Foreign direct investment (FDI) global legal guide

South Africa

Last updated 11 July 2024

Key Features

Types of deals subject to the FDI regime	17 July 2024 Most foreign inward and outward flow of funds or capital requires approval in terms of the Currency and Exchanges Act, 1933 and Exchange Control Regulations, 1961. Depending on the sector, there may be restrictions on foreign ownership. These sectors include mining, banking, energy and insurance. Following proclamation of an effective date of the new amendments to the Competition Act, 1998 ("Competition Act"), the types of deals that are subject to the FDI regime contemplated in the Competition Act relate to any acquisition or investment that involve a foreign acquiring firm that may give rise to a national security risk.
Principal authorities	11 July 2024 South African Reserve Bank ("**SARB**"), acting through its authorised dealers, being the financial surveillance department of the South African banks. Once in effect, the foreign investment committee ("**FIC**") to be constituted in terms of section 18A(a) of the Competition Act.
Lookback period	11 July 2024 The FIC may revoke its approval of a merger or, in respect of a conditional approval, make decisions regarding any of the conditions, if — (i) the approval was based on incorrect information for which a party to the merger is responsible; (ii) the approval was obtained by deceit; or

	(iii) a company concerned has breached an obligation attached to the approval. If the FIC's approval is revoked, the Competition Commission's or Competition Tribunal's ("Competition Authorities") approval or conditional approval of the merger is deemed to be revoked. The Competition Act does not set out a period of time upon which this revocation may take place and this aspect may be regulated in future regulations promulgated in terms of the Competition Act .
Mandatory / voluntary filing	17 July 2024 Once in effect, a filing to the FIC will be mandatory where a foreign acquiring firm is required to notify the Competition Authorities in South Africa of an intended merger and such merger relates to a national security interest. SARB must approve a foreign shareholding by way of endorsing a share certificate held by the foreign shareholder as "non-resident" within 30 days of such share certificate being used. Further any capitals inflows or foreign loans will be required to be approved by SARB.
Substantive test for intervention	11 July 2024 The FIC will be responsible for considering whether a merger involving a foreign acquiring firm may have an adverse effect on the national security. In respect of the SARB, the substantive test is whether (i) a foreign shareholder has been issued shares in a local company; or (ii) there has been an inward or outward flow of funds that requires SARB approval.
Extra-territorial reach	11 July 2024 No.
Timeline for review (approximately)	11 July 2024 Regulations in terms of the Competition Act regarding FIC processes, procedures and timeframes is still to be issued. A foreign acquiring company who is required to notify the Competition Authorities of the transaction, must together with its merger filing, file a notice with the FIC in the prescribed form and manner if the merger relates to list of national security interests. The FIC must within 60 days of this notice (or such other longer period that the President agrees to on good cause

	shown) consider and decide on whether the merger may have an adverse effect on national security interests. Within 30 days of such decision, the Minister must publish the FIC's decision.
Potential penalties	11 July 2024 In terms of the Competition Act, any contravention of the Competition Act may result in an administrative penalty being imposed, which administrative penalty may not exceed 10% of the firm's annual turnover in South Africa and its exports from the South Africa during the firm's preceding financial year or 25% where it is a repeat offence. In respect of SARB, any failure to comply with SARB approval , SARB may impose fines or penalties for such non-compliance. These fines or penalties may also assume the form of attachment and forfeiture of assets. Transactions effected without the requisite approval may also be reversed. The severity of the penalty is dependent on the nature and complexity of the approval being sