Under the new regime the Minister of Economic Affairs may request an excerpt of the voting rights register if the Minister suspects that the existence of **significant control jeopardizes national security or public order**. Furthermore, the telecommunications party shall, at the request of the Minister, investigate the **personal particulars of the holder of control** and the ties it has with third parties. The bill explains in that **significant control** occurs when the holder or prospective acquirer:

- alone or in deliberate concert with others either directly or indirectly acquires a stake of at **least thirty per cent** of the outstanding voting securities of the company, entitled to vote in the general shareholders' meeting or to dismiss / appoint more than half of the Board of Directors or Supervisory Board – even if all shareholders cast a vote;
- holds **one or more preferential voting shares**;
- **owns a branch** which is a telecommunications party; **or**
- as **partner becomes fully liable to creditors** for debts of the company acting under its own name.²⁴⁹

Significant control is i.a. construed to **jeopardize national security interests or public order when**:

- the **ownership-structure** and -proportions of the holder or prospective acquirer are **not transparent** (article 14a.4) or when the potential influence of a third party over the effectuation of the rights by the holder or prospective acquirer is insufficiently transparent or undesirable
- when the holder or prospective **acquirer** has a **dubious track record** in securing communication or continuity of service and compliance with legal regulations in this respect;
- the holder or prospective acquirer is or has **close ties with an undesirable person**;
- the **security situation in the country** of which the holder or prospective acquirer is resident; the country in which the central management of the holder or prospective acquirer is located or in the countries of the surrounding region is **uncertain** or bad.

3. Screening and review process

General screening (two tests)

Every foreign investor who wishes to obtain a residence permit for investment purposes, will have fulfill a set of criteria. First, The Netherlands Enterprise Agency requires an investment of at least € 1.250.000 in an innovative Dutch company. Secondly, the money needs to be wired to a bank which is registered in the Netherlands. Thirdly, the **investment must be of added value to the Dutch economy**. It applies two tests to that end. The first of these tests concerns the investment in a company. The fulfilment of all **criteria within the first test is obligatory**:

- the beneficiary is **registered** in the Dutch Chamber of Commerce (Kamer van Koophandel);
- the **nature** of the investment is likely to be positive for the Dutch Economy;
- the **continuity of the beneficiary company** remains warranted after the investment is made.

²⁴⁹

Article 14a.2.

The **second test concerns the effects** of the investment. **Two out of three** criteria from the second test need to be complied with:

- the creation of **ten full-time equivalent employees** within five years (of which sixty per cent needs to be created within three years);
- the existence of **innovation**: the product or service is new; or new technology is applied in production, distribution or marketing; or the *modus operandi* of the beneficiary is innovative²⁵⁰
- **non-financial contribution**: the investor created or owns the beneficiary company and either has: an educational background which is relevant for the beneficiary company (level: master or higher & in possession of a diploma from an institution recognized by IDW); or five years of demonstrable entrepreneurial experience; or five years of demonstrable working experience on a senior level; or demonstrable to have brought in five business partners

Furthermore, The Financial Intelligence Unit Nederland, which falls under the Ministry of Finance, will probe the **origin of a proposed investment**. These tests within the Aliens Circular 2000 appear to be the **only general screening legislation which is currently in force** in the Netherlands.

Sector-specific screening tests (examples from the financial sector – reliability and suitability)

In the wake of a hostile take-over attempt of ABN-AMRO by a consortium comprised of Royal Bank of Scotland, Fortis Bank and Banco Santander in 2007, the decision of the Minister of Finance (and the Dutch Central Bank) to grant a DNO came under fire. Part and parcel of the discussion was the extent to which the **discretionary variables** in the decision-making matrix of article 3:100 of the FSA had been sufficient to shield the domestic financial sector from undesirable foreign infringement. A few years after the debacle, which eventually ended in the forced nationalization of ABN AMRO, the Dutch Parliament voted in favor of the 2011 Bill on the Implementation of the Directive Holdings Financial Sector.²⁵¹ It appears that the bill **significantly expanded the discretionary power** of the Dutch Central Bank in the decision-making matrix of article 3:100 of the FSA – **with respect to the issuance of new DNOs**. Under the new regime, every legal or natural foreign investor who applies for a qualifying holding must convince the Dutch Central Bank – and therewith the Ministry of Finance – that it is reliable, suitable and financially solid.

Even after the Dutch Central Bank considers a foreign direct investor reliable and issues a DNO for a desirable qualifying holding, Policy Rule Reliability Test²⁵² allows The Dutch Authority for the Financial Markets to block the qualifying holding from the effectuation of its main benefit: the appointment of managers – if they are considered unreliable or unsuitable.²⁵³ This restriction of undesirable foreign direct investment control can take place through the reliability test codified in Policy Rule Reliability Test and through the suitability test in Policy Rule Suitability 2012. Variables to be tested within the matrix of reliability are the intentions, actions and antecedents (criminal, financial, supervision, fiscal, administrative and other) of applicants. The policy rule implies that even after the Ministry of Finance – through the Dutch Central Bank – issues a DNO against a qualifying holding, the Ministry of Finance – through The Dutch Authority for the Financial Markets – has the discretion to strip the qualifying

²⁵⁰ This concerns activities, stimulated through current policy in sectors of essential interest to the economy.

²⁵¹ <https://zoek.officielebekendmakingen.nl/stb-2011-206.html> (20.12.18).

²⁵² Beleidsregel Betrouwbaarheidstoetsing. Available at <https://wetten.overheid.nl/BWBR0017862/2006-01-29> (20.12.18).

²⁵³ This is confirmed in § 3.f of Bill 34049 nr. 3: <https://zoek.officielebekendmakingen.nl/kst-34049-3.html>.

holding from the effectuation of undesirable voting power. Remarkably, both decisions take place within the same decision-making matrix: (un)-reliability and / or (un)-suitability.

Based on article 3:104 of the FSA, the Dutch Central Bank furnishes the Minister of Finance with specific information regarding application for DNOs against qualifying holdings with the potential of creating significant systemic effects. Before the European Central Bank took over the supervision of European banks in 2007, the Minister of Finance had the exclusive competence over the admission of qualifying holdings in Dutch systemic banks. In the current system, the informing duty merely serves to allow the Minister to receive insight in the latest developments in the financial sector. More legislation is being prepared in order to furnish the Dutch government with all the information it needs to exercise maximum control over foreign direct investments. The latest Bill envisages the creation of a Central Shareholders Register. It has been placed in Parliament in September 2018 and once ratified, it will introduce article 7a to the Registration Act 1970. It requires notaries to register shareholders' particulars in a Central Shareholders Register. Even though its apparent aim is to combat tax evasion and bankruptcy fraud, it will clearly allow the Minister of Finance to gain insight in off-the-grid existence of and changes in foreign (in)direct control structures.

Transparency is a precondition for every legal and natural person who wishes to obtain or maintain a license for supplying (specific) financial services. Every bank, payment service provider or investment firm requires a license which is issued by the Dutch Central Bank and The Dutch Authority for the Financial Markets²⁵⁴ or the European Central Bank²⁵⁵. Article 3:16 of the FSA proscribes any person in the payment and securities transactions industry - with a registered office in the Netherlands - from affiliation with any person in a formal or de facto control structure if the obscurity thereof forms or can form an obstacle to supervision. Furthermore, the FSA proscribes specific financial undertakings – most notably payment services institutions, banks, clearing and settlement institutions – from any affiliation with persons in a formal or actual control structure, if the law of a non-EU Member State which applies on those persons hinders or may hinder supervision.

Screening in the Bill on Undesirable Control Telecommunications 2018

Another example of possible new legislation is the Bill on Undesirable Control Telecommunications²⁵⁶ which foresees a new chapter in the Telecommunications Act. The proposed chapter 14a is titled "Prevention of undesirable control over electronic communication networks and services." If ratified in Parliament, the bill will permit the Minister of Economic Affairs to prohibit the acquisition of a significant control in any telecommunications party if the significant control would result in a significant influence over the telecommunications sector which might **jeopardize national security or public order** (stipulated in article 14a.2).

The new bill also grants Minister of Economic Affairs an **ex-post authority to prohibit the acquisition** if facts and circumstances which jeopardize national security or public order became known or first known to the Minister of Economic Affairs after the acquisition. An example of significant influence over the telecommunications sector in the new law is: "the possibility that abuse or deliberate disruption of the telecommunications-party wherein the acquirer holds or acquires significant control can cause illicit impediments to the protection of personal particulars or confidentiality of communication or cause long-term disruptions of access to internet or phone services (thresholds still to be stipulated)".

²⁵⁴ See articles 2:3b, 4:13 and 3:16 of the FSA; exemptions are stipulated in article 1a of the Exemption Regulation Wft.

²⁵⁵ Directive 2014/65/EU and per Directive (EU) 2016/1034.

²⁵⁶ <https://zoek.officielebekendmakingen.nl/kst-32637-311.html> (20.12.18).

Under article 14a.7 the Minister of Economic Affairs can proscribe the holder or prospective acquirer whose acquisition of significant control has been prohibited, from effectuating voting rights and every other right connected to shareholding, membership or participation in the company, except where it concerns the rights to dividend and distribution from reserves. This proscription is notified to the relevant company by the Minister of Economic Affairs. The company is obliged to either adhere to the proscription under article 14a.8 or notify the Minister their refusal to adhere to the proscription. Under article 14a.9 the Minister of Economic Affairs may coerce the company into compliance with the proscription through the appointment of an official receiver. The Minister of Economic Affairs coerces a holder or prospective acquirer whose acquisition of significant control has been prohibited, to diminish control so far as to prevent it from being a majority (article 14a.10). If the significant control holder refuses adherence, the Minister of Economic Affairs can coerce the telecommunications party to diminish control so far as to prevent it from being a majority.

The Bill also delegates specific power to the telecommunication party in fulfilling the request to diminish control. If the diminution of control for instance requires the alienation of shares, the relevant listed party is authorized to request the collective deposit (or a comparable foreign institution) to release the relevant equity interest (article 14a.13). The relevant listed company subsequently notifies the Minister of Economic Affairs of any refusal by an affiliated institution, central institute, intermediary, institution abroad or foreign institution with a function comparable to that of the central institute to cooperate with the request.

Judicial review

Article 7:1 of the Law on Administrative Procedures in the Netherlands²⁵⁷ **allows every foreign direct investor to object against any decision of an administrative authority** (such as The Dutch Authority for the Financial Markets or the Netherlands Authority Consumer and Market). The notice of objection must be sent to the decision-making authority within 6 weeks after the announcement of a decision to be admissible. The notice of objection must comply with several minimum requirements. It should at least include the name and address of the submitter, the date, a description of the decision against which the objection is directed (in practice often a copy of the decision is added) and the grounds for the objection and contain a request for reimbursement of costs. In order to extend the six weeks deadline, a preliminary notice of objection is often first filed in practice, requesting a longer period to further specify the grounds for the objection. This is also called a pro forma objection.

If objection is made, administrative bodies must fully reconsider their decision. Often the administrative authority will be advised by an independent committee when dealing with the objection and usually follows that advice when deciding on the objection. Usually a hearing also takes place. The **decision period on the objection is 6 weeks**, or - if a committee is established - 10 weeks after receipt of the objection. This period can be **extended once for a maximum of 4 weeks**. An appeal can be lodged with the court against the decision on the objection (which may also include the decision to abstain from any decision).

Making an **objection has no suspensive effect on the decision of the administrative authority**. This means that the consequences of the decision with which the investor does not agree with will not be suspended. To be able to achieve this, there is the possibility of submitting a request to the court for a provisional order. If an investor does not agree with the decision on the notice of objection, he or she can lodge an appeal with the administrative section of the court within 6 weeks after receipt of the final decision of the administrative authority decision. In general, this is only possible if a notice of

²⁵⁷ Algemene wet bestuursrecht. Available at <https://wetten.overheid.nl/BWBR0005537/2018-09-19> (20.12.18).

objection has been submitted. The same requirements and deadlines apply for the filing of the notice of appeal as for filing a notice of objection. Here too there is the possibility to submit a pro forma notice of appeal. The grounds of the appeal must then be filled in time. Failure to do so results in inadmissibility.

Contrary to the notice of objection, a fee needs to be paid for the appeal at the court. If this is not paid on time, the appeal will be declared inadmissible. The administrative authority which made the contested decision must submit a statement of defense on the appeal and send the relevant documents to the court. The court can order a hearing but is not obliged to do so. The court decides in writing. The possibility exists to appeal against the decision of the court. The filing of an appeal (as well as the filing of an objection) does not suspend the consequences of the decision which the investor does not agree with. To be able to achieve this, there is the possibility of submitting a request to the court for a provisional order.

H. NORWAY

1. Introduction

Similar to its neighbouring countries, Norway has a comparably open investment regime and there is **no legal framework specifically regulating or restricting foreign investment**. However as will be discussed below, investments are potentially subject to merger and acquisition regulations and various restrictions on investments are laid down in certain sector-specific regulations. More significantly, Norway's traditional openness toward foreign investment will be tested with the new National Security Act.

Merger control regulation

The Norwegian Merger Control Authority may prohibit concentrations that will significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.²⁵⁸ Thus, companies are required to notify the Norwegian Competition Authority of any mergers, acquisitions and agreements by which they acquire control of other companies if the turnover of the undertakings concerned exceeds certain turnover thresholds. The general rule provides that a concentration must be notified to the Authority if the **combined annual turnover** of the undertakings concerned exceeds **NOK 1 billion** in Norway (unless only one of the undertakings concerned has an annual turnover exceeding NOK 100 million in Norway, in which case no notification is required).

The Authority's examination focuses only on the effect on competition in Norway, regardless of the nationality of the parties/investors. For this reason, *we will not examine these rules any further in this national report*.

Sector specific restrictions

There are a number of **investment restrictions in certain sectors of the economy** where the government or government agencies operate various kinds of licensing or authorization schemes. Some of these are general restrictions applicable to all kinds of investors (i.e. national/EEA and foreign), whereas other apply either only to non-Norwegian investors (or to non-Norwegian and non-EEA investors). Such provisions are laid down in sector specific regulations and concern the following: land, real estate and long term leases, farmland and forests; waterfalls, power supply rights, mining rights; financial institutions; petroleum and gas exploitation; media and audio-visual services; commercial fishing; air transport; maritime transport.²⁵⁹

2018 National Security Act

On 6 March 2018, the Norwegian parliament adopted a new National Security Act (Lov 2018-06-01-24 Lov om nasjonal sikkerhet).²⁶⁰ The Act is scheduled to enter into force on 1 January 2019, along with three government ordinances that are currently submitted for public consultation.²⁶¹

From an investment perspective, an important novelty in the 2018 National Security Act is the introduction of a mechanism to **control the acquisition of Norwegian companies that play a crucial role in supporting critical national services and security interests**. In short, the new Act requires

²⁵⁸ Norwegian Competition Act (*Konkurranseloven Lov 2004-03-05-12*) Chapter 4.

²⁵⁹ Trade Policy Review Norway 2018, World Trade Organisation, p. 33, report available at https://www.wto.org/english/tratop_e/tp473_e.htm (09.11.2018).

²⁶⁰ The Act is available at <https://lovdata.no/dokument/NL/lov/2018-06-01-24> (06.11.2018).

²⁶¹ <https://www.regjeringen.no/no/dokumenter/horing---forskrifter-til-ny-sikkerhetslov/id2606681/?expand=horingsnotater> (06.11.2018).

anyone wishing to acquire at least 1/3 of any business that either processes security classified information (*behandler sikkerhetsgradert informasjon*), controls information or infrastructure that are crucial for basic national functions (*råder over informasjon, informasjonssystemer, objekter eller infrastruktur som har avgjørende betydning for grunnleggende nasjonale funksjoner*), or pursues activity that is crucial for basic national functions (*driver aktivitet som har avgjørende betydning for grunnleggende nasjonale funksjoner*), (to notify the ministry responsible for the area in which the business activity in question is carried out.²⁶² The notification will trigger an investigation and may result in a prohibition on or mandatory adjustment of the proposed investment.

While a first legislative proposal only targeted foreign investors, the Act finally adopted applies to all investors. The government motivated the general application of the rules with the fact that ownership structures can be very complex and that it is a risk that the actual acquirer would not be reviewed if the application is limited to only foreign investors.²⁶³ Given the original legislative proposal and the government's reasoning, it can be assumed that any measure of prohibition or adjustment is likely to be enforced principally in relation to foreign investors. The areas likely to be affected are communications (telecom, transportation, media etc.), energy, banking and financing.²⁶⁴

2. Notification requirement and Screening or Review Process

2.1 Sectorial restrictions

For **land, real estate and long-term leases, farmland and forests**, concessions are required for acquisition and for leases of longer than 10 years and on certain ownership of land.²⁶⁵ **Waterfalls, power supply rights and mining rights** require licensing and approval of the competent ministry.²⁶⁶ **Petroleum and gas exploration** is subject to discretionary government license for exploration and production.²⁶⁷

The previous Media Ownership Act laid down rules that restricted foreign ownership. However, it was replaced in 2016 by the Act on Transparency of Ownership in Media (*Lov om åpenhet om eierskap i medier - Lov 2019-06-17-64*) which contains no restrictions on foreign ownership. Instead, there is a general duty to inform the relevant authority about ownership changes and any collaborations that provide a party with editorial influence similar to that of an owner.²⁶⁸

The following sectors contain rules limiting investments of foreign nationals or companies to certain ownership caps: For **commercial fishing**, licenses are only granted to Norwegian and companies in which Norwegians owns at least 60% of the capital and 60% of shares.²⁶⁹ For the **registration of aircraft** that have Norwegian or EEA nationality: foreign ownership is limited to one third or less of the capital

²⁶² Lov om nasjonal sikkerhet Chapter 10 section 1 and 2. See also Chapter 1 section 2 and 3 in the same Act.

²⁶³ Government bill *Prop 153 L (2016-2017) Lov on nasjonal sikkerhet*, p. 150.

²⁶⁴ <https://www.adeb.no/en/news/publications/norway-implements-new-rules-controlling-foreign-ownership/> (09.11.2018).

²⁶⁵ Concessions Act (*Konsesjonsloven - Lov 2003-11-28-98*), Chapter 1 and 2.

²⁶⁶ Act on Acquisition of Waterfalls, Mines and Other Real Estate, No. 16, of 14 December 1914; Act relating to the regulation of watercourses, Act No. 17, of 14 December 1917.

²⁶⁷ The Petroleum Act (*Petroleumsloven – Lov 1996-11-29-72*).

²⁶⁸ Act on Transparency of Ownership in Media (*Lov om åpenhet om eierskap i medier - Lov 2019-06-17-64*), section 4.

²⁶⁹ *Lov om retten til å delta i fiske og fangst - LOV-1999-03-26-15*, section 5.

of the Norwegian company.²⁷⁰ As regards **maritime transport**, to be registered as a vessel in the Ordinary Ship Register (i.e. not the International Ship Register) a minimum of 60% of the capital is to be held by Norwegian or EEA nationals.²⁷¹

Two examples of requirements that exist in the different schemes are set forth below.

Exploration and production of petroleum and gas

Under the Petroleum Act (*Petroleumloven*), the exploration and production of petroleum and gas requires a license granted by the Ministry of Petroleum and Energy (*Olje- og energidepartementet*).²⁷² The first step for an investor is to notify the Ministry of the wish to become a licensee or operator.

In order to be granted a licence a number of requirements must be fulfilled. The basic requirement is that the investor **must establish an organisation/company in Norway**. The pre-qualifying process include a meeting between the interested investor and the Norwegian Petroleum Directorate (*Oljedirektoratet*) and the Petroleum Safety Authority (*Petroleumstilsynet*). These two authorities evaluates the investors, and submit their findings to the Ministry of Petroleum and Energy and the Ministry of Labour and Social Inclusion. Based on that evaluation, and following an assessment of the investor's financial position, the Ministry of Petroleum and Energy decides whether or not to approve the investor as eligible to receive a license. The **screening includes issues related to technological knowledge, prior experience in the field, management, and health, environment and safety**.²⁷³

The Norwegian Petroleum Directorate and the Petroleum Safety Authority start the pre-qualification process upon the reception of a confirmation that the **investor will cover all expenses incurred by the authorities** in connection with such process. The expenses will normally include personnel costs for the working hours required for the evaluation, travel expenses including accommodation, as well as any costs associated with a potential offshore verification.²⁷⁴

Financial institutions

There are a number of restrictions applicable to **financial institutions**. These include *inter alia* a mandatory suitability assessment in cases of acquisition of over 10% of the share capital and that at least 50% of the members of the board and half the members of the corporate assembly of a bank must be Norwegian or EEA nationals or residents.²⁷⁵

An application for a bank license shall be submitted to the Financial Supervisory Authority (*Finanstilsynet*). The application must include all information showing that the applicant complies with the requirements laid down in the Act on Financial Institutions such as minimum capital requirements and requirements that that the persons managing the bank possess adequate qualifications and do not hold a position elsewhere that can constitute a conflict of interest with the bank.²⁷⁶ The **Ministry of Finance (*Finansdepartementet*) decides whether or not to grant a licence within six months** from

²⁷⁰ Aviation Act (*Luftfartsloven – Lov 1993-06-11-101*), Chapter 3 section 2.

²⁷¹ Maritime Code (*Sjøloven – Lov 1994-06-24-39*), section 1.

²⁷² The Petroleum Act (*Petroleumloven – Lov 1996-11-29-72*), Chapter 2 and 3.

²⁷³ Information on the qualification process is available in English at <http://www.npd.no/en/Topics/Production-licences/Theme-articles/Pre-qualification/The-work-process/> (19.11.2018).

²⁷⁴ <http://www.npd.no/en/Topics/Production-licences/Theme-articles/Pre-qualification/Documentation-and-cost-associated-with-the-pre-qualification-process/> (19.11.2018).

²⁷⁵ Act on Financial Institutions (*Finansforetaksloven LOV-2015-04-10-17*), Chapter 5.

²⁷⁶ Act on Financial Institutions (*Finansforetaksloven LOV-2015-04-10-17*), Chapter 3.

the receipt of the application. The decision is taken following an assessment *inter alia* of whether the company's capital situation is satisfactory; whether initial equity is considered sufficient in relation to the activities applied for; and whether the organisation and operations plan is adequate for the activities to be conducted.²⁷⁷

The Financial Supervisory Authority (*Finanstilsynet*) charges all supervised entities an annual fee which covers the costs of supervision. There are no other kinds of licensing fees and the licence is unlimited in duration.²⁷⁸

2.2 The 2018 National Security Act

As mentioned above, the new National Security Act has been adopted and is scheduled to enter into force first on January 1, 2019. Three ordinances laying down more detailed rules will also come into force at that time.²⁷⁹ The ordinances will address: (1) public authorities' role and responsibility relating to national security; (2) companies' obligations relating to preventive security; and (3) clearance of suppliers and personnel.²⁸⁰

The Act's rules on thresholds for ownership control that trigger notification requirement are laid down in Chapter 10. The first provision in that Chapter provides that an **investor acquiring a qualified ownership in a business** that falls under the Act **must notify** the relevant ministry or the Norwegian National Security Authority (*Nasjonal Sikkerhetsmyndighet*).

An ownership is qualified in the following situations:

1. if the acquirer directly or indirectly acquires at least **one third of the shares or votes** in the business;
2. if the acquirer obtains the **right of ownership** to at least **one third of the shares** in the business;
3. if the acquirer in any other way obtains the **effective control** of the business.

Entities and activities that fall within the scope of the National Security Act are described in Chapter 1 of the Act. As regards the application of the ownership rules in Chapter 10, the subjects targeted are principally (1) businesses that either process security classified information (*behandler sikkerhetsgradert informasjon*), (2) businesses that control information or infrastructure that are crucial for basic national functions (*råder over informasjon, informasjonssystemer, objekter eller infrastruktur som har avgjørende betydning for grunnleggende nasjonale funksjoner*), or (3) businesses that pursue activity that is crucial for basic national functions (*driver aktivitet som har avgjørende betydning for grunnleggende nasjonale funksjoner*).²⁸¹ It should be noted, however, that the National Security Act applies also to all administrative agencies at national, regional and local level.²⁸²

²⁷⁷ Act on Financial Institutions (*Finansforetaksloven LOV-2015-04-10-17*), Chapter 3 section 2.

²⁷⁸ R. Sjoqvist et al., *Banking Regulation in Norway: overview*, Thomson Reuters Practical Law, 2018, question 4.

²⁷⁹ The proposals of the three ordinances are available at <https://www.regjeringen.no/contentassets/61541372f9f74ed1982b0a4338d791f2/horingsnotat---forskrifter-til-sikkerhetsloven.pdf> (06.11.2018).

²⁸⁰ Id.

²⁸¹ Lov om nasjonal sikkerhet Chapter 1 section 3.

²⁸² Lov om nasjonal sikkerhet Chapter 1 section 2.

An acquirer must notify the ministry responsible for the area in which the business activity in question is carried out. If the business activity does not fall within any ministry's responsibility, the acquirer must notify the National Security Authority.²⁸³

The notified authority (i.e. either a ministry or the National Security Authority) is then tasked with deciding whether to approve or prohibit the transaction. This means that a **review process is always initiated following the triggering of the notification requirement.**²⁸⁴

A first decision must be rendered as soon as possible and at the latest after 60 working days following the notification. The authority making the decision can ask other relevant authorities to comment on potential risks relating to the acquisition and the acquirer's credibility from a security perspective. Moreover, the authority can require the acquirer to submit additional information. The time limit of 60 days is suspended until such additional information is submitted. The authority either approves the acquisition or, if it finds that security interests may be at risk, decides that the matter must be decided by the government.²⁸⁵

After referral of the case to the government, the government can, if it finds that the acquisition involves a **not insignificant threat to Norwegian security interests** (*en ikke ubetydelig risiko for at nasjonale sikkerhetsinteresser blir truet*), prohibit the acquisition or make it subject to certain conditions.²⁸⁶ The assessment involves a **proportionality test**, weighing the potential disadvantages for the acquirer and the business activity with considerations of national security interests.²⁸⁷ This rule applies **also to an already completed acquisition.**

To our knowledge, there will be **no fees charged for the notification and approval procedure.** The sanctions and penal provisions laid down in Chapter 11 of the National Security Act do not include sanctions in cases of non-compliance with the notification procedure.

3. Screening or Review Process

Issues concerning the screening or review process have been discussed above under question 2.

4. If possible, an assessment of the actual practice of investment control processes

Given that the 2018 National Security Act has not yet entered into force, the investment control processes applied the last 15 years are those laid down in certain sector specific regulations. According to our research, there appears to be no legal commentary from an investment control perspective on the actual practice of such sector-specific rules.

²⁸³ Lov om nasjonal sikkerhet Chapter 10 section 1.

²⁸⁴ Lov om nasjonal sikkerhet Chapter 10 section 1 and 2.

²⁸⁵ Lov om nasjonal sikkerhet Chapter 10 section 2.

²⁸⁶ Lov om nasjonal sikkerhet Chapter 10 section 3.

²⁸⁷ Government bill *Prop 153 L (2016-2017) Lov on nasjonal sikkerhet*, p. 193.

I. POLAND

1. Introduction

For the past decades, Poland's successful attempt to improve its business environment has been evidenced by its move up in the international rankings of countries in terms of competitiveness and ease of doing business.²⁸⁸ Generally open to foreign direct investment, Poland offers investors readily available commodities and components, as well as an increasingly strong domestic market and high-quality human capital.²⁸⁹

However, foreign investors point to the administrative dimension of doing business in Poland as a source of uncertainty and complexity.²⁹⁰ In particular, Poland's extensive and unclear bureaucratic procedures make paying taxes or obtaining licenses burdensome, and the ambiguity of, and constant changes to, Poland's legal system reduces the security of foreign investments.²⁹¹

The over-complexity is particularly apparent in the rules relating to access to strategic sectors of the Polish economy and to the surveillance processes that take place in those sectors. Such sectoral restrictions constitute significant barriers to movement of capital to Poland. Moreover, while sectoral legislation stipulates various conditions that an investor would need to meet to do business, **compliance with established criteria provides no guarantee of receiving the necessary permission** to invest. This is because the legislation grants controlling authorities broad discretionary powers. From deciding on the appropriateness of candidates to supervising the actual activity of investors, the Polish government maintains not only *ex ante*, but also an effective *ex post* control over foreign investments within the Polish economy.

Aside from sectoral restrictions, foreign investors may also face restrictions due to the *Act on Competition and Consumer protection* and the requirements established by the *Law on Control of Certain Investments*. As is the case for sectoral controls on foreign investment, these two laws give the government substantial discretion in determining which foreign investments are permitted to operate. The fact that the laws are facially non-discriminatory does not, therefore, necessarily equate to equal protection of foreign investors with nationals.²⁹²

*The Law on Control of Certain Investments*²⁹³ requires any investor, irrespective of its country of origin, to get an approval of competent authorities **prior to** commencing any transactions that may result in obtaining **significant participation or gaining control** over entities deemed to have strategic importance for state economy. Designating the entities which are strategically important lies within the state's competences²⁹⁴, and appears to stem from the state's desire to maintain control over the

²⁸⁸ EY, *Doing Business in Poland*, 2017, p.9, <https://www.ey.com/pl/pl/issues/business-environment> (16.07.2018)

²⁸⁹ Polish Information and Foreign Investment Agency, Grant Thornton, HSBC Bank, *International business has anchored in Poland: Survey*, 2015 ed., p.6, http://kssse.pl/upload/content/Dla_przedsiębiorcy/HSBC_raport_08_ENG.pdf (16.07.2018)

²⁹⁰ *International business has anchored in Poland: Survey, Ibid*, p.17.

²⁹¹ *Ibid*.

²⁹² See, e.g., Henry Foy, Poland: Barriers to Business, Financial Times, 5 April 2015, <https://www.ft.com/content/4b416656-d898-11e4-ba53-00144feab7de> (22.11.2018).

²⁹³ *The Law on control of certain investments*, Ustawa z dnia 24 lipca 2015 r. o kontroli niektórych inwestycji. <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150001272> (04.07.2018)

²⁹⁴ *Regulation on the entities subject to protection*, Rozporządzenie Rady Ministrów z dnia 6 grudnia 2017 r. w sprawie wykazu podmiotów podlegających ochronie,

protected companies²⁹⁵ and to prevent changes to their equity structure in a way that might negatively affect the Polish economy.²⁹⁶

This report will first mention the goals of Polish competition law screening. Then we describe the sectoral restrictions in a broad and illustrative manner. The main focus is in the final section, in which we look more closely at the *Law on Control of Certain Investments*.

2. Competition Law

The *Act on Competition and Consumer Protection*²⁹⁷ requires any acquisition of an undertaking or creation of new undertaking by two or more undertakings²⁹⁸ to be reported to the Office of Competition and Consumer Protection, if such transaction **leads or may lead to a concentration that exceeds thresholds defined by the Law (EUR 1 billion worldwide turnover or EUR 50 million Polish turnover)**. The Law stipulates two-stage procedure for notifications about intended concentration. The first phase concerns transactions that do not raise competition concerns and is based solely on filling notice by an applicant. The second phase is initiated by a **separate decision** of the Office of Competition and Consumer Protection, where concentration raises justified **concerns as to significant restriction of competition and there is a necessity to conduct market investigation**.²⁹⁹ Significantly, this procedure does not cover cases that fall within the scope of regime established by the *Law on Control of Certain Investments*.³⁰⁰

As there are no special rules with respect to foreign investments,³⁰¹ *the details of the review will not be further discussed* in this report.

²⁹⁵ <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170002387> (04.07.2018)
Explanatory note to the Regulation on the entities subject to protection, Uzasadnienie do Rozporządzenie Rady Ministrów z dnia 8 grudnia 2016 r. w sprawie wykazu podmiotów podlegających ochronie,
<http://webcache.googleusercontent.com/search?q=cache:Mm9ZPSdlA5sJ:bip.msp.gov.pl/download/1/9993/SkanRozporzadzenieRadyMinistrowzdnia8grudnia2016rwsprawiewykazupodmiotowpodlegaj.pdf+&cd=1&hl=ru&ct=clnk&gl=ch&client=firefox-b-ab> (16.07.2018).

²⁹⁶ Georgiana Caramihai, *The Act on Control over Certain Investments - between the state's needs and the European legislation. Report on Polish law*, Lawyr.it, Ed. 1 Vol. 4, 2016,
<https://www.lawyr.it/index.php/about-us/lawyr-it-blog/752-the-act-on-control-over-certain-investments-between-the-state-s-needs-and-the-european-legislation-report-on-polish-law> (11.09.2018)

²⁹⁷ *Act on competition and consumer protection*, Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20070500331> (22.08.2018)

²⁹⁸ *Doing business in Poland*, Wardynski & Partners, 2016, Warsaw, p. 30,
http://www.wardynski.com.pl/en/w_publication/doing-business-in-poland-2/ (04.09.2018)

²⁹⁹ *Merger Control 2018: Poland*, International Comparative Legal Guides, source:
<https://iclg.com/practice-areas/merger-control-laws-and-regulations/poland> (05.09.2018)

³⁰⁰ *Ibid.*

³⁰¹ Aleksander Stawicki, Bartosz Turno and Wojciech Kulczyk, *Merger Control: Poland*, Getting the deal through, August 2018, <https://gettingthedealthrough.com/area/20/jurisdiction/39/merger-control-poland/> (11.09.2018)

3. Sectoral restrictions

Sectoral restrictions are introduced by way of making business activities in specific areas conditioned upon issuance of **licences (concessions), permissions, or entry in special registers**. This rule finds its expression in **various sectoral legislative acts** which **specify procedures** for granting such access, conditions that applicants need to meet, and designate controlling authorities responsible for screening and supervision.

The procedure of **getting a license**, unlike for the issuance of a permission, does not rely solely on applicant's adherence to the requirements established by the legislation.³⁰² It **involves gaining the assent of the licensing authorities, who have broad discretion in matters including national security** and threats to the states. Namely, the licensing authorities may refuse to grant a license, may revoke a license already granted, or may change a license's scope if they determine that it poses a threat to state or national security. The strategic spheres of Polish economy falling within the sectoral discretionary licensing regime, include:

- 1) mining;
- 2) producing and trading in defense or security products and technologies;
- 3) fuels and energy;
- 4) broadcasting;
- 5) protection of persons and property;
- 6) air transportation;
- 7) casinos.³⁰³

In case of so-called **"regulated activity"**, an **investment must be registered** in the relevant register before starting operations.³⁰⁴ Such registration requires submission of an application accompanied by notice that the entity meets all the requirements that apply to certain type of business.³⁰⁵

Sectoral legislation may additionally introduce **limitations based on national origin**. In particular, getting a licence or permission may be conditioned upon having registered office in a specific country or countries (Member States of the EU or EFTA). Although **generally all non-residents have equal conditions for doing business in Poland** (regime of national treatment),³⁰⁶ access to strategic sectors of Polish economy may be more restricted for investors from states outside the EU and EFTA. Some legislation also confers the **same beneficial status** to entities with registered office in **Turkey as EU/EFTA residents** enjoy.

Sectoral legislation may also require management or supervisory board of an entity to have particular number of Polish citizens or citizens of Member States of the EU/EFTA. It may impose limitations on equity participation of foreign investors in entities operating in specific sectors.

³⁰² *Doing business in Poland*, Wardynski & Partners, 2016, Warsaw, p. 32, http://www.wardynski.com.pl/en/w_publication/doing-business-in-poland-2/ (04.09.2018)

³⁰³ Source: <http://firma.um.warszawa.pl/dla-przedsiębiorców/wiedza/zezwoleń-i-koncesje/> (03.08.2018)

³⁰⁴ *Doing business in Poland*, Wardynski & Partners, *Ibid*, p.33.

³⁰⁵ *Ibid*.

³⁰⁶ Law on participation of foreign entrepreneurs and other foreign persons in economic turnover in the territory of the Republic of Poland, Ustawa z dnia 6 marca 2018 r. o zasadach uczestnictwa przedsiębiorców zagranicznych i innych osób zagranicznych w obrocie gospodarczym na terytorium Rzeczypospolitej Polskiej, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000649> (09.07.2018)

Additionally, investors in strategic sectors of Polish economy may need to report to the competent authorities about the state of implementation of their granted licences³⁰⁷ or to report about changes to composition of management or supervisory boards.³⁰⁸

As there is a broad variety of sectors with limited investor access, each with its own requirements, limitations, procedures and authorities responsible for performance of supervision, the following will illustrate two of the screening proceedings in Poland: the energy sector and the real estate sector.

3.1. Restrictions

Energy sector:

A licence in the energy sector may be issued only to an applicant that has a **registered office or a habitual residence** in the territory of a Member State of the EU, the EFTA or in Turkey. In addition to this requirement, the applicant is also required to have sufficient financial resources and technical means, which would guarantee proper performance of business activity covered by the licence.

³⁰⁹

For production of liquid fuels or their marketing with foreign countries *the Energy Law Act* requires applicant to have **registered office or habitual residence in the territory of the Republic of Poland** and to acquire liquid fuels **for the purposes of conducting business activity in Poland**. In addition, the applicant needs to have a collateral in the amount of PLN 10 000 000 for securing appearance of indebtedness resulting from the activity performed and to have storage installations for liquid fuels.³¹⁰

Poland treats energy security as an issue of a high priority, and, therefore, in addition to protection granted by licensing regime, there is a separate legal act that regulates maintenance of critical infrastructure in energy sector. This legislation empowers the minister competent for energy matters with authority to abolish decisions of energy company, if their implementation may pose a “**real threat to functioning, continuity and integrity of the critical infrastructure**”.³¹¹

Real Estate:

In the sector of agricultural real estate, in 2016 Poland imposed a total ban on sale of lands **included to Agricultural Property Reserve of the State Treasury**.³¹² This moratorium has **duration of 5-years and covers everyone, irrespective of country of origin**. Acquisition of other agricultural land is in

³⁰⁷ *Energy Law Act*, Ustawa z dnia 10 kwietnia 1997 r. Prawo energetyczne, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970540348> (13.07.2018)

³⁰⁸ *Gambling Act*, Ustawa z dnia 19 listopada 2009 r. o grach hazardowych, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20092011540> (17.07.2018)

³⁰⁹ *Energy Law Act*, Ustawa z dnia 10 kwietnia 1997 r. Prawo energetyczne, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970540348> (13.07.2018)

³¹⁰ *Ibid.*

³¹¹ *Act on special powers of minister competent for energy matters and their performance towards certain capital companies or capital groups operating in electricity, crude oil and gaseous fuels sectors*, Ustawa z dnia 18 marca 2010 r. o szczególnych uprawnieniach ministra właściwego do spraw energii oraz ich wykonywaniu w niektórych spółkach kapitałowych lub grupach kapitałowych prowadzących działalność w sektorach energii elektrycznej, ropy naftowej oraz paliw gazowych, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20100650404> (16.07.2018).

³¹² *Act on suspension of the sale of real estate of the Agricultural Property Reserve of the State Treasury and on amendments to certain acts*, Ustawa z dnia 14 kwietnia 2016 r. o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa oraz o zmianie niektórych ustaw, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000585> (18.07.2018)

practice limited almost exclusively³¹³ to **individual farmers**, who has **sufficient qualifications** and **resides at least 5 years in the municipality, where** the land being sold is located.³¹⁴

Additionally, **foreigners from states other than Member States of the EU/EFTA or Switzerland** need to apply for **permission** of the minister of internal affairs in order to purchase real estate (agricultural and non-agricultural) or shares in entity owning real estate in Poland.³¹⁵ For such permit to be granted, the foreigner needs to prove that he has **specific ties with Poland** (Polish nationality or origin, marriage to a Polish national, Polish temporary or permanent residence permits etc.)³¹⁶ The size of an area that can be purchased by foreigners **could not exceed 0,5 ha for personal needs** or should be **sufficient** for real needs of the business or agricultural activities conducted.³¹⁷

3.2. Grounds for screening / review, definition and implementation

The Entrepreneur's Act names **national security, security of citizens and other important public interests** as reasons for limitation of access to economic activity in specific areas, and stipulates **necessity of getting entry into register of regulated activity or obtaining appropriate authorization (licence or permit) for pursuing business in those sectors**. Sectoral legislation in its turn give further detail on the application of this provision by qualifying the values which are fundamental for maintenance of security in the respective sector.

Energy sector:

The Energy Law Act, in particular, indicates that its provisions are aimed at ensuring energy security of the country, its sustainable development, efficient and rational use of fuels and energy, development of competition, counteracting negative outcomes of natural monopolies, and balancing interests of energy companies and recipients.³¹⁸

Real Estate:

The Law that governs procedure of acquiring title to agricultural property, **names food safety and sustainable development of agricultural lands** as underlying purposes of established regime of land management.

The Act on acquisition of real estate by foreigner indicates that foreigner might be allowed to purchase real estate in the territory of Poland (agricultural or non-agricultural), if such acquisition **does not pose threat to defence capability, state security and public order**, and does not contravene to social and health policies.³¹⁹

³¹³ *Outlook on doing business in Poland*, Wardynski & Partners, 2017, Warsaw, http://www.wardynski.com.pl/en/w_publication/outlook-on-law-and-business-in-poland/ (22.08.2018)

³¹⁴ *Act on shaping the agricultural system*, Ustawa z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20030640592> (18.07.2018)

³¹⁵ *Act on Acquisition of real estate by foreigners*, Ustawa z dnia 24 marca 1920 r. o nabywaniu nieruchomości przez cudzoziemców, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19200310178> (09.07.2018)

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Act on Acquisition of real estate by foreigners, Ibid.*

3.3. Principles applied when determining admission (e.g., non-discrimination, transparency, predictability)

Polish sectoral legislation may name criteria which need to be taken into account by controlling authorities in the process of evaluating the appropriateness of an application to perform certain activities. These criteria often relate to applicant's ability to make necessary investments³²⁰, absence of facts of revocation of previously granted licences,³²¹ absence of proceedings pending against shareholders or members of management board in relation to money laundering or the financing of terrorism³²².

3.4. Procedure of screening or review

For each protected sector of economy the respective law appoints a specific controlling authority responsible for examination of applications and adoption of decisions regarding granting access for performance of business activities in those sectors.

Energy sector:

Function of a controlling authority is performed by **the President of the Energy Regulatory Office**. The President, who must be a Polish citizen³²³, is appointed by the Prime Minister of the Republic of Poland on the basis of competitive selection of candidates for a five-year term.³²⁴

Real Estate:

In order for foreigner (except those originated from countries members of the EEA or Switzerland) to purchase real estate in the territory of Poland, it must obtain a permit from **the minister of internal affairs**. Granting of such permit is conditioned upon **absence of any objections of the Minister of National Defense**.³²⁵

Acquisition of agricultural land (except by individual farmer and by state and municipal units) requires the **consent of the General Director of the National Center for Agricultural Support**.³²⁶ **The General Director** is appointed by the Prime Minister of the Republic of Poland at the request of the minister competent for rural development.³²⁷ The National Center for Agricultural Support is granted **pre-emption rights** for purchasing agricultural lands and shares in companies that own such lands.³²⁸

Acquisition of agricultural land by **foreigner** (except those originated from countries members of the EEA or Switzerland) **additionally** requires approval **of the minister of internal affairs and no objections by the minister competent for rural development**.³²⁹

³²⁰ *Broadcasting Act*, Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19930070034> (17.07.2018)

³²¹ *Gambling Act*, Ustawa z dnia 19 listopada 2009 r. o grach hazardowych, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20092011540> (17.07.2018)

³²² *Gambling Act*, *Ibid.*

³²³ *Ibid.*

³²⁴ *Energy Law Act*, *Ibid.*

³²⁵ *Act on Acquisition of real estate by foreigners*, *Ibid.*

³²⁶ *Act on shaping the agricultural system*, *Ibid.*

³²⁷ *Act on National Center for Agricultural Support*, Ustawa o Krajowym Ośrodku Wsparcia Rolnictwa, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170000623> (24.09.2018)

³²⁸ *Act on shaping the agricultural system*, *Ibid.*

³²⁹ *Act on Acquisition of real estate by foreigners*, *Ibid.*

Costs:

Fees for lodging application for granting licence or permission to conduct business activity in the territory of Poland are charged in the amount **PLN 616**.³³⁰ However, *the Act on stamp duties* also indicates several exception to this rule.

In particular, a stamp duty for **granting a licence for foreign trade in liquid fuels and natural gas** amounts to **PLN 4.244**.³³¹

A stamp duty for granting **permission to foreigner** for acquisition of **real estate** or perpetual usufruct rights, or for acquisition of shares in commercial company, that owns or holds perpetual usufruct in real estate, amounts to **PLN 1570**.³³²

Together with stamp duties, additional fees may be provided for in the applicable legislation.

Timing / deadlines, ex-ante or ex-post

Sectoral legislation requires **pre-transactional notification** to the controlling authorities in all cases in which a licence or permission is required.

Duration of process, feedback vs. silent approval, public information

The specific duration of the licensing procedure is calculated on the basis of general terms established for adoption of administrative decisions. The main rule regarding issuance of such decisions is that **it has to be done without undue delay**, but not later than **one month** (or **two months** in particularly complex cases).³³³ In case of delay, the public authority is obliged to inform applicant about it, as well as about reasons of such delay, and to indicate a new date for solving the issue.³³⁴

Generally, sectoral legislation requires governmental authorities to keep registers of licence holders publically available and to publish information regarding the entities which applied for licenses, were granted or changed a license, and on those whose licences were withdrawn, revoked, refused, or expired.

Final decisions: use of proportionality or all/nothing, possibility of administrative/judicial review

In the process of adopting a decision regarding licensing, controlling authorities are not bound to grant licence to every candidate that meets necessary requirements. Indeed, licensing authorities enjoy **broad discretionary powers for deciding on the appropriateness of candidates**,³³⁵ as long as due consideration is given to issues of state and public security, and to fundamental public interests. Granting permissions or entering registers of regulated activity, on the other hand, are mainly **based on fulfillment of requirements** defined by the legislation.³³⁶

³³⁰ *Act on stamp duties*, Ustawa z dnia 16 listopada 2006 r. o opłacie skarbowej, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20062251635> (10.07.2018)

³³¹ Energy Regulatory Office, <https://www.ure.gov.pl/pl/urzed/dla-koncesjonariuszy/oplaty> (30.07.2018)

³³² *Act on stamp duties*, *Ibid.*

³³³ *Code on Administrative Proceedings*, Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19600300168> (06.08.2018).

³³⁴ *Code on Administrative Proceedings*, *Ibid.*

³³⁵ *Doing business in Poland*, Wardynski & Partners, 2016, Warsaw, p. 32, http://www.wardynski.com.pl/en/w_publication/doing-business-in-poland-2/ (04.09.2018)

³³⁶ *Doing business in Poland*, Wardynski & Partners, *Ibid.*

All decisions regarding granting, changing, refusal to grant and revocation of licences and permits have a status of administrative decisions and are subject to review by way of **administrative proceedings**. This function is performed by “**authorities of higher level**” as defined by the *Code on Administrative Proceedings*.³³⁷ If a minister took the challenged decision, appeal must be to the respective Voivodeship (Provincial) Administrative Courts according to the *Law on proceedings before administrative courts*.³³⁸

Energy sector:

Decisions of **the President of the Energy Regulatory Office** are appealed to **the Court of Competition and Consumers Protection**³³⁹ (XVII Department of the District Court in Warsaw), even though the minister competent for energy matters is a higher authority of the President within the meaning of the *Code of Administrative Proceedings*.

Real Estate:

The Law defines the Minister Competent for Rural Development as an authority of higher level of the General Director of the National Center for Agricultural Support.³⁴⁰ Consequently, his/her decisions are appealed to the Voivodeship (Provincial) Administrative Court.

Penalties in case of breach of final decisions

A violation of a “stand still” obligation or a failure to inform controlling authorities about intention to perform specific business activity will lead to considering all performed transactions and actions as invalid, and to the imposition of pecuniary penalties.

Violation of rules and conditions laid down by licence, permit or other decision of controlling authorities may lead to revocation of granted permission for performance of specific activities, modification of scope of such permission, and the imposition of pecuniary penalties.

4. Law on control of certain investments

4.1. Restrictions

Thresholds: maximum or minimum equity requirements

The *Law on Control of Certain Investments* is targeted at catching different scenarios of gaining control over protected entities. Therefore, it explicitly defines notions of “significant participation” (**20%, 25% or 33%**) and “control” (**>50%**), and regulates cases of their **indirect and consequential acquisitions**.³⁴¹

³³⁷ *Code on Administrative Proceedings*, Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19600300168> (06.08.2018)

³³⁸ *Law on proceedings before administrative courts*, Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021531270> (06.08.2018)

³³⁹ *Civil Procedural Code*, Ustawa z dnia 17 listopada 1964 r. - Kodeks postępowania cywilnego, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640430296> (10.08.2018)

³⁴⁰ *Act on shaping the agricultural system*, *Ibid.*

³⁴¹ *The Law on Control of Certain Investments*, *Ibid.*

The Law requires any potential investor to make prior notification to controlling authority regarding any intention to acquire or gain a qualified threshold in protected entities.³⁴²

The Law also empowers the authorities to initiate proceedings *ex officio* if the investor gained control (at least 20% of the votes) over an entity by means of illegal actions. The same is true if the acquisition resulted from the application of foreign legislation.

Activity restrictions

Something similar to activity restrictions could be found in *the Law on Control of Certain Investments*. The Law imposes “stand still” obligation on applicants for the time necessary for the controlling authority to adopt decision concerning their investments. This obligation covers performance of any activity covered by applicant’s notification, as well as those that implicitly lead to gaining control over protected entities. This so-called “**consequential acquisition**” includes cases when an entity gains significant participation/domination in another entity subject to protection, or in parent undertaking to such entity, by means of:

- 1) redemption of shares of the entity subject to protection or the acquisition of treasury shares of such entity;
- 2) division of the entity subject to protection or its merger with another entity;
- 3) making amendments to the articles of association concerning establishing, amending or abolishing rights of individual shareholder attached to preference shares; or
- 4) cancellation of shares or share certificates of an entity subject to protection.

4.2. Grounds for screening / review, definition and implementation

The Law on Control of Certain Investments declares the protection of public order and security as the main purpose underlying established regime. The Law requires the Council of Ministers to consider which companies to place on the list of protected entities based on the **market share of those entities**, the scale of their activity, any **threats to fundamental social interests** related to their activity, **a lack of feasibility to apply less restrictive measures** and the necessity to perform control over investments to such entities **for reasons of protection of public order and security**.

4.3. Principles applied when determining admission (e.g., non-discrimination, transparency, predictability)

The Law on Control of Certain Investments, due to concerns of the Polish government regarding sustainable functioning of the protected entities,³⁴³ requires applicants to indicate in their notification:

- 1) directly or indirectly held shares or rights attached to shares of the entity subject to protection;
- 2) **any legal or factual relations that could enable other entities to exercise voting rights** over the entity subject to protection or could give other entity **possibility to acquire** shares of the entity subject to protection;

³⁴² *Control of certain investments*, Clifford Chance, Briefing Note, 2015, https://www.cliffordchance.com/briefings/2015/07/control_of_certaininvestments.html (10.09.2018)

³⁴³ Explanatory note to the **Regulation on the entities subject to protection**, Uzasadnienie do Rozporządzenie Rady Ministrów z dnia 8 grudnia 2016 r. w sprawie wykazu podmiotów podlegających ochronie, <http://webcache.googleusercontent.com/search?q=cache:Mm9ZPSdlA5sJ:bip.msp.gov.pl/download/1/9993/SkanRozporzadzenieRadyMinistrowzdnia8grudnia2016rwsprawiewykazupodmiotowpodlegaj.pdf+&cd=1&hl=ru&ct=clnk&gl=ch&client=firefox-b-ab> (16.07.2018)

- 3) information regarding capital group to which the entity submitting the notification belongs (structure, entities involved, legal and actual capital, financial and personal ties with other entities etc.);
- 4) professional, business or statutory activity of the entity submitting the notification;³⁴⁴
- 5) a manner of implementation of intention referred to in the notification;
- 6) **intentions concerning the entity subject to protection and anticipated changes to its internal and external organization** (merger with another company, financing activities, changes to dividend and employment policies) etc.

4.4. Procedure of screening or review

The controlling authorities according to the *Law on Control of Certain Investments* are **the Prime Minister of the Republic of Poland and the Minister competent for energy matters**.³⁴⁵ Their competences are divided depending on the economic activity in which an entity subject to protection conducts its activities. The Law also stipulates establishment of the Consultation Committee, which operates as an advisory body of the controlling authority and consists of:

- 1) the Minister of Foreign Affairs;
- 2) the Minister of Defence;
- 3) the Interior Minister;
- 4) the Minister of Economy;
- 5) the Minister of Environment;
- 6) the Agriculture Minister;
- 7) the Minister of Public administration;
- 8) the Minister of Transportation;
- 9) the Minister of Electronic Communications;
- 10) the Minister of Mines;
- 11) the Energy Minister;
- 12) the Minister for Maritime Economy;
- 13) the Minister Inland Waterway Transport;
- 14) the Head of the Internal Security Agency;
- 15) the Head of the Foreign Intelligence Agency;
- 16) the Director of the Government Centre for Security;
- 17) the Head of the Military Counterintelligence Service;
- 18) the Head of the Military Intelligence Service;
- 19) the President of the Energy Regulatory Office; and
- 20) the President of the Office of Electronic Communications.³⁴⁶

Members of the Consultation Committee as well as the Chairman of the Consultation Committee are appointed by the Prime Minister.³⁴⁷

Costs

The Law on control of certain investments does not mandate a fee for lodging a notification.

³⁴⁴ In particular: about the subject of this activity, the scope and place of its conduction, current course, education held by the entity being natural person, or education of persons forming management and supervisory bodies of legal entities.

³⁴⁵ *The Law on control of certain investments, art.3 para 1 p.6.*

³⁴⁶ *The Law on control of certain investments, art.13 para.3.*

³⁴⁷ *Ibid, art.13 para 5.*

Timing / deadlines, ex-ante or ex-post

The Law emphasizes that **any intention** to acquire a significant participation in or domination over protected entity needs to be reported to the controlling authorities. Therefore, the Law establishes a **pre-transactional notification requirement**, and concretizes that such notification shall be performed prior to conclusion of any agreement stipulating obligation to purchase, prior to performance of any other action or transaction that lead to acquisition, prior to adoption of resolution by the general meeting of shareholders that gives raise to so-called “consequential acquisition”, and prior to announcement of a call for subscription to shares of publicly traded companies.³⁴⁸

However, *the Law on control of certain investments* also has an exception to the abovementioned rule. In case of an **indirect acquisition as a result of the application of foreign legislation**, the Law requires the **company, the shares of which have been acquired** (provided that it holds at least 20% of shares of entity subject to protection or is a parent undertaking of the entity holding significant participation in the entity subject to protection), to submit the notification about such acquisition. This must happen within **7 days** (or 30 days, if the effect of such indirect acquisition of the protected entity was not obvious and was reasonably only discovered later).³⁴⁹

Duration of process, feedback vs. silent approval, public information

The *Law on control of certain investments* stipulates that a decision is to be issued within **90 days** from the date of initiation of proceedings.

Final decisions: use of proportionality or all/nothing, possibility of administrative/judicial review

Following examination of submitted notification and documents, the controlling authority will either allow performance of the action/transaction covered by the notice or raise an objection against it.³⁵⁰ If there are formal shortcomings, the controlling authority may demand that the applicant complement its notification with necessary information, to provide necessary documents or to submit written explanations. Time-period for adjusting provided data is determined by the controlling authority, however it could not be shorter than 7 days.³⁵¹

In case when controlling authority, acting ex officio, is not able to determine means by which significant participation in the entity subject to protection has been obtained, it **may allow exercising rights** attached to shares of such entity, providing that it is executed in a way that **does not go beyond the significant participation**.

³⁵²

Decisions of the controlling authority are appealed to the **administrative courts**.

Penalties in case of breach of final decisions

A violation of a “stand still” obligation or a failure to inform controlling authorities about intention to acquire equity participation in covered entities can lead to a non-recognition of any performed transactions, the imposition of pecuniary penalties (up to **PLN 100 000 000**), the imposition of an obligation to dispose of acquired shares, or even imprisonment of up to 5 years.³⁵³ **If possible, an assessment of the actual practice of investment control processes (focus past 10 years)**

³⁴⁸ *Ibid*, art.5.

³⁴⁹ *Ibid*, art.5 para7.

³⁵⁰ *Ibid*, art.11.

³⁵¹ *Ibid*, art.9 para 2.

³⁵² *The Law on control of certain investments*, art.11 para 3

³⁵³ *Ibid*, art.15.

Foreign investors report about protectionist behavior on the part of Polish governmental and local authorities.³⁵⁴ This behavior can find its expression at any stage of the licensing or other procedure. Reportedly, necessary permission can not only be refused to be granted, but, even if already granted, can be revoked, simply because controlling authority decided that it did not want a foreign investor to be involved in particular activity.³⁵⁵

³⁵⁴ Poland: Barriers to Business, The Financial Times Limited, April 2015, <https://www.ft.com/content/4b416656-d898-11e4-ba53-00144feab7de> (20.08.2018).
³⁵⁵ *Ibid.*

J. SINGAPORE

1. Introduction

The Singaporean government makes a point of expressing its willingness to accommodate foreign investors³⁵⁶ and offers incentives to direct foreign investment.³⁵⁷ In 2017, among all the countries of the world, Singapore had the fifth largest inflow of foreign direct investment.³⁵⁸

In keeping with its open door approach to foreign investments, there is no formal screening mechanism.³⁵⁹ Application requirements for investments apply, with very few exceptions,³⁶⁰ to domestic investors as well as to foreign investors.³⁶¹³⁶²

However, the Singaporean government maintains a tight control of foreign and domestic business enterprises through a combination of governmental quasi-monopolies, restrictions on entrepreneurial immigration and licensing requirements.

³⁵⁶ Refer to the internet site of the Economic Development Board of Singapore and in particular to the statements made under the heading, “The Singapore Difference: Your Business Partner in Singapore”, available at <https://www.edb.gov.sg/en/why-singapore/discover-the-singapore-difference.html> (last consulted on 15.11.2018).

³⁵⁷ An extensive summary has been prepared as “Annex Table 5.A.8. Overview of tax incentives in Singapore” to Organisation for Economic Cooperation and Development, OECD Investment Policy Reviews: Southeast Asia, 2018, available at <https://www.oecd.org/daf/inv/investment-policy/Southeast-Asia-Investment-Policy-Review-2018.pdf>. For descriptions of specific incentives, see “Set Up Your Investment Journey with Singapore”, available at <https://www.edb.gov.sg/en/how-we-help/setting-up.html> and EYGM Limited, Doing Business in Singapore, 2016, under the heading, “Incentives – examples”, freely accessible in electronic form at www.fccsingapore.com/sites/default/files/public/News%20documents/Aug%202016%20-%20Doing%20business%20in%20Singapore%20-%20EY.pdf (all last consulted on 15.11.2018).

³⁵⁸ Refer to Banco Santander, S.A, *Singapore: Foreign Investment*, 2018, under the heading “FDI in figures”, available at <https://en.portal.santandertrade.com/establish-overseas/singapore/foreign-investment> (last consulted on 15.11.2018).

³⁵⁹ Refer below, to point 2. of this national contribution to the current report.

³⁶⁰ Refer below, especially to points 2.1.2. and 2.3. in this national contribution to the present report.

³⁶¹ Refer to Bonnitca, J, “Singapore” in International Institute for Sustainable Development, *Investment Laws of ASEAN Countries: A comparative review*, 2017, available at <https://www.iisd.org/sites/default/files/publications/investment-laws-asean-countries.pdf> (last consulted on 15.11.2018).

³⁶² Refer to U.S. Department of State, Bureau of Economic and Business Affairs, *Investment Climate Statements for 2018: Singapore*, freely accessible in electronic form on the State Department’s internet site at <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2018&dld=281533> (last consulted on 15.11.2018).

2. Notification requirements (restrictions imposed on investors or investments)

All persons, whether Singaporean or foreign, who wish to set up a new business (a subsidiary, branch, partnership, trust, or sole proprietorship) in Singapore, are required to register with the Accounting and Corporate Regulatory Authority.³⁶³

Aside from choosing an acceptable name which is not already registered, the sole prerequisite for registration is that the business have representative that is a citizen, permanent resident, or who holds a work permit in Singapore (an “EntrePass”).³⁶⁴ The application process for an EntrePass is restrictive, designed to limit entrepreneurial immigration into Singapore.³⁶⁵

ACRA registers every applicant who fulfills these administrative prerequisites, without any screening of foreign applicants. The registration usually takes 15 minutes, but may take up to 2 months if approval or review by other agencies is necessary.³⁶⁶ Business activities are permissible as soon as registration is completed unless the activities themselves require a license.

3. Licensing

The ACRA examines the business activity proposed by the applicant in order to determine whether it requires licensing in Singapore. The relevant ministries undertake the examination of relevant cases.³⁶⁷

4. Sector Specific Regulation

4.1. Immovable property / Background information

Singapore, including its outlying islands, is approximately comparable in size to the Swiss Canton of Glarus. Since the Republic of Singapore was founded in 1965, its population has increased from 1.8 million to 5.8 million and this will continue to grow in the coming years.³⁶⁸ Optimisation of land usage

³⁶³ Refer to statements made by the Economic Development Board under the heading, “Set Up Your Investment Journey with Singapore”, freely accessible in electronic form on the Board’s internet site, *op. cit.* The ACRA was established in 2004 by merging the Registry of Companies and Businesses (equivalent to the Swiss *Handelsregisteramt*) with the Public Accountants’ Board. The ACRA has since added an Institute of Corporate Law to its organisational structure. The ACRA’s internet site is located at <https://www.acra.gov.sg> and contains a number of “How to Guides” for investors.

³⁶⁴ The qualification is referred to as someone who is an “authorised representative ordinarily resident” in Singapore. See Economic Development Board, “Set Up Your Investment Journey with Singapore”, available on the Board’s internet site, *op. cit.*

³⁶⁵ Refer to the official indications given by the Singaporean Ministry of Manpower on its internet site, freely accessible at <https://www.mom.gov.sg/passes-and-permits/entrepass/eligibility> and to practical explanations provided by a company services provider at <https://www.singaporecompanyincorporation.sg/how-to/immigration-relocation/comprehensive-guide-to-the-singapore-entrepreneur-pass/> (both last consulted on 16.11.2018).

³⁶⁶ ACRA website, “Registering a Foreign Company” (consulted 4 December 2018).

³⁶⁷ Refer to the instructions given by ACRA for the registration of foreign company branches, *op. cit.*, under “Processing Time”.

³⁶⁸ Refer to the relevant figures published by the Singaporean Department of Statistics, available at

has therefore always been a fundamental challenge faced by the Singaporean government. From the point of view of national security, it has been considered essential to retain relatively large rainwater catchment areas in a largely natural state. It has always been clear that Singapore wishes to avoid attaining the population density levels of the islands of Hong Kong and Macau. From the point of view of economic policy, industries occupying large areas of land have had to be discouraged or replaced by space-efficient industries. In order to maintain social and political stability, structural efforts have been made to ensure that affordable housing is constantly available to Singaporean with lower or middle incomes.

At the structural level, the Land Acquisition Ordinance 1920 had permitted the compulsory acquisition of land for infrastructural and defence projects. It was replaced soon after independence by the Land Acquisition Act 1966, which enables the Singaporean government to compulsorily acquire land for all purposes of public policy in respect of land management. That Act was amended in 1973 so as to counter speculative trading in land and limit the costs of compensating former owners of land acquired by the State. The government made very active use of the legislation in the following years. By 1985, the State owned 76.2% of the land surface of Singapore.³⁶⁹ Its control of this fundamental resource has enabled the government to direct the details of economic and urban development throughout Singapore, without discouraging private enterprise.³⁷⁰

Publicly owned land in Singapore is vested primarily in the Singapore Land Authority and secondarily in the Jurong Town Corporation. According to the Singapore Land Authority's internet site,³⁷¹ it "runs a regular programme of releasing State lands for sale to the private sector ...". Another part of the same internet site³⁷² shows however, that no land has actually been sold by the Authority since the beginning of 2011. Our research indicates that the Authority, like the Jurong Town Corporation,³⁷³ strongly prefers to grant only leasehold titles to private sector investors. The deeds of lease may contain clauses giving the Authority an optional power to terminate leases before expiry, if the Authority considers that termination is necessary for reasons of public policy.³⁷⁴

In addition to using its power as the country's largest landowner, Singapore uses its taxing powers to control land acquisition by foreign investors.

<http://www.tablebuilder.singstat.gov.sg/publicfacing/createDataTable.action?refId=14912> (last consulted on 09.11.2018).

³⁶⁹ National Library Board, "Land Acquisition Act is enforced", 2013, with references to sources in the footnotes. The article is available at <http://eresources.nlb.gov.sg/history/events/1f669eff-bc82-49d1-a27c-2624e4cab8c6> (last consulted on 08.11.2018).

³⁷⁰ Refer to Paper Masters, "Research Papers on Investing in Singapore", available at <https://www.papermasters.com/investing-in-singapore.html> (last consulted on 08.11.2018).

³⁷¹ <https://www.sla.gov.sg/Services/Purchase-of-State-Land/Management-of-Land-Sales> (last consulted on 08.11.2018).

³⁷² <https://www.sla.gov.sg/Services/Purchase-of-State-Land/SLA-Land-Sales> (last consulted on 08.11.2018).

³⁷³ Refer above, to the last paragraph under point 2.1.3. in this national contribution to the present report.

³⁷⁴ In 1988, the Raffles Country Club obtained a 40-year lease over land for the erection of extensive premises and the establishment of a golf course. In August of 2018, ten years before the lease would have expired, the Singapore Land Authority terminated it in order to make room for the planned Kuala Lumpur – Singapore High Speed Rail Link, although the newly elected Malaysian government had stated that it would not go ahead with the project. Refer to Mokhtar, F, "Farewell to Raffles Country Club, as SLA acquires land amid uncertainty over HSR project", article published in the 01.08.2018 edition of the *Today* newspaper. See <https://www.todayonline.com/singapore/farewell-raffles-country-club-sla-acquires-land-amid-uncertainty-over-hsr-project> (last consulted on 08.11.2018).

On the one hand, stamp duty is charged on contracts for sale and purchase, as well as on mortgages, leases and rental agreements in respect of all kinds of immoveable property. This duty usually constitutes a very small part of the value of the transaction: 0.4% of four times the average annual rent payable under a lease or rental contract; between 1% and 4% of the purchase price of non-residential property. A much higher, so-called “Additional Buyer’s Stamp Duty” may be payable upon purchase of a residential property: 5% by a foreign citizen with right of permanent residence in Singapore who is buying one residential property; 7% by a Singaporean citizen buying a second residential property; 10% by a permanent resident buying a second or subsequent residential property or a Singaporean citizen buying a third or subsequent residential property; 15% by any legal entity or by a foreign citizen with no right of permanent residence in Singapore.³⁷⁵ In 2018, except for the first category, all of these rates were increased by five percentage points, or ten percentage points in the case of legal entities, because the Singaporean government considered that the housing market was “overheating” as a result of speculation (i.e. “high transaction volumes” were causing prices to rise “ahead of economic fundamentals”).³⁷⁶ By virtue of bilateral agreements, individual citizens of Iceland, Liechtenstein, Norway, Switzerland or the USA are treated in the same manner as Singaporean citizens for this purpose, meaning that they are not required to pay the additional duty upon purchasing a first residential property in Singapore. Sellers are required to pay a stamp duty if they dispose of immovable property less than three years after having acquired it. The rates of duty payable by sellers of industrial property are now slightly higher than those payable on residential property. No distinction is made on the basis of the nationality, residence or legal form of the seller.³⁷⁷

On the other hand, the intensification of land use for industrial purposes is strongly encouraged.³⁷⁸ Income tax rebates (Land Intensification Allowance) are offered to industrial enterprises which can meet or surpass benchmarks set by the Economic Development Board of Singapore for “Gross Plot Ratio”, being the relationship between the number of square meters of floor-space used by the enterprise once it’s buildings have been constructed and the number of square meters of land allocated to the enterprise.³⁷⁹

³⁷⁵ A clearly comprehensible summary of applicable stamp duties is provided by Jones Lang Lasalle, an internationally active real property investment, management and consulting enterprise, on its internet site dedicated to investment in Singapore:
<http://www.joneslanglasallesites.com/investmentguide/country/singapore/taxesonacquisitionandtransferofrealestate> (last consulted on 08.11.2018).

³⁷⁶ Monetary Authority of Singapore, “Raising Additional Buyer’s Stamp Duty Rates and Tightening Loan-to-Value Limits to Promote a Stable and Sustainable Property Market”, press release dated 05.07.2018 and freely accessible on the Authority’s internet site: <http://www.mas.gov.sg/News-and-Publications/Media-Releases/2018/Raising-Additional-Buyers-Stamp-Duty-Rates-and-Tightening-Loan-to-Value-Limits.aspx> Refer also to Pooja Thakur Mahrotri, “Singapore Home Sales Rebound as Buyers Move Past Curbs”, article dated 15.10.2018, originally posted on the internet site of Bloomberg and freely accessible in electronic form at <https://www.bloomberg.com/news/articles/2018-10-15/singapore-home-sales-rebound-as-buyers-move-past-latest-curbs> (both last consulted on 08.11.2018).

³⁷⁷ Refer to the Jones Lang Lasalle internet site dedicated to investment in Singapore, *op. cit.*

³⁷⁸ The Jurong Town Corporation lists the projected “Plot Ratio” of an industrial building as one of the criteria for selecting applicants for allocation of land: <https://www.jtc.gov.sg/customer-services/Pages/allocation-policies.aspx> Also for the purpose of land use intensification, the Corporation has itself built deep underground storage facilities for hydrocarbons and chemical products in a geographically stable area of Singapore: refer to <https://www.jtc.gov.sg/industrial-land-and-space/Pages/jurong-rock-caverns.aspx> (both last consulted on 09.11.2018).

³⁷⁹ A detailed *Land Intensification Allowance (LIA) – Main Brochure* is freely accessible on the internet site of the Economic Development Board:

Finally, it may also be of interest to note that the existing legislative framework implicitly gives the Singaporean government a completely discretionary power to refuse to permit the construction of new churches and other places of worship. Buildings on land to be used for religious purposes are not expressly excluded from the scope of “residential property”, which “foreign persons” can acquire only with government approval, and religious congregations, which normally take the legal form of societies, are to be treated as “foreign persons” if even a single member does not have Singaporean citizenship. The Land Dealings Approval Unit’s electronic application platform specifically foresees³⁸⁰ applications for approval to acquire a “place of worship”, although section 30 of the Residential Property Act states that “religious groups” and foreign diplomatic missions are not required to comply with that procedure.

4.1.1. Residential property development

Under section 4 of the Housing Developers (Control and Licensing) Act,³⁸¹ housing developments may be undertaken only by persons holding a housing developer’s licence issued by the Urban Redevelopment Authority. “Housing development” is defined in section 2 to mean the construction or the financing of the construction of more than four units of housing accommodation. A “housing developer” is defined to mean a company or a limited liability partnership incorporated under Singaporean law. The Housing Developers (Control and Licensing) Act also includes within that latter definition “persons” and other entities, such as partnerships and societies, which do not have legal personality. The Urban Redevelopment Authority’s published criteria for the evaluation of licensing applications³⁸² make it clear however, that individuals and small businesses will not be licensed.³⁸³

Where a housing developer acts without a licence, the “person” or legal entity commits a criminal offence and may be fined and/or imprisoned upon conviction if it is a legal entity, its individual managers may be fined and/or imprisoned.

The Housing Developers (Control and Licensing) Act does not exclude licensing of Singaporean legal entities which are owner and/or financed by foreign nationals. Our research has located no indications that the Urban Redevelopment Authority systematically rejects applications lodged by foreign-owned companies.

<https://www.edb.gov.sg/content/dam/edb-site/downloads/brochures/LIA%20Brochure.pdf> (last consulted on 09.11.2018).

³⁸⁰ <https://www.sla.gov.sg/ldau/MainPage.aspx> (last consulted on 07.11.2018).

³⁸¹ Originally promulgated as Act no. 4 of 1965 and now integrated, as Chapter 130, into the systematic collection of Singaporean primary legislation, the *1985 Revised Edition of the Statutes of the Republic of Singapore*. Non-authoritative texts of the collected statutes are freely accessible in electronic form on a website (*Singapore Statutes Online Plus*) maintained by the Attorney-General’s Chambers: <https://sso.agc.gov.sg/Index> (last consulted on 05.11.2018).

³⁸² *Criteria for a Housing Developer’s Licence (Sept 2018)*, freely accessible in electronic form at <https://www.ura.gov.sg/Corporate/Guidelines/Developers/-/media/0334C134DE2A4F028AA9F0D640DAD3E3.ashx> (last consulted on 05.11.2018).

³⁸³ Non-corporate applicants must provide a bank or insurance guarantee of at least one million Singapore Dollars.

A published list³⁸⁴ of the currently licensed Singaporean residential property developers indicates that licences have been issued only to private companies registered in Singapore and public companies listed on the Singapore Stock Exchange.³⁸⁵

4.1.2. Ownership of residential property

Under section 2 of the Residential Property Act,³⁸⁶ “residential property” includes all land in Singapore upon which one or more dwellings have been constructed, all land zoned as residential under the urban planning legislation, all vacant land and any other land which the Singaporean government may wish to classify as “residential property”.

Restricted Resident Property

Section 3 generally prohibits the acquisition by “foreign persons” of any immovable property rights in residential property. It is specified that the prohibition extends to acquisition by gift or inheritance. The category of “foreign persons” is deemed to include individuals who have no permit to permanently reside in Singapore. Singaporeans who give up their citizenship and permanent residents who give up or lose their rights of residence are required to sell any Singaporean residential property rights within two years thereafter, under threat of a fine and/or imprisonment in default.³⁸⁷

Immoveable property transactions effected in contravention of the Act are deemed to be null and void. Provision is made³⁸⁸ for confiscation of any profits generated in cases where a Singaporean citizen or legal entity is convicted of the offence of secretly acquiring residential property on behalf of a foreigner.

It is possible for foreign persons to apply for and obtain exceptional approvals of acquisition of “restricted residential property”. The Singapore Land Authority maintains a specific Land Dealings Approval Unit to administer such applications.³⁸⁹ Decisions of the Land Dealings Approval Unit to accept or refuse applications are made on an entirely discretionary basis, but the Unit states that successful applicants will normally fulfil two criteria:

- (i) permanent residence in Singapore for at least the five years immediately preceding the making of the application;
- (ii) “exceptional economic contribution to Singapore”.³⁹⁰

The second criterion does not necessarily require investment in Singapore, or ownership of an enterprise; the Unit states that the applicant’s “employment income assessable for tax in Singapore” will be taken into consideration.³⁹¹ Approval can be granted for the acquisition of only one “restricted

³⁸⁴ Undated « List of Property Developers in Singapore » freely accessible in electronic form at <http://www.sgpropertyinvestors.com/list-of-property-developers-in-singapore.html> (last consulted on 05.11.2018).

³⁸⁵ In particular, BBR Holdings (S) Ltd, part of the BBR Network based in Switzerland, and Roxy-Pacific Holdings Limited.

³⁸⁶ Originally promulgated as Act no. 18 of 1976, now integrated, as Chapter 274, into the *1985 Revised Edition of the Statutes of the Republic of Singapore*, *op. cit.*

³⁸⁷ Section 3A of the Residential Property Act.

³⁸⁸ By sections 23 and 23A of the Residential Property Act.

³⁸⁹ The internet site of the Unit is freely accessible at <https://www.sla.gov.sg/ldau/MainPage.aspx> (last consulted on 06.11.2018).

³⁹⁰ Refer to the Unit’s response to the Frequently Asked Question, “What are the criteria for approval?”, freely accessible on the Unit’s internet site, *ibid*, under the heading “FAQs”.

³⁹¹ *Idem*.

residential property” at any one time; it is a condition of every approval that, if the applicant already owns such a property, she must dispose of it within a specified, short period of time.³⁹²

The Land Dealings Approval Unit also has the task of issuing so-called “Clearance Certificates” to Singaporean legal entities wishing to buy any restricted residential property. By way of enforcement of the rule that a legal entity is a “foreign person” if any of its shareholders, directors, members, partners, trustees or ultimate owners are not Singaporean citizens,³⁹³ owners of restricted residential property may sell only to companies or other legal entities which can present such certificates.³⁹⁴ If a Singaporean legal entity admits a foreign national to a directorship, partnership, trusteeship or membership or to the circle of its shareholders or other owners, the entity is said to “become a converted foreign entity”.³⁹⁵ A Singaporean legal entity that owns any restricted residential property must apply for approval before becoming a converted foreign entity. Failure to do so exposes the entity and its managers to criminal prosecution and to a fine and/or imprisonment upon conviction.³⁹⁶

It is interesting to note that the Land Dealings Approval Unit has put in place³⁹⁷ a separate application process for residential property acquisitions at Sentosa Cove. This is a high-end residential zone created on territory added to the eastern end of Sentosa Island by means of landfill. Since the early 2000s, it has been marketed to High Net Worth Individuals and their families. According to a media report,³⁹⁸ approvals of acquisition of “restricted residential property” are currently being granted only in respect of houses at Sentosa Cove. Buyers do not receive full title to land at Sentosa Cove. The State conveys only a leasehold title, limited to 99 years, after which the property reverts completely to the Singaporean State.

Non-Restricted Residential Property

An exception to the Residential Property Act³⁹⁹ permits foreign persons to acquire “non-restricted residential property”, defined to include only flats and units in housing developments formally designated as “condominia” under the planning legislation.⁴⁰⁰ No restriction is imposed on the number

³⁹² Refer to the Unit’s response to the Frequently Asked Question, “I own a restricted property. Can I apply to purchase another restricted property?”, *ibid*.

³⁹³ Refer above, to the first paragraph under this point 2.1.2. of the present national contribution to the present report.

³⁹⁴ This is the effect of sections 10 to 19 of the Residential Property Act, which require Singaporean companies, limited liability partnerships and societies to apply for certificates and empower the Land Titles Registry to refuse to register transfers of residential property to such entities unless they present certificates.

³⁹⁵ Section 26 of the Residential Property Act.

³⁹⁶ Subsections 9(6) and 9(7) of the Residential Property Act.

³⁹⁷ Refer to the answers given by the Land Dealings Approval Unit on its internet site, *op. cit*, to Frequently Asked Questions in respect of “Application for Foreign Person Purchase (Sentosa Cove)”.

³⁹⁸ Pooja Thakur Mahrotri, “The Lost Decade of Sentosa Cove, Singapore’s Billionaire Haven”, article originally posted on the internet site of Bloomberg and freely accessible in electronic form at <https://www.bloomberg.com/news/articles/2018-09-18/the-lost-decade-of-sentosa-cove-singapore-s-billionaire-haven> (last consulted on 07.11.2018).

³⁹⁹ Set out in subsection 4(1) of the Residential Property Act.

⁴⁰⁰ Section 2 contains a detailed definition of « flat », including units in residential buildings for which strata titles are registered. Paragraphs 4(1)(c) and 4(2)(c) expressly and separately include within the category of “non-restricted residential property” all condominiums within the scope of the Executive Condominium Housing Scheme Act. This scheme is designed to enable young, middle-income families to buy condominium units in “gated communities”. According to the website of the public Housing & Development Board, which administers the scheme, it is open only to couples at least one of whom is a

of flats or units which a foreign person may acquire in Singapore, but no single foreign person is permitted⁴⁰¹ to acquire all of the units in a condominium or all of the flats in every building included within a single residential development.

4.1.3. Ownership of commercial and industrial property

The Residential Property Act specifies⁴⁰² that its provisions do not apply to persons, whether foreign or Singaporean, wishing to acquire “land, buildings or other premises” which are available exclusively for commercial and/or industrial usage under Singaporean planning legislation or for usage as hotels under the Hotels Act. The Singapore Land Authority specifies on its internet site⁴⁰³ that hotels and other commercial properties and industrial sites can be purchased by foreigners, without the need to obtain an approval.

As a matter of fact, commercial properties (i.e. offices and shops) available for acquisition in Singapore usually take the form of high-value developments attributed by the government to consortia of property developers. We have seen no indications that foreign developers are excluded or even discouraged from participating in such consortia.

4.2. Manufacturing armaments

According to a published research paper written before 2007, “Armament manufacturing is strictly closed to foreign investment”.⁴⁰⁴

Our research has identified no express norm of Singaporean law to that effect. The manufacturing of arms, explosives or substances identified as precursors to explosives is governed by the Arms and Explosives Act⁴⁰⁵. Section 13 makes it a criminal offence, punishable by a fine and/or imprisonment (and/or caning if the offender intended to use the items to commit other criminal offences), to manufacture or deal in arms, explosives or poisonous gases without having been licensed to do so.

Licences may be issued by the Singapore Police Force. Certain conditions under which licences may be issued are set out in section 21G and additional conditions⁴⁰⁶ and guidelines⁴⁰⁷ are published on the internet site of the Singapore Police Force. According to the guidelines, the applicant, if a company, “must be registered with the Registry of Companies and Businesses”. Foreign companies (in the sense that they have been created under foreign legal systems and/or in the sense that they are owned by

Singaporean citizen: refer to <https://www.hdb.gov.sg/cs/infoweb/residential/buying-a-flat/new/eligibility/executive-condominiums> (last consulted on 06.11.2018).

⁴⁰¹ By subsection 4(2) of the Residential Property Act.

⁴⁰² In the second part of the definition of the term, “residential property”, included in section 2 of the Act.

⁴⁰³ <https://www.sla.gov.sg/Services/Restriction-on-Foreign-Ownership-of-Landed-Property> (last consulted on 05.11.2018).

⁴⁰⁴ Paper Masters, “Research Papers on Investing in Singapore”, *op. cit.*, in its sixth principal paragraph.

⁴⁰⁵ Originally promulgated as Ordinance no. 9 of 1913, now integrated, as Chapter 13, into the *1985 Revised Edition of the Statutes of the Republic of Singapore*, *op. cit.*

⁴⁰⁶ “Licensing conditions for licence to manufacture arms”, freely accessible at <https://www.police.gov.sg/e-services/apply/licenses-and-permits/arms-and-explosives/manufacturing-of-arms-or-explosives/conditions> (last consulted on 14.11.2018).

⁴⁰⁷ “Guidelines on application for a licence to deal in arms / manufacture arms / repair arms (including swords, spears, spearheads, bayonets and daggers) or to deal in explosives / manufacture explosives / store explosives”, available at <https://www.police.gov.sg/e-services/apply/licenses-and-permits/arms-and-explosives/manufacturing-of-arms-or-explosives/guidelines#content> (last consulted on 14.11.2018).

foreign investors) can be so registered. At least one director (or one partner, if the applicant is a limited partnership or a limited liability partnership) must also submit an application and that person must be either a citizen or a permanent resident of Singapore aged at least 21. This again places no restriction upon foreign ownership of the investment vehicle. In addition, section 21F requires the police, before issuing any licence, to determine whether the applicant is “a fit and proper person” to hold such a licence and whether it would otherwise serve “the public interest” to issue a licence to that applicant. Each individual director of an applicant company, or individual partner of an applicant partnership, is also required to show that she is “a fit and proper person”. The Singapore Police Force has formulated detailed guidelines⁴⁰⁸ for determining the fitness and propriety of each applicant. None of these guidelines refer to the applicant’s nationality or place of residence.

It is probably also worth noting in this context that licensed Singaporean arms manufacturers are permitted to sell their arms only in export trade, or to Singaporean public authorities.⁴⁰⁹ Neither foreign, nor Singaporean investors can therefore obtain “access to a domestic market” for armaments in Singapore.

According to a reliable press report,⁴¹⁰ Singapore Technologies Engineering Ltd. was the only arms manufacturer operating in Singapore in late 2015. This company is the successor to the Chartered Industries of Singapore, an enterprise created by the Singaporean government soon after independence to mint coins and develop arms for national defence.⁴¹¹ Until 1990, the company was wholly owned by Temasek Holdings Pte Ltd, Singapore’s sovereign wealth investment fund.⁴¹² It was then listed on the Singapore Stock Exchange and has become a major international enterprise, active in aeronautics, maritime engineering and electronics, as well as “land systems” (military equipment), with important subsidiary operations in China and the USA.⁴¹³ Temasek Holdings Pte Ltd continues however, to be the company’s “controlling shareholder”.⁴¹⁴

⁴⁰⁸ “Guidelines for considering whether a person is fit and proper to hold a licence under the Arms & Explosives Act, Chapter 13”, available at <https://www.police.gov.sg/e-services/apply/licenses-and-permits/arms-and-explosives/manufacturing-of-arms-or-explosives/guidelines#content> via a link from par. 2.a. (last consulted on 14.11.2018).

⁴⁰⁹ Par. 2.(b) of the “Licensing conditions for licence to manufacture arms”, *op. cit.*

⁴¹⁰ Chng, G, “Singapore-made arms to be produced overseas”, in *The Straits Times* of 01.10.2015, freely accessible in electronic form at <http://www.straitstimes.com/singapore/singapore-made-arms-to-be-produced-overseas> (last consulted on 14.11.2018). This article refers to ST Kinetics, a wholly owned subsidiary of Singapore Technologies Engineering Ltd.

⁴¹¹ Refer to Zhuang, J, “Chartered Industries of Singapore, A Surprising Side of Singapore Design”, dated 05.06.2017 available at <http://justinzhuang.com/posts/tag/chartered-industries-of-singapore/> (last consulted on 14.11.2018).

⁴¹² Refer to Temasek’s internet site at <https://www.temasek.com.sg/en/who-we-are/about-us.html> (last consulted on 14.11.2018). The fund has the legal form of a common company limited by shares, all of which are owned by Singapore’s Ministry of Finance.

⁴¹³ Refer to company’s internet site at <https://www.stengg.com/en/about/> (last consulted on 14.11.2018).

⁴¹⁴ This was confirmed by a press release of the company dated 18.01.2017, “ST Engineering’s Electronics Arm Acquires 51% equity stake in SP Telecommunications Pte Ltd”, available at <https://www.stengg.com/en/newsroom/news-releases/st-engineerings-electronics-arm-acquires-51-equity-stake-in-sp-telecommunications-pte-ltd/> Refer also to Stolarchuk, J, “Temasek-controlled ST Engineering’s Chinese unit files for bankruptcy after ‘best efforts’ to avoid such an outcome fail”, in *The Independent* of 27.04.2018, available at <http://theindependent.sg/temasek-controlled-st-engineerings-chinese-unit-files-for-bankruptcy-after-best-efforts-to-avoid-such-an-outcome-fail/> (both last consulted on 14.11.2018).

4.3. Legal services

The U.S. Department of State has been complaining for some time⁴¹⁵ about restrictions on access to the Singaporean market for legal services. The regulatory framework in this field is particularly complicated. For clarity of exposition, a distinction should be made between access to the legal profession and ownership of vehicles for the provision of legal services.

4.3.1. Access to legal profession

Each aspiring Singaporean lawyer must surmount a number of hurdles: obtain a law degree from an officially approved university; be registered by the Singapore Institute of Legal Education as a “qualified person”; pass the courses and examinations prescribed by that Institute; complete an approved practice training period.⁴¹⁶ The person can then be “called to the bar” as a solicitor advocate, but can actually practise only once the Supreme Court of Singapore issues a “practising certificate” which needs to be renewed annually.⁴¹⁷ Whatever may be the difficulties faced by foreign lawyers in meeting the other requirements, only persons who are either citizens or permanent residents of Singapore will be registered as “qualified persons”.⁴¹⁸

It is open to foreigners (and to Singaporeans who have not studied at an approved university) to apply for registration as “regulated foreign lawyers” in Singapore. Even in the best case however, such lawyers are not allowed to provide services falling outside the “permitted areas of legal practice”.⁴¹⁹ Advocacy before almost all the courts and administrative tribunals of Singapore falls outside the “permitted areas”, as do conveyancing services (i.e. formal transfers of immovable property) and the provision of advice on all aspects of administrative, criminal, family or succession law, as well as in respect of non-commercial trusts.⁴²⁰ In the result, only Singaporean citizens or permanent residents can become Singaporean solicitor advocates serving the complete domestic market for legal services.

⁴¹⁵ Compare p. 7 of U.S. Department of State, *2014 Investment Climate Statement: Singapore*, freely accessible in electronic form on the State Department’s internet site at <https://www.state.gov/documents/organization/227436.pdf> (last consulted on 22.11.2018) with U.S. Department of State, Bureau of Economic and Business Affairs, *Investment Climate Statements for 2018: Singapore*, *op. cit.*, under the heading, “Legal Services”.

⁴¹⁶ Refer to the internet site of the Singapore Institute of Legal Education, especially at <http://www.sile.edu.sg/admission-requirements/practice-training-period> (last consulted on 22.11.2018).

⁴¹⁷ Under Part III (sections 25 to 28) of the Legal Profession Act, Chapter 161 of the *1985 Revised Edition of the Statutes of the Republic of Singapore*, *op. cit.*

⁴¹⁸ This is the effect of the Legal Profession (Qualified Persons) Rules, classified as Rules & Regulations 15 under Chapter 161 of the *1985 Revised Edition of the Statutes of the Republic of Singapore*, *op. cit.* Graduates of the National University of Singapore or of Singapore Management University may qualify, but the law faculties of these institutions enroll only Singaporean permanent residents. Under Rules 8, 9 and 9A, graduates of the approved Australian, British, New Zealand or US-American universities may qualify only if they are Singaporean citizens or permanent residents. Practising certificates can be issued to so-called “*locum* solicitors” (who replace employed solicitors or sole practitioners on a temporary basis) only if they are Singaporean citizens or permanent residents; subsection 26(1A) of the Legal Profession Act.

⁴¹⁹ Legal Profession Act, Part IVA, in particular subparagraph 36B(3)(a)(i).

⁴²⁰ Part 1, in particular subrule 4(1), of the Legal Profession (Regulated Individuals) Rules, statutory instrument 701/2015.

4.3.2. Ownership of law firms

In 2015, the Singaporean government extended its law firm licensing regime to all types of vehicles for the delivery of legal services, being companies, limited liability partnerships, partnerships and sole practitioners. Licences are issued (and can be revoked) by a newly established Legal Services Regulatory Authority, which is in fact not an independent authority, but a department within the Ministry of Law.⁴²¹

Vehicles permitted to practice in all fields of law and supply all kinds of legal services in Singapore are licensed as “Singapore Law Practices”. “Regulated foreign lawyers”⁴²² are permitted to work in “Singapore Law Practices”, including as partners or directors.⁴²³ In recognition of the worldwide trends towards “multi-disciplinary practices”, so-called “regulated non-practitioners” (accountants, engineers or other non-legal professionals) now have the same rights.⁴²⁴ In addition, foreign law firms may seek the approval of the Legal Services Regulatory Authority to become shareholders or partners in “Singapore Law Practices”.⁴²⁵ On the other hand, foreign lawyers, foreign law firms and non-lawyers may together hold no more than 35% of the total ownership value, shareholder voting rights or partnership interests in a “Singapore Law Practice” and its managing partner or director must always be a Singaporean solicitor.⁴²⁶ In the result, foreign law firms or other foreign investors can acquire only minority interests in Singaporean law firms and then only with the approval of the Singaporean government.

Since 2008, the Singaporean government has permitted foreign and multi-jurisdictional law firms to apply for licences to operate in Singapore as Qualifying Foreign Law Practices. These firms may practise foreign and international law and may hire Singaporean solicitors to provide services in the “permitted areas”⁴²⁷ of Singaporean law (essentially commercial law).⁴²⁸ Nine licences were actually issued to firms considered as fulfilling the relevant criteria, including whether the firm’s Singapore office would function as its regional head office, the extent to which the office would “generate offshore work” and the number of lawyers who would work in the office.⁴²⁹ At present, the Ministry of Law states⁴³⁰ that it is accepting no new applications and has no plans to issue a new call for applications. It has also announced⁴³¹ that it may not renew some of the existing licenses when these expire, because some of the benefits that were expected to accrue to Singapore have in fact not materialised.

⁴²¹ Refer to Ministry of Law, *Circular on the Establishment of the Legal Services Regulatory Authority*, Singapore, 2015, available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Announcements/Circular%20on%20the%20Establishment%20of%20the%20LSRA.pdf> (last consulted on 23.11.2018).

⁴²² Refer above, to the second paragraph under point 2.3.1. in this national contribution to this report.

⁴²³ Legal Profession Act, subsection 176(1).

⁴²⁴ Legal Profession Act, section 36G; Legal Profession (Regulated Individuals) Rules, Rule 17.

⁴²⁵ Legal Profession Act, subsection 176(9).

⁴²⁶ Rule 3 of the Legal Profession (Law Practice Entities) Rules, statutory instrument 699/2015.

⁴²⁷ Refer above, to the second paragraph under point 2.3.1. in this national contribution to this report.

⁴²⁸ Legal Profession Act, paragraph 171(4)(a); Legal Profession (Law Practice Entities) Rules, Rule 57.

⁴²⁹ Refer to Ministry of Law, *Award of Qualifying Foreign Law Practice licences*, Singapore, 2008, available at <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/award-of-qualifying-foreign-law-practice-licences.html> (last consulted on 23.11.2018).

⁴³⁰ On the section of its internet site entitled “Types of Licence or Registration” (<https://www.mlaw.gov.sg/content/minlaw/en/legal-industry/licensing-or-registration-of-law-practice-entities0/types-of-licence-or-registration.html> - last consulted on 23.11.2018), at the end of the description of a “Qualifying Foreign Law Practice”.

⁴³¹ Refer to Ministry of Law, *Update on Qualifying Foreign Law Practice Licences Awarded in 2013*, Singapore, 2008, available at <https://www.mlaw.gov.sg/content/minlaw/en/news/press->

4.4. Banking services

The U.S. Department of State has been complaining for some time⁴³² about restrictions on access to the Singaporean market for banking services. In reality, the Singaporean government has gradually liberalised the banking sector in the course of the last 20 years. The remaining restrictions apply in the market for retail banking services, under which licensed foreign banks are permitted to operate no more than ten physical branch offices and have limited access to the Singaporean network of automatic teller machines. Those restrictions form part of the government's policies aimed at ensuring sustainable growth of retail banking as a key element of the Singaporean economy.⁴³³

releases/update-on-qualifying-foreign-law-practice-licences-awarded-in-20.html (last consulted on 23.11.2018).

⁴³² Compare pp. 5 - 6 of U.S. Department of State, *2014 Investment Climate Statement: Singapore*, *op. cit.*, with U.S. Department of State, Bureau of Economic and Business Affairs, *Investment Climate Statements for 2018: Singapore*, *op. cit.*, under the heading, "Banking and Finance".

⁴³³ Refer to the website of the Monetary Authority of Singapore (<http://www.mas.gov.sg/Singapore-Financial-Centre/Types-of-Institutions/Commercial-Banks.aspx>), making very short references to commercial banks having "Qualifying Full Bank privileges", and to a detailed "monograph" presenting the relevant regulatory policies: Monetary Authority of Singapore, *Objectives and Principles of Financial Sector Oversight in Singapore*, 2015, available at <http://www.mas.gov.sg/News-and-Publications/Monographs-and-Information-Papers/2004/Objectives-and-Principles-of-Financial-Sector-Oversight.aspx> (both last consulted on 29.11.2018).

K. SWEDEN

1. Introduction

Sweden has a comparably open investment regime and there is no legal framework regulating or restricting foreign investment. Unlike many other European countries, Sweden does not operate any FDI screening mechanisms. Some restrictions to investments are laid down in sector specific regulations. However, as a rule they apply to investments generally and do not contain specific rules for foreign investments.

2. Sectoral restriction

2.1. National security restrictions

The Swedish Protective Security Act requires the authorities and others falling under the scope of the law to take measures in order to protect against espionage, sabotage, terrorism and other crimes that can constitute a threat to national security, and to protect classified information.⁴³⁴ However, it does **not contain any rules specifically addressing investments**.

In a Government Information Note, the **government discusses the European Commission's proposal for establishing a framework for screening of foreign direct investments** into the European Union.⁴³⁵

The government recognises that Sweden does not have a legal regime regulating foreign investments, although it states that it could potentially be useful to lay down rules regarding foreign companies acquiring Swedish businesses that deal with critical infrastructure and security sensitive data. However, the government criticizes the European Commission's proposal for lacking sufficient substance and that it therefore cannot be assessed whether or not it is a suitable response to these challenges.⁴³⁶ The preliminary position of the government to the Commission's proposal is that information relating to national security must not be part of the information duty and that the regulation should not apply to businesses that are suppliers primarily to the defence sector.⁴³⁷

2.2. Sector-specific restrictions

Although the Swedish rules do not, as a rule, require any licences to conduct business locally, there are exceptions for certain sectors of the economy. **Operators within the field of insurance and banking/financial services are required to have licences**. However, operators that have been approved by other EU/EEA Member States in these sectors may, in certain circumstances, benefit from mutual recognition of their foreign licences. Acquisition of companies in the financial sector such as banks, insurer, credit market company and mutual fund management companies is subject to approval by the Financial Supervisory Authority (*Finansinspektionen*).⁴³⁸

Under the Radio and TV Act, an **acquisition of a licence to broadcast TV** may not be approved by the Swedish Press and Broadcasting Authority (*Myndigheten för press, radio och TV*), in the event that the

⁴³⁴ Protective Security Act (*Säkerhetsskyddslag (1996:627)*)

⁴³⁵ Fakta-PM om EU-förslag 2017/18:FPM9 KOM (2017) 487, KOM (2017) 494.

⁴³⁶ Fakta-PM om EU-förslag 2017/18:FPM9 KOM (2017) 487, KOM (2017) 494, p. 2.

⁴³⁷ Ibid, p. 6.

⁴³⁸ Lag (2004:297) om bank- och finansieringsrörelse, Chapter 14.

acquisition increases, by more than a limited extent (*ökar i mer än begränsad omfattning*), the concentration of ownership among the companies with licences to broadcast TV.⁴³⁹

In order to conduct an activity affecting the environment, a licence is generally required in accordance with the rules laid down in the Environmental Code.⁴⁴⁰ Mining activities are regulated in the Minerals Act and require an exploration permit granted by the Mining Inspectorate (*Bergsstaten*).⁴⁴¹ A permit may exceptionally be revoked if vital public interests are at stake or where - for reasons of foreign or defense policy - it is necessary to safeguard Swedish control over a deposit/mine. Until date, there has been no withdrawal of a permit on any of these grounds.⁴⁴²

Under Swedish real estate law, any natural or legal person has the right to acquire land. Restrictions on foreign ownership of real estate were abolished in the 1990s.

2.3. Merger control regulation

Under the **Swedish merger control regime**, companies are required to notify the Swedish Competition Authority of any mergers, acquisitions and agreements by which they acquire control of other companies, if the turnover of the undertakings concerned exceeds certain turnover thresholds. The general rule provides that a concentration **must be notified** to the Authority if the **combined annual turnover of the undertakings concerned exceeds SEK 1 billion in Sweden** and at least two of the undertakings concerned had a turnover in Sweden the preceding financial year which exceeds SEK 200 million for each of the undertakings.⁴⁴³

The Authority can prohibit concentrations that will significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position.⁴⁴⁴ The rules apply regardless of the nationality of the parties. Given that the Authority's examination only focuses on the effect on competition, we will not examine these rules any further in this national report.

⁴³⁹ Radio and TV Act (*Radio- och TV-lag (2010:696)*), Chapter 4 section 15.

⁴⁴⁰ Environmental Code (*Miljöbalk (1998:808)*).

⁴⁴¹ Minerals Act (*Minerallag (1991:45)*).

⁴⁴² Minerals Act (*Minerallag (1991:45)*) Chapter 6 section 3.

⁴⁴³ Swedish Competition Act (*Konkurrenslag (2008:579)*) Chapter 4 section 6.

⁴⁴⁴ Swedish Competition Act (*Konkurrenslag (2008:579)*) Chapter 4.

L. UNITED KINGDOM

1. Introduction

1.1. Overview

The United Kingdom (“UK”) does not operate a legal framework specifically regulating or restricting foreign investment. Foreign investors are treated in the same way as UK-owned businesses, and there is **no formal policy distinction made between domestic and foreign investment**.⁴⁴⁵ There are, nevertheless, legislative **rules of general application** that allow the government to intervene in particular transactions, including for reasons of public interest. Government and independent regulators also operate **licensing or authorization schemes in particular sectors of the economy**.

1.2. Current Developments

In a recent consultation on the revised rules, the government stated that the *Enterprise Act 2002*, as drafted, was no longer sufficient to ensure that national security risks were receiving the appropriate level of scrutiny.⁴⁴⁶ As a result, it adopted what it describes as “**short-term**” measures, extending the range of **transactions that can be reviewed based on national security concerns. From 11th June 2018, legislative thresholds⁴⁴⁷ for intervening in transactions to protect public interest have been lowered in three areas**.⁴⁴⁸ The government estimates that between 5 to 29 additional mergers and acquisitions per year would be brought into scope by the changes to thresholds. Based on recent data and trends, it expects only a small minority of these (one to six per year) to raise national security concerns requiring a public interest review.⁴⁴⁹ It is important to note that the **new thresholds do not differentiate between mergers involving domestic and foreign purchasers**. However, the government has stated that, “...foreign investors are less likely to have the UK’s interests at heart and may be controlled or influenced by hostile state actors.”⁴⁵⁰

In **July 2018**, the government published **separate proposals for a longer-term regime of voluntary notification and review processes for investments**, acquisitions and other transactions that may raise national security concerns.⁴⁵¹ The government has also published what is known as a *statement of*

⁴⁴⁵ See Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, 6th edition, October 2018, Law Business Research Ltd, London, p. 199.

⁴⁴⁶ Department for Business, Energy & Industrial Strategy, *National Security & Infrastructure Investment Review – Government response to its consultation on short-term proposals*, 15th March 2018, Crown Copyright, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690623/Government_Response_final.pdf (25.10.2018), para. 2.

⁴⁴⁷ Including UK turnover of the target business or the share of supply threshold.

⁴⁴⁸ See section General Merger Control Regime, Investigation, section of this country report, below.

⁴⁴⁹ Department for Business, Energy & Industrial Strategy, *Enterprise Act 2002: Changes to the turnover and share of supply tests for mergers – Guidance 2018*, June 2018, Crown Copyright, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715174/EA02_guidance.pdf (25.10.2018), p.6, para ix.

⁴⁵⁰ Department for Business, Energy & Industrial Strategy, *Enterprise Act 2002: Changes to the turnover and share of supply tests for mergers – Guidance 2018*, op. cit., para. 4.14.

⁴⁵¹ Secretary of State for Business, Energy and Industrial Strategy, *National Security and Investment – a consultation on proposed legislative reforms*, July 2018, Crown Copyright, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing_1.pdf (29.10.2018).

policy intent,⁴⁵² setting out the kinds of trigger events for national security concerns with regard to which notifications of relevant events might be expected. The proposed legislation sets out specific trigger events which are designed to capture the points at which it is considered an acquirer gains the ability to direct the options of an asset or direct the operations or the strategic direction of an entity. This will not then mean that the trigger event poses a risk to national security; the relevant government minister will then make a **national security assessment with regard to the relevant risk factors**. As with existing rules, **no distinction is made between domestic and foreign investment**. It is however noted in the *statement of policy intent* that:

“Foreign nationality may also make it comparatively more likely that an acquirer may pose a risk to national security. This does not negate the fact that the vast majority of foreign nationals pose no national security risk and make a positive contribution to the UK.

*It is possible that threats may also emerge from UK-based or British acquirers, although this is less likely compared to the types of parties above.”*⁴⁵³

According to initial analysis, the government expects around 200 notifications per year,⁴⁵⁴ and it will aim to screen out those in which it has no national security concerns (this being around half). Having only intervened in eight cases on national security grounds since the coming into force of the *Enterprise Act 2002*, this will represent a **significant increase in the number of transactions subject to national security scrutiny in future**. Consultation responses on the proposed new legislation are still being considered and is unlikely to conclude this year. Accordingly, it is not addressed further below.

1.3. Overview of General Investment Screening Measures

Although not specific to foreign investment, **intervention under these general rules may be more likely in circumstances where foreign investors are involved**. In particular, the public interest intervention regime that provides for intervention in relation to transactions that may raise issues of national security is, by its nature, of particular relevance to foreign investment.⁴⁵⁵

The following generally applicable legislative regimes regulating state intervention are most likely to concern foreign direct investment (“FDI”):

- **Merger control law:** competition law reviews undertaken pursuant to the *Enterprise Act 2002*⁴⁵⁶ are discussed below.
- **Public interest review regimes:** the UK government can intervene to review transactions where the national “public interest” is of concern. The scope of the UK’s “public interest” includes national security, media plurality and financial stability. These reviews, set out in chapters 2 and 3 of the *Enterprise Act 2002*, are discussed below.

⁴⁵² Department for Business, Energy & Industrial Strategy, *National Security and Investment – Draft Statutory Statement of Policy Intent*, July 2018, Crown Copyright, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728311/20180717_Statement_of_policy_intent_-_shared_with_comms.pdf (29.10.2018).

⁴⁵³ *Ibid*, p. 27.

⁴⁵⁴ Secretary of State for Business, Energy and Industrial Strategy, *National Security and Investment – a consultation on proposed legislative reforms*, *op. cit.*, para. 20, p. 11.

⁴⁵⁵ *Ibid*.

⁴⁵⁶ *Enterprise Act 2002*, available at <https://www.legislation.gov.uk/ukpga/2002/40/contents> (24.10.2018). Reviews must also take into account the European Union merger control regime. These are not addressed further in this report.

- **Section 13 of the *Industry Act 1975***⁴⁵⁷ provides the Secretary of State for Business, Energy and Industrial Strategy with the power to block an acquisition by a non-UK based entity of an 'important manufacturing undertaking' where it appears that the change of control would be contrary to the interests of the UK or a substantial part of it. There is, however, no known example of this provision having been relied on to prohibit a transaction,⁴⁵⁸ and this is *not therefore addressed further in this country report*.
- **Golden shares:** after the privatization of publicly-run companies in the 1980s and 1990s, the government retained 'golden shares', conferring on them particular rights under the company constitution. Such rights include restricting shareholding in the company to a particular percentage (usually 15 percent) and powers over the disposal of material assets.⁴⁵⁹ This is *not addressed further in this country report*.

1.4. Specific Sectoral Restrictions

Investments in regulated sectors, such as water⁴⁶⁰ and financial services⁴⁶¹ may be subject to separate merger control assessment or authorization requirements, while independent regulators operate in a number of sectors, including communications, water, electricity, gas and energy, nuclear and aviation.⁴⁶² The scope of regulators' powers to intervene will vary, as will the processes and timeframes applying to the different regimes. Mergers which concern the defence industry may also necessitate appropriate authority from the Ministry of Defence to assign or novate defence contracts.⁴⁶³

The licensing of transactions in specific economic sectors by regulators is **formally non-discriminatory**. However, the nationality of an investor may play a part in the authorization process in some cases.⁴⁶⁴

2. General Merger Control Regime

As referred to above, there are two principal routes by which the UK government may intervene in a transaction: **merger control rules and public interest cases**. Though **formally non-discriminatory**, these forms of governmental review are discussed below because of their relevance to foreign investors.

⁴⁵⁷ *Industry Act 1975*, section 13, available at <https://www.legislation.gov.uk/ukpga/1975/68/section/13> (24.10.2018).

⁴⁵⁸ Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.*, p. 203.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ In the water sector, a special regime applies to mergers between licensed water companies. See sections 32 and 33 of the *Water Industry Act 1991*, available at <https://www.legislation.gov.uk/ukpga/1991/56/contents> (25.10.2018).

⁴⁶¹ Such as where the acquisition or increase of 'control' over a UK authorised financial services firm requires the prior approval of the appropriate UK financial services regulator.

⁴⁶² Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.*, p. 196. Regulated by *Ofcom*, *Ofwat*, *Ofgem*, the *Office for Nuclear Regulation* and the *Civil Aviation Authority*, respectively.

⁴⁶³ *Ibid.*

⁴⁶⁴ Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.*, p. 196.

2.1. Scope

The UK merger control regime, as established by the *Enterprise Act 2002*, covers mergers, acquisitions of minority shareholdings, asset purchases and joint ventures. **No distinction is made between mergers involving purely domestic enterprises and those which include foreign entities.**

2.2. Notification

The **Competition and Markets Authority (the “CMA”)** is the UK’s economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. There is, under the *Enterprise Act 2002*, no requirement to notify mergers to the CMA. Notification is therefore described as ‘voluntary’ in the UK, unlike the situation in many other jurisdictions, including under the EUMR. Since **notification of a qualifying merger is not mandatory** under the Act, it is said to be perfectly acceptable for parties not to notify a merger which meets the jurisdictional thresholds, and the fact that a merger has not been notified does not negatively affect the CMA’s substantive evaluation of the competitive effects of a merger.⁴⁶⁵

One of the functions of the CMA is to obtain and review information relating to merger situations, with a **duty to refer for an in-depth Phase 2 investigation** any relevant merger situation **where** it believes that it is, or may be the case, that the merger has resulted, or may be expected to result, in a **substantial lessening of competition** in a UK market.

Under section 5 of the *Enterprise Act 2002*, the CMA is responsible for obtaining, compiling and keeping under review information about matters related to the carrying out of its functions under the Act. In order to carry out these functions, the CMA proactively reviews a variety of information sources, including national and representative trade press, to obtain information about anticipated and completed mergers. Accordingly, the **CMA may become aware of a transaction as a result of its own market intelligence functions** (including through the receipt of complaints) or by **notification from the parties to the transaction**.

Parties may, however, ask the CMA to consider the merger by way of informal advice, pre-notification discussions or, as foreseen by the *Enterprise Act 2002*, by making a voluntary written notification.⁴⁶⁶ **Notification is made by completing a prescribed merger notice**, either in the format of the template or in a format of the parties’ choice.⁴⁶⁷ **A filing fee exists** for submitting a merger notice, and this varies according to the target’s UK turnover.⁴⁶⁸ **All mergers that qualify for reference for a Phase 2 investigation are subject to the fee**, irrespective of whether a reference for a phase 2 investigation is made. A merger fee is not payable if the merger involves the acquisition of an interest

⁴⁶⁵ Competition & Markets Authority, *Mergers: Guidance on the CMA’s jurisdiction and procedure*, *op. cit.*, paras. 6.1 and 6.2.

⁴⁶⁶ *Enterprise Act 2002*, section 96.

⁴⁶⁷ Merger notice forms are available at Gov.uk, *Merger notice forms*, 31st March 2014, available at <https://www.gov.uk/government/publications/mergers-forms-and-fee-information> (01.11.2018).

⁴⁶⁸ From January 2016, fees are: £40,000 where turnover is below £20m; £80,000 where turnover is £20m to £70m; £120,000 where turnover is £70m to £120m; £160,000 where turnover exceeds £120m: *The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003* (Statutory Instrument no. 1370 of 2003), Article 5, available at <http://www.legislation.gov.uk/uksi/2003/1370/contents/made> (01.11.2018).

that is less than a controlling interest and the CMA investigated the acquisition on its own initiative.⁴⁶⁹ Other exceptions also exist in relation to small and medium-sized enterprises.

Given that notifications are voluntary, there are no penalties for failing to notify the CMA. However, there are a **number of risks for merger parties of not notifying** and/or completing a merger. These include the power of the CMA to make interim orders preventing any action (such as integrating the merging businesses) that may prejudice or impede its investigation. These remain in force until the transaction is cleared or remedial action is taken. If the CMA has reasonable grounds to believe that the parties to a completed merger are integrating their businesses, it can require that this integration is unwound.

The *Enterprise and Regulatory Reform Act 2013*⁴⁷⁰ introduced a new **statutory 40 working-day time limit for initial screening of a merger** under the **Phase 1** merger investigation. The CMA is, in relation to completed mergers, subject to a **deadline of four months** from the date on which two or more enterprises ceased to be distinct enterprises **for making a reference for a Phase 2 review**.⁴⁷¹

2.3. Investigation

A transaction is reviewable if it **constitutes a** ‘relevant merger situation’⁴⁷² for the purposes of the *Enterprise Act 2002*. The three (cumulative) criteria for a relevant merger situation are that:⁴⁷³

1. two or more enterprises (broadly speaking, business activities of any kind⁴⁷⁴) must cease to be distinct.⁴⁷⁵ ‘Ceasing to be distinct’ is defined in section 26 of the Act as two enterprises being brought under common ownership or control. ‘Control’ is not limited to the acquisition of outright voting control but may include situations falling short of outright voting control;
2. the UK turnover of the enterprise being acquired exceeds £70 million (known as the ‘turnover test’)⁴⁷⁶ or the transaction results in one enterprise having a share of supply of goods or services of any description of at least 25% in the UK or in a substantial part of the UK (this meaning that the share of supply increases as a result of the merger and exceeds 25%, known as the ‘share of supply’ test);⁴⁷⁷ **and**

⁴⁶⁹ See CMA, *Merger fees information (January 2016)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492426/Merger_fees_information_January_2016.pdf (01.11.2018).

⁴⁷⁰ *Enterprise and Regulatory Reform Act 2013*, available at <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted> (01.11.2018).

⁴⁷¹ *Enterprise Act 2002*, *op. cit.*, section 24. This may be extended by agreement with the parties concerned by up to 20 days: *Enterprise Act 2002*, section 25.

⁴⁷² *Enterprise Act 2002*, *op. cit.*, sections 22(1) and 33(1).

⁴⁷³ Except in relation to mergers involving enterprises active in the development or production of items for military or military and civilian use, quantum technology and computing hardware; since June 2018, thresholds for constituting a ‘relevant merger situation’ in these areas have been lowered: see “Relevant enterprises” section of this country report, below.

⁴⁷⁴ *Enterprise Act 2002*, *op. cit.*, section 129.

⁴⁷⁵ *Ibid*, section 23. Plans which, if carried into effect, will lead to enterprises ceasing to be distinct are included.

⁴⁷⁶ *Ibid*, section 23(1)(b).

⁴⁷⁷ *Ibid*, section 23(3).

3. the merger has not yet have taken place, or took place not more than four months before, unless the merger took place without having been made public and without the CMA being informed of it.⁴⁷⁸

As mentioned above, in **June 2018**, the government lowered the merger **thresholds for certain ‘relevant enterprises’**. This was primarily intended to reduce the thresholds for government intervention under the public interest regime (described below), but also extends the range of transactions open to potential competition review under the general merger control regime conducted by the CMA. A ‘relevant enterprise’ is one that is involved in specific activities connected with: (a) military or dual-use goods subject to export control; (b) computer processing units; or (c) quantum technology. The threshold for review with regard to enterprises involved in such activities is that the enterprise being acquired must have **turnover in the UK of over £1 million** or the share of supply test is met. For the share of supply test to be met, the share of supply does not need to increase as a result of the merger, so long as the relevant enterprise has 25%.⁴⁷⁹

Phase 1

Notification of a transaction leads to what is known as the **Phase 1 Investigation** by the CMA to determine whether the merger needs to be referred for a detailed assessment (**Phase 2 Investigation**).⁴⁸⁰

The purpose of the CMA-led **Phase 1 screening investigation** is to determine whether an in-depth **Phase 2 investigation** is required. The *Enterprise Act 2002* imposes a duty on the CMA, following the *Phase 1* investigation, to refer completed and anticipated mergers for such an in-depth investigation if it believes that it is or may be the case that:

- a **relevant merger situation has been created** or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
- the creation of that situation has resulted, or may be **expected to result in a substantial lessening of competition (“SLC”)** within any market or markets for goods or services in the UK.⁴⁸¹

Phase 1 begins on the first working day after the CMA confirms to the merger parties that it has received a complete merger notice or that it has sufficient information to launch an investigation of its own volition. The assessment period has a **40-working day timetable**.⁴⁸² Over the first 15 days, the CMA: engages in information gathering and invites views from interested third parties; may also directly contact third parties; and undertakes a substantive evaluation of the proposed transaction, taking into account the information gathered from publicly available sources, third parties and the

⁴⁷⁸ In which case, the CMA only has jurisdiction to investigate within four months from the earlier of the date on which material facts about the merger are made public or the date on which the CMA is informed of the merger.

⁴⁷⁹ *Enterprise Act 2002, op. cit.*, section 23A.

⁴⁸⁰ See section 3 of this country report, below.

⁴⁸¹ *Enterprise Act 2002, op. cit.*, sections 22(1) and 33(1).

⁴⁸² *Ibid*, section 34ZA.

merger parties.⁴⁸³ It **subsequently holds ‘state of play’ discussions with the parties**,⁴⁸⁴ conducts “issues” meetings in cases raising more complex or material competition issues, before issuing, by day 40, a clearance decision or a decision that the test for reference to *Phase 2* is satisfied.

The CMA makes one of the following **decisions at the end of Phase 1**: (1) unconditional clearance; (2) clearance subject to legally binding undertakings from the parties; or (3) a reference for a *Phase 2* investigation. The CMA may, however, decide not to make a reference for a *Phase 2* investigation it is considering whether to **accept undertakings by the parties** to remedy, mitigate or prevent the SLC or any adverse effect instead of making a *Phase 2* reference.

Phase 2

The **Phase 2 investigation** involves a detailed **analysis of the merger by the CMA**, based on the same grounds as for the *Phase 1* investigation. This is performed by an **‘Inquiry Group’**. An Inquiry Group will consist of at least three (and no more than five)⁴⁸⁵ panel members directed by a CMA Panel Chairperson and supported by CMA staff. Panel members are appointed by the Chair of the CMA from a variety of backgrounds, include economics, law, accountancy and/or business.

The **Phase 2 report** containing conclusions must normally be published within **24 weeks of the date of the reference**.⁴⁸⁶ This period can be extended by up to eight weeks at the CMA's discretion.⁴⁸⁷ The investigation includes both written submissions from the parties to the transaction and interested third parties and oral hearings with the parties to the transaction and significant third parties.

Again, the CMA must decide whether there is a relevant merger situation and, if so, whether it may lead to an SLC. The CMA must make one of the following **decisions at the end of Phase 2**: (1) unconditional clearance; (2) conditional clearance, subject to legally binding undertakings (proposed by the merging parties and negotiated with the CMA) or the CMA's order making powers; or (3) prohibition.⁴⁸⁸

The CMA will send the final report to the main parties in the **form in which it will be published**, and this will remain embargoed until publication. In cases where the main party is a UK-listed company, a copy of the final report, as well as the news release is made available to the main parties on an embargoed basis after the London Stock Exchange has closed on the day before publication.⁴⁸⁹

If the CMA has concluded that a merger would give rise to an SLC and that **remedial action** should be taken by it to remedy that SLC, the CMA will take steps to implement those remedies following publication of the final report. This may include accepting undertakings from the parties or the CMA

⁴⁸³ See Timothy McIver and Anne-Mette Heemsoth of Debevoise & Plimpton LLC, *Merger Control in the UK (England and Wales): overview*, Thomson Reuters Practical Law, 1st August 2018, available at [\(https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=\(sc.Default\)\)](https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=(sc.Default)) (05.11.2018).

⁴⁸⁴ Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure*, *op. cit.*, para. 7.8.

⁴⁸⁵ See Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure*, *op. cit.*, paras. 10.2-10.8.

⁴⁸⁶ *Enterprise Act 2002*, *op. cit.*, sections 38 and 39.

⁴⁸⁷ *Ibid*, section 39(3).

⁴⁸⁸ See Timothy McIver and Anne-Mette Heemsoth of Debevoise & Plimpton LLC, *Merger Control in the UK (England and Wales): overview*, *op. cit.*

⁴⁸⁹ Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure*, *op. cit.*, para. 13.14.

exercising its power to make an order.⁴⁹⁰ The Inquiry Group remains in existence until final undertakings are accepted by the CMA or an order made. The CMA has a statutory deadline of 12 weeks following its final report, exceptionally extendable once by up to six weeks, to implement its *Phase 2* remedies. A timetable is drawn up by the CMA for the drafting and implementation of other undertakings or an order.

If a party fails to comply with any undertakings, **compliance**, the CMA **may bring civil proceedings** for an injunction or interdict or for any other appropriate relief or remedy in a UK court. Moreover, **any person affected by the contravention** of undertakings or an order who has sustained loss or damage as a result of such contravention may also bring an action against the party bound by the undertakings or order.⁴⁹¹

3. Public Interest Review Regime

The UK government, acting via the relevant Secretary of State, can intervene in a transaction on defined public interest grounds in respect of:

- **public interest intervention cases:** transactions that are reviewable under UK merger control law pursuant to section 42 of the *Enterprise Act 2002*, but that the CMA has not referred for a *Phase 2 investigation* and the Secretary of State determines that there are public interest implications. In these cases, the Secretary of State may issue a **public interest intervention notice ("PIIN")**.
- **special public interest cases:** transactions that do not meet the requirements for notification under UK (or EU) merger control law, but raise special public interest considerations pursuant to section 59 of the *Enterprise Act 2002*. In these cases, a **special public interest intervention notice ("SPIIN")** is issued.

3.1. Scope

Public interest considerations are limited to:

- national security (including public security);
- plurality⁴⁹² and other considerations relating to newspapers and other media; and
- the stability of the UK financial system.⁴⁹³

⁴⁹⁰ Order-making powers are set out in sections 84, 86, 87, 88 and Schedule 8 to the *Enterprise Act 2002*, *op. cit.*

⁴⁹¹ *Enterprise Act 2002*, *op. cit.*, section 94. See Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure*, *op. cit.*, para. 14.8.

⁴⁹² As to the meaning of 'plurality' in this context, see Ofcom, *Measuring media plurality*, 21st October 2011, available at <https://www.ofcom.org.uk/consultations-and-statements/category-1/measuring-plurality> (29.11.2018).

⁴⁹³ Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure*, January 2014, Crown Copyright, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf (31.10.2018), para. 16.2.

3.2. Notification

The review of public interest mergers is principally a screening process that takes place without ‘notification’ as such.

It is the **Secretary of State, rather than the parties to a merger themselves**, which, by way of an intervention notice, **notifies the CMA** of a request to conduct a *Phase 1* merger investigation in relation to specified public interest considerations.

It should, however, be recalled that the CMA is under an obligation to bring to the attention of the Secretary of State any merger it is investigating at *Phase 1*,⁴⁹⁴ which it believes raises a material public interest consideration. The **CMA must advise the Secretary of State on any mergers** which might fall within the scope of the public interest or the special public interest provisions of the *Enterprise Act 2002* where the Secretary of State has served an intervention notice in that case.⁴⁹⁵

3.3. Investigation

The **CMA has an obligation to inform the Secretary of State** where it is investigating a merger (at *Phase 1*) that it believes raises public interest considerations.

As discussed above, the Secretary of State may choose to intervene in a merger case by issuing a PIIN or SPIIN, thereby leading to a *Phase 1* investigation by the CMA of those public interest considerations. The **procedures and form of inquiry largely replicate those set out above** which apply to general merger situations.

The **considerations** on which a PIIN may be issued, as established by section 58 of the *Enterprise Act 2002*, are:

- national security, including public security;
- the need for accurate presentation of news and free expression of opinion in newspapers;
- the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK;
- the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;
- the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests;
- the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the *Communications Act 2003*;⁴⁹⁶ and

⁴⁹⁴ *Enterprise Act 2002, op. cit.*, section 57.

⁴⁹⁵ Competition & Markets Authority, *Mergers: Guidance on the CMA’s jurisdiction and procedure, op. cit.*, para. 2.6.

⁴⁹⁶ *Communications Act 2003*, available at <https://www.legislation.gov.uk/ukpga/2003/21/contents> (05.11.2018). Section 319 sets out the standards objectives of the code of the UK’s media regulator, *Ofcom*. Standards refer to the standards for the content of programmes to be included in television and radio services.

- the interest of maintaining the stability of the UK financial system.⁴⁹⁷

The PIIN will request that the CMA prepare a report in relation to the specified public interest considerations. As part of its **Phase 1 investigation**, the CMA will issue an invitation requesting third-party comments on the public interest considerations. This will usually take **40 working days**, but will depend on the date stipulated in the intervention notice.

In addition to the CMA's report, **advice on public interest issues** will also normally be provided to the Secretary of State (directly or indirectly via the CMA) by the relevant government department or public body (e.g., *Ofcom* in the case of newspaper and media mergers, the Ministry of Defence for defence mergers, the energy regulator, *Ofgem*, for energy sector mergers and the *Financial Conduct Authority* and *Bank of England* for mergers concerning the stability of the UK financial system). *Ofcom* will also conduct its own public consultation as part of its review.⁴⁹⁸

The Secretary of State must subsequently take a decision about whether to **refer the transaction for a Phase 2 investigation** on public interest grounds, **to accept undertakings** from the parties in lieu of a reference to a *Phase 2* investigation or not to make a reference (in which case, the CMA may nevertheless pursue a *Phase 2* investigation on the basis that competition concerns are relevant). The CMA will be instructed to deal with the merger as an ordinary merger case.⁴⁹⁹

Parties have **five working days** from the announcement of the *Phase 1* decision to **offer undertakings in lieu of a reference to Phase 2**. The Secretary of State must decide **whether to pursue these** undertakings after a further period of **five working days**. The **negotiation and acceptance** of the undertakings must then take place within a **further 40 working days**, at the end of which acceptance must be announced, although there is a possibility of a 40 working-day extension in exceptional circumstances.⁵⁰⁰

Where a **Phase 2 inquiry** goes ahead, its **procedures are similar to those for normal merger references**. The principal differences are that the CMA provides its report to the Secretary of State, who has the final decision on public interest matters. The CMA has to prepare a report and give it to the Secretary of State within 24 weeks (subject to a possible 8-week extension where 'special reasons' exist for doing so) from the date of the reference. Once the Secretary of State has received the CMA's report, he or she has 30 days in which to make and publish his or her decision.⁵⁰¹ The Secretary of State must accept the CMA's conclusions as to whether the transaction will result in a substantial lessening of competition and the CMA's jurisdictional assessment.⁵⁰² However, he or she is not bound by the CMA's suggested remedies.⁵⁰³

The Secretary of State is required to publish the CMA's *Phase 1* report. A non-confidential version of the CMA's final report in public interest cases must be published no later than the publication of the Secretary of State's decision on the case. The final report is published on the relevant government

⁴⁹⁷ *Enterprise Act 2002*, section 58.

⁴⁹⁸ As summarised by Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.* p.209.

⁴⁹⁹ *Enterprise Act 2002*, section 56.

⁵⁰⁰ As summarised by Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.* p.209.

⁵⁰¹ *Enterprise Act 2002*, *op. cit.*, section 54(5).

⁵⁰² *Ibid*, sections 54(2) and 54(7).

⁵⁰³ *Ibid*, section 55(3).

website as well at www.gov.uk/cma. A **merger fee** is calculated in respect of cases in which a PIIN has been issued in the same way as for usual competition cases.⁵⁰⁴

Enforcement of the Secretary of State's decision of an adverse public interest finding is set out under provisions of the *Enterprise Act 2002*.⁵⁰⁵ In particular, the Secretary of State may take such action as he or she considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from the relevant merger situation.⁵⁰⁶

Finally, it should be noted that any person aggrieved by a decision in connection with a reference or possible reference in a public interest case may apply to the **Competition Appeal Tribunal ("CAT")** for review of that decision.⁵⁰⁷ The CAT determines such appeals in accordance with judicial review principles, and has the power to quash the whole or part of the relevant decision or to dismiss the application. **Decisions of the CAT may be appealed to the Court of Appeal** in England and Wales or other appeal courts in the respective jurisdictions of the UK. Any decision of the Secretary of State may also be **subject to judicial review by the High Court** on limited grounds of errors of law and procedure.⁵⁰⁸

4. Special Public Interest Intervention

4.1. Scope

Unlike public interest mergers, **Secretary of State intervention** in a merger under section 59 of the *Enterprise Act 2002* on **special public interest grounds** does not require that the jurisdictional thresholds under the general merger regime are met. Such mergers are narrowly defined and are limited to: (1) **mergers in the defence industry** if one of the enterprises concerned is carried on in the UK by, or under the control of, a body corporate incorporated in the UK and where one or more of the enterprises concerned is a relevant government contractor;⁵⁰⁹ and (2) where the merger involves a supplier or suppliers of at least 25% of any description of **newspapers or broadcasting in the UK**.⁵¹⁰ It is reported that such cases are rare, this provision having only been used twice under the *Enterprise Act 2002* to date, both of which were in the defence sector.⁵¹¹

4.2. Notification

The review of public interest mergers is principally a screening process that takes place without 'notification' as such.

⁵⁰⁴ See section of this country report on the general merger control regime, above.

⁵⁰⁵ *Enterprise Act 2002*, *op. cit.*, section 55 and Schedules 7 and 8.

⁵⁰⁶ *Ibid.*, section 55(2).

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Enterprise Act 2002*, *op. cit.*, section 59(3B) and (8).

⁵¹⁰ *Ibid.*, section 59(3C) and (3D).

⁵¹¹ Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.*, p. 201, and reference to mergers of *Lockheed Martin Corporation/Stasys Ltd* (2005) and *Atlas Elektronik GmbH UK/Qinetiq's Underwater Systems Winfrith Division* (2009).

4.3. Investigation

As with a PIIN, the issue of a SPIIN by the Secretary of State will be followed by a screening process as part of a *Phase 1* investigation by the CMA.

Where the Secretary of State issues a SPIIN, the **CMA will prepare a report for the Secretary of State** at the conclusion of a **Phase 1 investigation**, advising as to whether a special merger situation has been created.⁵¹² The SPIIN will specify the time period within which the CMA must provide the report to the Secretary of State. The CMA will also summarise representations that it has received relating to the considerations in the SPIIN. Given that the CMA is not expert in the considerations that would be expected to be specified in the SPIIN, it is likely to confine itself at *Phase 1* to summarising and commenting on the representations received by relevant third party experts, such as the Ministry of Defence.⁵¹³

A reference for a **Phase 2 investigation** will be made by the Secretary of State where he or she believes that it is or may be the case that, taking into account only the public interest consideration, the creation of a special merger situation operates or may be expected to operate against the public interest.⁵¹⁴ The CMA's *Phase 1* report is published by the Secretary of State at the time the reference decision is announced. The parties are contacted prior to publication to discuss whether the report contains confidential information that should be excised before being published.⁵¹⁵

It is said that the CMA will, following a reference on special public interest grounds, apply **similar procedures (including time frames)** to those outlined for normal mergers and public interest cases;⁵¹⁶ however, the *Phase 2* inquiry group assessment would be **confined to determining whether the merger operates or may be expected to operate against the public interest issue(s)** identified in the intervention notice. It should be noted that no merger fee is payable in special public interest cases.⁵¹⁷

Enforcement of the Secretary of State's decision is provided for on the same basis as that applying to public interest cases.⁵¹⁸

5. Investment control processes in practice

Public interest cases which have arisen over the past 10 years have, by and large, been permitted to proceed or have been **resolved through the acceptance of undertakings** by the Secretary of State from the parties concerned. Undertakings have commonly been used with regard to the national security and media plurality grounds of public interest intervention. Other mergers referred for public interest reviews have **ultimately been found not to raise concerns** which might otherwise justify the transaction being blocked.

⁵¹² *Enterprise Act 2002, op. cit.*, section 61.

⁵¹³ Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure, op. cit.*, para. 16.24.

⁵¹⁴ *Enterprise Act 2002 op. cit.*, section 62.

⁵¹⁵ Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure, op. cit.*, para. 16.24.

⁵¹⁶ See above in relation to time frames.

⁵¹⁷ Competition & Markets Authority, *Mergers: Guidance on the CMA's jurisdiction and procedure, op. cit.*, para. 16.26.

⁵¹⁸ *Enterprise Act 2002, op. cit.*, section 66(6) and Schedules 7 and 8.

It is reported that transactions reviewed on national security considerations have tended to be **defence mergers** with public security concerns being addressed by way of various undertakings negotiated or proposed by the Ministry of Defence, including the maintenance of strategic capabilities within the UK and the protection of classified information and technology.⁵¹⁹ **Often, such undertakings are provided at the conclusion of a *Phase 1* review**, thereby avoiding reference to an in-depth *Phase 2* investigation.⁵²⁰

⁵¹⁹ As reported in: Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.*, p.211 with reference to various cases at footnote 55.

⁵²⁰ As was the case when AEUK (a subsidiary of Atlas Elektronik GmbH, based in Germany) sought to acquire Qinetiq's Underwater Systems Winfrith division (USW, a supplier of research, advice, enabling technology, systems and support to the UK's armed forces). More recently in the 2017 purchase by Chinese radio systems, *Hytera Communications Corporation Ltd*, of Cambridge-based *Sepura plc*, the Secretary of State accepted undertakings in line with advice from the Home Office, instead of referring the merger to a *Phase 2* review. See Alex Potter, *United Kingdom*, in Calvin S. Goldman Q.C. (editor), *The Foreign Investment Regulation Review*, *op. cit.*, pp. 211-212.

M. UNITED STATES

1. Brief introduction explaining the general foreign investment environment in that country

The United States of America (US) has traditionally had a very open and non-discriminatory foreign direct investment regime. Unlike traded goods, which historically were subjected to periods of highly restrictive tariffs and non-tariff barriers, foreign capital was generally permitted to flow freely into all sectors of the economy and treated no differently than domestic-source capital.

President Ronald Reagan was the first President to officially declare the United States “openness” to foreign investment. His words from 1983 indicate the beliefs behind US FDI policy and acted as a justification for pressuring other countries to follow suit:

*“The United States believes that international direct private investment plays a vital and expanding role in the U.S. and world economies. It can act as a catalyst for growth, introduce new technology and management skills, expand employment and improve productivity.”*⁵²¹

Since then, each administration has praised what liberal investment policies held in promise. This, together with its large consumer market and low corporate rates, has resulted in the United States being the world’s largest capital importer as well as exporter, and ranking number one in the AT Kearney Investor Confidence Index in 2018, entering its sixth year leading the ranking.⁵²² The FDI inflow in 2017 was \$277.3 billion, bringing the FDI stock past the \$4 trillion-mark.⁵²³

The sources of the largest foreign capital flows are all allies. The United Kingdom, Canada, Japan, Germany, and Ireland were the top five in 2017, followed by France, Switzerland, the Netherlands, Singapore, and Belgium.⁵²⁴

In the years leading to 2017, however, there was a rapid and large increase in the amount of FDI from China, much of which entered in the form of purchases of US companies by Chinese state-owned enterprises. The speed and absolute amounts of the increases in Chinese FDI (for example, while in 2008 there was reportedly less than \$1 billion of FDI from China into the USA, by 2016 there was more than \$46 billion⁵²⁵) alone naturally led to policymakers’ attention to this trend. The fact that the Chinese government was the investor in so many of the transactions, however, was equally important in causing observers to voice concern over the possible impacts these investments would have on United States’ national interests. Military security, but also economic strength and technological leadership became areas viewed to be under threat.

⁵²¹ Ronald Reagan: "Statement on International Investment Policy," September 9, 1983. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*.

<http://www.presidency.ucsb.edu/ws/?pid=41814> (viewed 20 August 2018).

⁵²² <https://www.atkearney.com/foreign-direct-investment-confidence-index>

⁵²³ Elizabeth Schaefer, More Than Four Trillion Dollars: FDI in the USA in 2017, *tradeology*, 2 August 2018 (available at: <https://blog.trade.gov/2018/08/02/more-than-four-trillion-dollars-fdi-in-the-usa-in-2017/>; viewed 19 August 2018).

⁵²⁴ Id. (chart by Bureau of Economic Analysis, also giving amounts of FDI from each source country).

⁵²⁵ National Committee on US-China Relations and Rhodium Group, *New Neighbors 2018 Update: Chinese FDI in the United States by Congressional District 2* (April 2018) (available for download at: <https://rhg.com/research/new-neighbors-2018/>; viewed 19 August 2018).

While 2017 witnessed a sharp drop in both the number of investments and the amount of capital originating in China⁵²⁶, the legislative interest in controlling foreign direct investments had already resulted in the shift toward a more heavily supervised framework of FDI.

1.1. Non-Security-related Investment Restrictions on FDI

Despite its interest in barrier-free global capital flows, there have long been some restrictions on the entry of investments into the United States which are not related to national security. To note are the following screenings to which foreign investments may be subject: (1) competition law; (2) securities registration; (3) sectoral regulation.

A further source of restrictions are State laws. Investors must ensure they have a State's permission in addition to the federal permission to enter that State. Each of the States has its own corporate code and State law is also relevant for certain aspects of competition law as well as for the regulation of certain sectors (such as financial services and utilities). State laws may supplement federal requirements, but may not conflict.

The following will concentrate on federal investment restrictions.

1.2. Competition Law

The competition law framework of the United States applies to foreign investors as well as to domestic investors. Under the US anti-trust law, no transactions (mergers or acquisitions) may proceed if the result would (with a reasonable probability) leave an entity in a market position from which it could restrict competition. The Sherman Act of 1890⁵²⁷ prohibits the existence of monopolies, the Clayton Act of 1914⁵²⁸ prohibits mergers or acquisitions if the effect is anticompetitive, and the Federal Trade Commission Act of 1914⁵²⁹ targets unfair trade practices. None of these acts was created with foreign investors as a consideration, yet each is applicable to foreign-controlled companies.

One of the main restrictions on investors (including of FDI) arising out of US competition law is the pre-transaction notification requirement. In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvement Act⁵³⁰ (HSR), amending the Clayton Act. Section 201 of the HSR requires parties to mergers, acquisitions, and tenders above certain thresholds⁵³¹ to file a notification with the DOJ and FTC prior to taking any concrete steps in their transaction. The regulators then have a period (usually 30 days) in which to investigate the probable effects on competition and request additional information. If they conclude the transaction would have a negative effect on competition, the agencies may seek to prevent the parties from moving forward with the transaction as planned.

⁵²⁶ Id. (stating that FDI from China was only \$29 billion in 2017, down 35% in total and 9% in number of projects). The drop in FDI was reportedly mainly due to a new Chinese policy to restrict outward investment, but US screening procedures were also a factor. Id. at 3.

⁵²⁷ 15 U.S.C. §§1-2.

⁵²⁸ 15 U.S.C. §§ 18-19.

⁵²⁹ 15 U.S.C. §§41 ff.

⁵³⁰ 15 U.S.C. § 18a, Public Law 94-435.

⁵³¹ The threshold is adjusted annually. For 2018, the HSR notification applies to transactions of \$84.4 million or more. 83 Fed. Reg. 19, p. 4050 (29 January 2018).

Significantly, the antitrust laws lend a presumption of permissiveness to commercial transactions.⁵³² Thus, if, for example, the DOJ/FTC determine that a merger is likely to have an anticompetitive effect, it is up to the government to request that the parties remedy the anticompetitive concerns or to begin litigation to prohibit the transaction. Any court decision to stop a transaction is therefore also open to appeal by the involved enterprises.

As there is no indication that foreign investors are disadvantaged by discriminatory uses of competition law, further details of the notification and review processes will not be given here.

1.3. Securities Registration

The Securities Act of 1933⁵³³ and the Securities Exchange Act of 1934⁵³⁴ exist to ensure that the US stock market activities are competitive and transparent. The Securities Act applies to transactions in which stocks are offered or purchased, while the Securities Exchange Act applies to transactions in which stocks are being transferred, making rules about proxies and shareholder disclosure important.⁵³⁵ Administered by the Securities Exchange Commission (SEC), the two Securities laws apply to any person, regardless of nationality.

These two Acts require certain transactions to be notified and certain information released when stocks or shares are offered, purchased, or traded, whether by establishing a publically traded company or in the merger or acquisition of an existing companies.⁵³⁶ When a company issues stocks on a stock exchange, the company must register with that stock exchange, and a notice of this registration must be submitted to the SEC for clearance. The SEC publishes these and other reports electronically for the public.⁵³⁷

For mergers, the SEC must be notified and will also require that a proxy or information sheet be submitted to be sent to any existing shareholders. The Regulation Fair Disclosure⁵³⁸ requires that any material non-public information a company gives to certain individuals also must be made public (either simultaneously or “promptly”). This prohibition on insider trading is accompanied by other transparency-related rules requiring investors to report “material” facts, issues, or changes to the SEC wherever the withholding of the information would limit the fairness of the capital markets.

⁵³² See Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, 2d ed., Ch. XI Control Through Competition Law and Policy 447-588, 460 (Martinus Nijhoff Publishers, 2002).

⁵³³ Title I, 15 U.S.C. § 77, as amended by P.L. 115-174, enacted 24 May 2018.

⁵³⁴ 15 U.S.C. § 78, as amended by P.L. 115-141, enacted 23 March 2018.

⁵³⁵ Alan M. Klein, *Mergers & Acquisitions* (June 2017). Text available at <https://gettingthedealthrough.com/area/21/jurisdiction/23/mergers-acquisitions-2017-united-states/> (viewed 20 August 2018).

⁵³⁶ State law rules might require further filings, particularly in the case of mergers and establishment or dissolution of a company, and generally regulate the specific duties of the board of directors, voting rights, by-laws, and statutes. Klein, *supra* n. 516.

⁵³⁷ The SEC’s Electronic Data Gathering, Analysis and Retrieval (“EDGAR”) system, containing all filings submitted to the Commission, was established in 1984 and offers anyone the ability to search by keyword, name of company, address, voting record, etc. See <https://www.sec.gov/edgar/searchedgar/webusers.htm> (viewed 20 August 2018).

⁵³⁸ Selective Disclosure and Insider Trading, 17 CFR Parts 240, 243, and 249; <https://www.sec.gov/rules/final/33-7881.htm> (viewed 20 August 2018).

Specific regulations further govern the acquisition and holding of more than 5% of one class of shares of a company by a person or group of persons. The Securities Exchange Act sections 13D and 13G mandate the submission of a “beneficial owner” report at least once a year in order to ensure that the extent of holdings of any person/group that has the ability to control the company by voting or investment.⁵³⁹

As there is no indication that foreign investors are disadvantaged by discriminatory uses of securities law, further details of the notification and review processes will not be given here.

2. Sectoral and other Regulation

Despite the generally open and non-discriminatory attitude of the United States toward foreign capital inflows, there are a few sectors of the economy in which limitations are applicable to investors. Most restrictions are not solely for foreign investors, but some are. The following sets forth the most significant nationality-based federal⁵⁴⁰ restrictions, as set out in the United States GATS Schedule of Specific Commitments.⁵⁴¹

2.1. Real Estate

The United States restricts the initial purchase of federal lands to U.S. citizens unless the purchaser is a company established under State law.⁵⁴² A few States also have restrictions on the purchase of land by non-citizens or non-residents.

2.2. Professional Services

Legal practice is only open to natural persons, and partnership in a law firm requires a law degree. Practicing before the US Patent and Trademark Office is limited to US citizens.

2.3. Telecommunications

There are several limits on foreign investors in the media and telecommunications sector. The Communications Act of 1934, administered by the Federal Communications Commission (FCC), has a Section 310 containing a number of foreign ownership restrictions on broadcast, common carrier, and aeronautical radio station licenses.⁵⁴³

First, satellite connections are only available to Comsat.

⁵³⁹ US Securities and Exchange Commission, Fast Answers: Schedule 13D (<https://www.sec.gov/fast-answers/answerssched13htm.html>; viewed 20 August 2018).

⁵⁴⁰ The regulation of a number of sectors falls within State competence. These are more likely to impose some restrictions on foreign investors, although often the specific regulation is aimed at non-resident rather than only non-US investors.

⁵⁴¹ See GATS/SC/90, available at https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (viewed 19 December 2018).

⁵⁴² Id. Horizontal Commitments, Acquisition of Land; http://i-tip.wto.org/services/GATS_Detail.aspx?id=22777§or_path=00000 (viewed 20 August 2018).

⁵⁴³ David N. Fagan, The U.S. Regulatory and Institutional Framework for FDI, 2 Investing in the United States: A Reference Series for Chinese Investors 8 (Deloitte/Vale Columbia Center, 2009). Fagan also notes the relevance of State-level telecommunications authorities in merger and acquisition requests. Id.

Second, common carrier radio licenses are not available, directly or indirectly, to foreign governments or non-US persons (natural or legal). Nor are radio licenses available to companies of which 20% or more of the capital is owned (or voted) by a foreign government or non-US person. Representatives of foreign governments or individuals are equally prohibited from ownership of radio licenses.

Third, a television or radio transmission license may not be issued to a foreign government, a foreign-chartered corporation, a US corporation that has a non-US citizen officer or director or owner of over 20% of the stock, a US corporation that is directly or indirectly controlled by a corporation which itself is owned by a company, 25% of whose capital stock is owned by a foreign government or non-US citizens or a company in which more than 25% of the directors or any officer is a non-US citizen. According to one report, however, the FCC often uses its discretion to permit more than the 25% recommended limit on indirect foreign ownership of companies which control FCC licensees because it determines that the foreign ownership would not be contrary to the public interest.⁵⁴⁴

2.4. Recreational

Tourism offices may not be official foreign-government agencies if they act on a commercial basis.

2.5. Financial Services

Financial Services is the sector in which the largest number of restrictions on foreign investors apply. Here, too, however, one finds many of the restrictions at the State level, as States have the main regulatory authority for insurance services and substantial oversight in banking. Many States prohibit foreign-government owned insurance providers from operating and a number of States refuse to permit foreign insurance companies to establish a first US-branch in their territory (ie, there must be a US presence prior to establishing in that State). Finally, a number of States restrict citizenship of the board of directors of insurance companies to US citizens.

In the banking sector, numerous limits apply to foreign persons. Most of these are based on prudential concerns, but the basic practice of offering treatment on the basis of reciprocity is explicitly stated as well. One of the main discriminatory restrictions on non-US banks is their inability to be members of the Federal Reserve System, which has the result that they cannot vote for directors. They also must register under the Investment Advisors Act if they wish to engage in securities advisory services. All of the directors of a national bank must be US citizens, and foreign non-banks may not own Edge corporations. Moreover, to engage in savings banks, credit unions, home loan and thrift business operations the entity must be a US established entity. Mergers and takeovers of banks or branches are also limited in some circumstances and by some State laws.

2.6. Other Sectors

The Defense Production Act of 1950⁵⁴⁵, Section 721a prohibits foreign government-controlled entities from investing in (“merge with, acquire, or take over”) companies that have sensitive or large (>\$500 million) contracts with the Departments of Defense or Energy.⁵⁴⁶ This is subject to an exception for transactions that receive certification under the national security screening mechanism.⁵⁴⁷ Significant restrictions on maritime services and mining exist for foreign investors as well.

⁵⁴⁴ Fagan, *supra* note 542.

⁵⁴⁵ 50 U.S.C. App. §2061 et seq., Sec. 721a (Prohibition on Purchase of United States Defense Contractors by Entities Controlled by Foreign Governments).

⁵⁴⁶ § 721a(a), 50 U.S.C. App. §2170a(a).

⁵⁴⁷ § 721a(b).

3. National Security Screening of FDI

The United States' concern with national security seemingly has become the new and defining feature of its investment policy for the past decade. This view of US investment policy is somewhat inaccurate: on the one hand, the rules regarding FDI remain highly liberal and open to most investors; on the other hand, national security concerns are not new: they have been firmly established as a reason to deviate from its otherwise liberal FDI policies since the mid-1970s. The current legislative framework offers the most expansive scope for screening foreign investments, but its precise scope remains dependent on Committee regulations for a number of key concepts.

4. Development of CFIUS Activities

An overview of the historical development of national security screening helps understand the current system.

CFIUS, Phase 1: Then-President Gerald Ford created the Committee on Foreign Investment of the United States (CFIUS) by executive order in 1975 to “monitor the impact of” foreign direct and portfolio investments and to “coordinate the implementation of” policies to be taken toward such investments by the executive branch or Congress.⁵⁴⁸ The perceived threat at that time was the capital flowing into the United States from the OPEC members. The first decade of CFIUS, however, did little to change the investment environment of the United States. The Committee itself met rarely and the political landscape of the 1980s emphasized liberal entry rules for capital rather than restrictions.

CFIUS, Phase 2: In 1988, however, the growing economic power of Japan – and in particular the challenge Japanese high-tech companies were posing to US dominance in that field – was a topic of concern to lawmakers. As a result, Congress amended Section 721 of the Defense Production Act of 1950 through the so-called Exon-Florio Amendment.⁵⁴⁹

This Amendment was important in clarifying and expanding the President's powers regarding foreign investments. First, it gave the President or his designee the competence to review, and if he deemed necessary, to prohibit, certain planned investments.⁵⁵⁰ By Executive Order no. 12661 (1988), the President handed the reviewing powers to CFIUS. He retained the sole power to prohibit proposed foreign investments.

⁵⁴⁸ Executive Order 11858 of May 7, 1975, section 1(b). Text available at: <https://www.archives.gov/federal-register/codification/executive-order/11858.html> (viewed 15 August 2018).

⁵⁴⁹ See Omnibus Trade and Competitiveness Act of 1988, §5021, Public Law 100-418; 50 US Code App. §2170 (1988).

⁵⁵⁰ *Id.* at §5021(a). See also Nikul Patel, Suggesting a Better Administrative Framework for the CFIUS: How Recent Huawei Mergers Demonstrate Room for Improvement, 38:3 NC J. Int'l L. & Comm. Reg. 955, 960 (2012) (noting that Congress' realization that the President needed the power to prohibit foreign investments in sensitive sectors arose out of the experience of Fujitsu's attempt to takeover Fairchild Semiconductor Corporation, a supplier of a number of defense contractors. While the CFIUS investigation of this proposed investment determined that it raised significant security concerns, there was no authority to actually prohibit the transaction. Fujitsu ultimately withdrew its offer due to public pressure).

Secondly, Exon-Florio limited the review/prohibit power to three particular types of investment: “mergers, acquisitions, and takeovers”.⁵⁵¹ As a result, greenfield (new) investments were not subject to this review. Consequently, neither purchases of land to construct a new business nor joint ventures were susceptible to investigations.

Thirdly, §721 limited the review or investigation of such investment to only those that could result in a foreign person gaining “control” over a US company.⁵⁵² Gaining access to technologies through purchases of minor shares in a company were not reviewable under this standard. Moreover, the amendment provided that only if the investigation indicated that such control would “threaten to impair the [country’s] national security” could the President/his designee prohibit the planned act of investment.⁵⁵³ At the time, the concept of national security was kept limited, as the Executive Branch rejected the attempts of certain members of Congress to include economic welfare (much less commercial) interests as part of “security”.⁵⁵⁴

Finally, the Amendment set forth a procedural framework for reviews, investigations, and decisionmaking.⁵⁵⁵ This framework foresaw time-limited review (30 days following the date of submission of a notice of the proposed or pending transaction) and investigation (45 days following the completion of the review and up to 15 days for a Presidential decision, if the investigation results in the transfer of the investigation to the President) periods for notified investments⁵⁵⁶, but no limitation on the temporal framework for non-notified investments. Thus, if a foreign investor did not voluntarily submit to a review, it would remain indefinitely liable to investigation by the Committee’s own determination of a potential threat.

CFIUS – Phase 3: In 1993, the Exon-Florio provisions themselves were amended by the Byrd Amendment to the National Defense Authorization Act.⁵⁵⁷ Passed largely as a reaction to the attempted acquisition of LTV Steele’s missile division by a French government-owned company, the Byrd Amendment aimed at closing holes in the process rather than expanding CFIUS’ jurisdiction.⁵⁵⁸ One aspect of this was the Byrd Amendment’s addition of a *mandatory* investigation of investments where “an entity controlled by or acting on behalf of a foreign government” was the investor, if that investment could lend a person control which might “affect the national security” of the country.⁵⁵⁹ This focus on state-owned entities responded to the concern that any time a foreign government took control of companies with national security implications, Congress would want to be informed.

The second change was to require CFIUS to report to Congress on any investigation, and not just on those that resulted in a prohibition of the proposed project.

⁵⁵¹ Id. at §5021(a).

⁵⁵² Id. at §5021(a).

⁵⁵³ Id. at §5021(c).

⁵⁵⁴ Edward M. Graham and David M. Marchick, *The Exon-Florio Amendment in: US National Security and FDI 33-73*, 42 (Institute for International Economics, 2006). Available at (14 December 2018).

⁵⁵⁵ Omnibus Trade and Competitiveness Act of 1988, §5021 (a), (c). See also, Graham and Marchick at 36.

⁵⁵⁶ The Department of the Treasury’s Resource Center has a “Process Overview” site with a plain text description of the limits contained in the legislation. See <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (information on the pre-FIRRMA CFIUS process was viewed 10 August 2018; post-FIRRMA procedural information was available soon afterwards, by 13 August 2018).

⁵⁵⁷ National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, § 837.

⁵⁵⁸ See Patel, *supra* n. 549 at 961-962.

⁵⁵⁹ National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, § 837(2)(b).

CFIUS, Phase 4: The Foreign Investment and National Security Act of 2007 (FINSAs)⁵⁶⁰ modified the CFIUS review process yet again. The change this time was in response to the Dubai Ports World incident, in which news of a planned purchase of a British company which managed a number of ports in the United States (including the New York and Miami ports) by an Arab state investor sent a large wave of concern through the Congress (as well as public). To the satisfaction of the Bush Administration, the CFIUS review passed the transaction as not posing a threat to national security because the UAE would not be gaining control over the ports.

Public outcry ultimately caused Dubai Ports World to withdraw from the transaction and Congress set out to curb CFIUS discretion even while further expanding its scope of operation.⁵⁶¹ There were several significant adjustments made in this respect⁵⁶², four of which are of particular interest.

- First, the FINSAs made an investigation of a merger, acquisition or takeover required not only if it would threaten national security or if the investment included a foreign government, but also if it would result in control of a “critical infrastructure” (that in turn would lead to a threat to national security).
- Second, the concept of national security is broadened to include “homeland security”. Thus, internal disruptions – including natural catastrophes or social disturbance - become “security” concerns.
- Third, CFIUS was given the power to require potential investors to make changes to their planned investment in order to mitigate risks to national security. These changes would become a binding aspect of the permission to move forward with the transaction.
- Fourth, Presidential decisions on foreign investment were made explicitly non-appealable. That is, rejected applications could not be challenged in court.

CFIUS – Phase 5: Even with the expansions of the review and investigative powers of CFIUS, the Executive maintained substantial discretion in determining when investigations were required and whether a particular investment was to be blocked. A number of terms were defined quite broadly: “national security”, “critical infrastructure”, and “credible evidence” all left the line-drawing to those performing the investigations and making the final decisions. Criticized by business interests as casting a chill on foreign investment, the flexibility was seen as necessary by others who feared that changing threats could not otherwise be targeted effectively.

Until August 2018, CFIUS permitted (but did not require) investors to request clearance for their mergers, acquisitions, or take-overs. Investors who did so benefited from an assurance that if the review and/or investigation resulted in a negative finding of threat, that decision would prevent later condemnation of the investment.⁵⁶³ This so-called “safe-harbor” was commercially beneficial, particularly as a non-reviewed investment could be challenged by the Treasury at any time in the future, should concerns arise.

⁵⁶⁰ Public Law 110-49 (2007).

⁵⁶¹ Maria Goes de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ('FINSAs') in Foreign Investment in the US.*, 2 Wm. Mitchell L. Raza J. 1, 20, (2011).

⁵⁶² See Moraes Gavioli at 22-23 (explaining eight major changes to the CFIUS framework).

⁵⁶³ Subsequent review could be undertaken if the initial process was tainted by misleading or false information or if risk mitigation obligations were breached. See 50 U.S.C. §4565 (b)(1)(D).

5. Foreign Investment Risk Review Modernization Act (FIRRMA)

The President's 3 August 2018 signing of the Defense Appropriations Act brought into effect the latest phase of CFIUS. Title XVII, called "Review of Foreign Investment and Export Controls"⁵⁶⁴ contains Subtitle A of Title XVII, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). The 28 sections of Subtitle A set out the details of foreign investment reviews by CFIUS as well as the CFIUS' structural aspects, most of which are valid immediately upon signing of the law.⁵⁶⁵

CFIUS itself **maintains its functional and structural characteristics**. Members of the CFIUS are the directors of **nine executive agencies or national offices**⁵⁶⁶: Department of the Treasury; Department of Justice; Department of Homeland Security; Department of Commerce; Department of Defense; Department of State; Department of Energy; Office of the U.S. Trade Representative; Office of Science & Technology Policy. The Department of the Treasury holds the chairmanship.

The Members, who can vote, are joined by participating (but non-voting) **Observers**. The latter are the heads of the Office of Management & Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council, and the Homeland Security Council. The Secretary of Labor and the Director of National Intelligence are also present at CFIUS meetings as non-voting, *ex officio* individuals. The mixed composition of the committee should **ensure** that **a balance of interests** is taken into account.

- ex-ante or ex-post / deadlines, simple notification or approval to be waited for
- costs (if possible)
- penalties in case of breach of notification obligation

Currently, the CFIUS imposes **no fees** on notifying parties. Because FIRRMA has greatly increased the number of potentially reviewable transactions, the law creates a legal basis for the Committee to charge applicants a processing fee. Essentially based on the time required to process an application, the charges take **due account of the capacity of smaller filers** to pay. It is not clear when, if ever, this option will be applied.

§1706 stipulates that the CFIUS «**may impose a penalty**» if **mandatory notifications are not made**, but these penalties, if any, will be the subject of future regulations.

5.1. Procedural Steps

The main steps of CFIUS review **remain as they had been for years, with an adjusted time schedule** to allow the Committee extra days to conduct their review:

1. submission of a **draft** notification (*voluntary*, but suggested by many lawyers);
2. submission of the **voluntary notification** by the investor and a formal acceptance of the notice by CFIUS (within 30 days);
3. possible national security **review** by CFIUS (within 45 days), leading to either a clearance of the project or the commencement of an investigation;

⁵⁶⁴ H.R. 5551-538, signed into law 3 August 2018.

⁵⁶⁵ See §1727 (Effective date).

⁵⁶⁶ For information about the membership of CFIUS, see the US Treasury's website at: <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (viewed 28 August 2018).

4. possible further national security **investigation** by CFIUS (within 45 days), leading to either a clearance (possibly with required mitigation) or the passing on of the review to the Office of the President with recommendations from CFIUS to clear or block the transaction;
5. a possible **Presidential review** and decision (within 15 days) to suspend, permit (possibly with mitigation), or prohibit the transaction.

FIRRMA, however, changes certain aspects of the screening process for foreign investors and their US partners considerably. Among the **most significant procedural changes** are:

- adding a possibility of filing a **summary declaration** rather than a full written notice for purposes of a CFIUS pre-examination
- making **mandatory** the **declaration of investments in which a foreign government/foreign government-owned entity has a “substantial interest”**
- **extending the review period** timeline to **45 days**, with a **possible additional 15 days** for special cause
- providing CFIUS with **authority to impose a filing fee** for notifications

Among the most **significant substantive changes** are:

- **defining “national security” to include issues of “homeland security”**, meaning CFIUS is to consider vulnerabilities to economic as well as military security and the ability of the US to avoid manmade and natural catastrophes
- **extending the definition of “covered transactions”** (investments subject to CFIUS review) to
 - purchase or lease of, or concessions **to real estate** in or near military establishments
 - direct or indirect investment relating to **critical infrastructure**⁵⁶⁷
 - direct or indirect investment in companies in which access to (or decisionmaking over) **critical technologies** and/or **sensitive personal data** is gained
 - **changes in the rights** of the foreign person that would result in control
 - all other **agreements that would be against the spirit** of the screening regulations

Note, however, that the **actual effects of most of the changes will remain unknown until the CFIUS issues regulations** to define and clarify key terms and procedural mechanisms. The CFIUS rulemaking mandate extends to many of the most important aspects of the overall screening framework.

5.2. Notification requirement (restrictions imposed on investors or investments)

Threshold triggering notification requirement

The process of investment screening aims to be compact and efficient, with clear procedural steps, standardized forms for submitting information, lists of required information published on the website, and time restrictions on the Committee (and/or President) to ensure that investors are not left for long periods of time without a decision. In reality, **the process can be time-consuming and resource-intensive**.

⁵⁶⁷ The definition of “critical infrastructure” in FIRRMA is based on that in the Critical Infrastructures Protection Act of 2001:
 [...] “critical infrastructure” means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.
 42 USC §5915(c)(e).

The **basic process remains voluntary** - most foreign investors have the choice of whether to file a notification of a planned or pending investment that may be a “covered transaction” or not to file.⁵⁶⁸ The reason to file is to receive a statement of certification that there are no concerns with the project. Unless a notification is made, the investment remains indefinitely subject to investigation on the Committee's own determination.

The **FIRRMA added three elements** to the basic procedure. First, it provided for a filer to ***stipulate*** that its project is a “covered transaction”. This shortens the CFIUS’ **reaction time to such notification to 10 business days**.⁵⁶⁹

Second, FIRRMA created an **optional “declaration”** as a simplified notification possibility (so-called “filing light”^{570, 571} Containing only basic information (maximum of 5 pages) about the project, the declaration will be reviewed as is by CFIUS, with the Committee having the possibility of requiring the parties to submit a full notification if it detects possible threats. The **CFIUS must respond to a declaration within 30 days** with a request for a full notification, additional information, a notification of the initiation of a full review, or that action has been completed.

Finally, the FIRRMA made ***mandatory the declaration of investments by foreign governments*** which would result in that government acquiring a “substantial interest” in a US entity that would lend the government access to critical infrastructure, critical technology, or sensitive personal data of US citizens.⁵⁷² The CFIUS, however, ***can waive this notification requirement*** if it determines that the foreign government would not gain the ability in fact to direct the company and “has a history of cooperation” with the CFIUS.⁵⁷³ Note that the mandatory declarations are part of the “pilot program” implementing FIRRMA, which was introduced in October 2018.⁵⁷⁴

Procedure of notification

The filing of a notice takes place by means of a **form submitted electronically** to CFIUS.

- ex-ante or ex-post / deadlines, simple notification or approval to be waited for
- costs (if possible)
- penalties in case of breach of notification obligation

Currently, the **CFIUS imposes no fees** on notifying parties. The FIRRMA ***creates the legal basis*** for the Committee to impose **a cost-based filing fee**, taking due account of the size of the filers. It is not clear when, if ever, this option will be applied.

⁵⁶⁸ Potential investors also have the opportunity of discussing their project with CFIUS prior to filing a notification or to submit a draft notice. See <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> (viewed 28 August 2018).

⁵⁶⁹ See FIRRMA, §1704.

⁵⁷⁰ US Department of the Treasury, Summary of the Foreign Investment Risk Review Modernization Act of 2018, <https://www.treasury.gov/resource-center/international/Documents/Summary-of-FIRRMA.pdf> (21 September 2018).

⁵⁷¹ See FIRRMA, §1706.

⁵⁷² Id.

⁵⁷³ Id.

⁵⁷⁴ Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies, 31 CFR Part 801, 83:197 Fed. Reg 51322 (11 October 2018).

FIRRMA orders CFIUS to “establish a process to identify” transactions that are covered but not notified or declared.⁵⁷⁵ It also stipulates that the CFIUS «**may impose a penalty**» if **mandatory notifications are not made**⁵⁷⁶, but these penalties, if any, will be the subject of future regulations.

5.3. Screening or review process

If a transaction is deemed “covered” *and* deemed to pose a potential security threat, the CFIUS will notify the investor that the transaction will **be reviewed, possibly investigated, and potentially sent to the President** with a recommendation that the transaction be prohibited. These three possible steps each have procedural requirements.

- a. National security review: If the CFIUS finds, within 45 days of receiving a notification, reason to be concerned that the proposed project “threatens to impair the national security ... and that threat has not been mitigated”, is a foreign government controlled transaction, or would result in a foreign party gaining control over critical infrastructure that would threaten national security, it **can request additional information** from the investor **and/or** ask the investor **to modify its project** in a way that eliminates the Committee’s concerns. If it finds no threat of risk, it can issue a clearance of the project.

In considering whether a transaction poses a risk, Congress intends CFIUS to consider a number of aspects of foreign relations, including considerations relating to the home state’s own investment screening program. The introductory notes to FIRRMA are interesting in this respect, noting the “Sense of Congress” that the President should encourage the spread of CFIUS-type reviews around the globe:

“(6) the President should conduct a more robust international outreach effort to urge and help allies and partners of the United States to establish processes that are similar to the Committee on Foreign Investment in the United States to screen foreign investments for national security risks and to facilitate coordination;

“(7) the President should lead a collaborative effort with allies and partners of the United States to strengthen the multilateral export control regime”⁵⁷⁷

This goal of harmonized investment screening procedures is likely to have an influence on the precise definitions of terms such as “foreign person”, which the CFIUS must set forth in regulations.

- b. National Security investigation: FIRRMA stresses that CFIUS is to undertake an investigatory process **only if the overall context of the particular project indicates risks to US national security** (rather than, for example, commercial interests). This might be triggered by a finding of newly-acquired “control” over a US entity that has commercial activities in the defense industry, or which lends access to control of surveillance of critical installations and infrastructure or to technology. **Control is considered holistically** rather than with exact numbers, and includes both legal and factual control. The CFIUS is to issue regulations to give further guidance to investors on this.

Moreover, the FIRRMA expands the notion of security to considerations of US leadership in technological development and implicitly takes into account politics and public perceptions.

CFIUS must **complete its investigation within 45 days**. If it determines that there are remaining concerns that further modifications to the proposed structure could not address,

⁵⁷⁵ FIRRMA, § 1710.

⁵⁷⁶ FIRRMA, § 1706.

⁵⁷⁷ FIRRMA, 1702(b)(6)-(7).

it **may forward the report to the President** with recommendations that he take a decision granting or prohibiting the admission of the investment.

- c. Presidential Review: The **President has 15 days** in which to make a decision on whether he will **authorize, suspend or prohibit** a proposed investment.⁵⁷⁸ He has **complete discretion** in both making findings on the risk and in taking the final decision.⁵⁷⁹

While the potential investor may challenge any decisions or findings made in the course of review or investigation in the District of Columbia Circuit Court of Appeals⁵⁸⁰, there is **no such review available** for the Presidential decisions.

6. Assessment of the actual practice

All CFIUS reviews and investigations must be reported to Congress annually. As a result, there are complete statistics available on the decisionmaking practice of CFIUS. In general, there has been an increase in the number of foreign investments denied establishment within the last two years. However, most commentators also note that this is due to two results of the process. First, the fact that most reviews are undertaken with a number of changes to the structure of proposed transactions to reduce any security threats. This makes what would have been impermissible investments able to pass the screening. Second, if a transaction is sent to CFIUS investigation, there is a significant likelihood of the investors terminating their plans due to financial or public pressure. As a result, there are only a handful of potentially risk-raising transactions that get through to the stage of Presidential refusal.

⁵⁷⁸ FIRRMA, § 1714.

⁵⁷⁹ Defense Production Act of 1950, §721(e).

⁵⁸⁰ FIRRMA, § 1715(2).

	Restrictions on FDI for National Security	Restrictions on FDI in Certain Sectors	Other Restrictions on FDI	Pre-Investment Notification/ Authorization Request Required?	Time limit for preliminary decision?	Factors triggering Investigation	Time limit for investigation?	Administrative Authority Responsible for Admission Decision	Can Modification of project be demanded as a condition?	Judicial Review Available
AU	"national interest"	Real estate; airline (Qantas); telecommunications; media		Notification only for: agricultural land; water rights; >2.5% interest in media business Authorization required for qualifying investments in land and businesses; always required for acquisitions by foreign governments		Various sectoral thresholds; National security, competition, tax, corporate governance, how well investor is regulated at home	Decision within 30 days of application (+90 day extension possible); investor informed within 10 days of decision	Treasurer with (nonbinding) advice of FIRB (non-governmental expert committee); Tax office	yes	No
CA	Yes: "la sécurité nationale".	Various, including: cultural heritage, banking, telecommunications, air transport,	Must also pass test of economic advantage to Canada	Yes (always)	45 days (with possible 30 day extension)	Net benefit test looks at probably impacts on: employment, use of resources, exports, diversity of products, participation of Canadians, competition, compatibility with political objectives of Canada	45 days	Minister of Innovation, Science and Economic Development (with inputs from specific relevant sectoral Ministry)	Yes	No (but possible annulment)

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						- If state-owned, also look at commercial basis National security test: Various \$CAN thresholds, depending on status of investor (WTO individual, preferential trade partner individual, foreign state entity)				
D	Sector-specific: defense/military industry: "wesentliche Sicherheitsinteressen, auswärtigen Beziehungen und friedliche Zusammenleben der Völker» All sectors: «Öffentliche Ordnung oder Sicherheit» - But NOT if only economic or labor interests threatened	Defense and security; cryptotechnologies industries		Sector specific: yes (only the direct acquirer) Non-sector specific: yes	Sector specific: 3 months after notification Non-sector specific: 3 months after it becomes known), up to 5 years	25% or more control (direct or indirect) and significant threat to national security, to foreign relations or peace Non-sector specific: 25% or more control over critical infrastructure (incl. energy, IT/telecommunications, transportation,	Sector specific: 3 months after all documentation has been received Non-sector specific: 4 months after all documentation has been received	Bundesministerium für Wirtschaft und Energie	yes	Only judicial review, not administrative review

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						public health, water, nutrition, and financial services) and a threat to public order and security				
F	Yes “sécurité publique” and “intérêts de la défense nationale”	Authorization required for investments in: 14 sectors for non-EU; 13 sectors for EU (and assimilated) investors; includes dual use goods; critical infrastructure; technologies; data; and public health; as well as (new) artificial intelligence, cybersecurity, robotics, semi-conductors, and hosting data		None for non-specified sectors. For Specified sectors, post-authorization notification required (currently within two months)	N/A	Concerns about either national interest (public order, public security, or national defense) OR doubts about investor (criminality/corruption/terrorism) -target company may be source of initial questions	For non-specified sectors, N/A For authorization of specified sectors, 2 months after request; if no response, authorization presumptive	Minister of Economy (Ministre de l'économie) - Reporting to Parliament required	yes	Yes

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		**post investment authorization may be granted by Minister, but may incur sanctions								
NL	interests vital for the preservation of social life	Yes. 12 sectors listed, but not necessarily exclusive	General screening requires residency permit	In some sectors. Example of electricity – changes in control of large electric plants must notify Ministry four months in advance		Depends on sector: in new telecommunications screening, ex.: a finding of “ significant control jeopardizes national security or public order ” will trigger an investigation; significant control may be found with at least 30% ownership or with one preferential share		General Screening: Netherlands Enterprise Agency (within Dutch Ministry of Economic Affairs) Sector Specific Screening variable authorities (ex. Ministry of Economic Affairs for telecommunications; Dutch Central Bank for financial services)		Yes
NO	Yes, new law to protect	Yes, numerous permissions and thresholds, including in commercial fishing, air transport,	Competition law applicable for mergers	Sectoral licencing;	Notification if 1/3 shares/voting power or actual control over a covered business	Covered business include businesses that process security classified information; that control	60 days	Relevant ministry or the National Security Authority	yes	yes

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		financial services, media				information or infrastructure that are crucial for basic national functions; businesses that pursue activity that is crucial for basic national functions				
Ös	„Gefährdung der Interessen der öffentlichen Sicherheit und Ordnung “; inclusiv Infrastruktur	Auch universities		Yes	Within one month after notification	25% Sectoral specificities	2 months after informing notifier of the need for an investigation	Wirtschaftsministerium	yes	Yes, for decision
PO	Products and technologies for military and police purposes; energy security	Many	Critical energy infrastructure Real estate not more than 0,5ha/personal use or not more than “sufficient” for business activity	yes		For Law on Control of Certain Investments – “significant participation” (ca. 20-25%) or “control” (usually >50%, but can be factual control, too) of particular enterprises Sectoral laws – various, generally 49% participation limit		For Law on Control of Certain Investments – Prime Minister + Minister of Energy, but 20-member Consultation Committee as advisors (ministers from 20 ministries, themselves appointed by PM) Sectoral restrictions – relevant ministry	yes	Yes, in administrative courts, appeal to Supreme Administrative Court

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SI	Not direct, although licensing can take into account terrorism dangers	Licensing required for many sectors		Registration of investments required (for all businesses)	If review necessary, up to 2 months			Various responsible ministries issue licenses		
SW	no	Financial services and media require; licensing also required for mining and if environment is affected	Competition law require notification if above threshold	Sectoral only	N/A	N/A	N/A	N/A	N/A	N/A
UK	Public interest review	Numerous, including financial services, water, defense, media	Merger control regime; acquisition of 'important manufacturing undertaking' ; golden shares	No (for merger control)	40 days	For general merger control, thresholds are relevant; for public interest review, factors are only: national security, diversity of media, stability of financial system; for special public interest, factors are: merger in defense industry or acquisition of 25% or more in media sector		Competition and Markets Authority; Relevant Secretary of State	yes	Yes, limited

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US	“National security” includes critical infrastructure and critical technology; includes real estate near sensitive installation (military bases, ports, etc) and-control over sensitive personal data of US citizens - sectoral -control maximum; nationality requirements on participation in management -Sense of Congress is to limit national security to not include economic health	Several, including Maritime sector, mining, financial services, broadcasting	Merger control; securities regulation	Only for foreign govt. transaction gaining control of US entity; otherwise voluntary	Within 45 days	Review: Possible threat to national security determine if investigation needed Investigation: determine if adjustments can reduce threats to national security	Review: Within 45 days, +15 if needed Investigation: within 45 days Presidential review: 15 days	Ultimately, President; but Committee on Foreign Investment in the United States (CFIUS) reviews/investigate and will forward decisions to President if prohibition is to occur	Yes. Review of conditions is now reason to refuse continued license; may be grounds for new investigation	Yes for CFIUS decisions, no for Presidential prohibition of transaction
EU	Framework established as “cooperation scheme” to inform MS and EU about investment that might threaten national security	Also financial services, energy	Competition law	No. MS may need to notify EU Commission	EU does not take a “decision” as such; MS must inform EU within 5 days of beginning screening; EU must respond within 25 days from time MS	National security or public order threats; projects that receive significant EU funding, critical infrastructure investment, critical technology, critical inputs, sensitive information	Up to MS	MS remains in control of this aspect (currently, investor need not get decision from EU)	MS remains in control of this aspect	Foreseeable

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					give information					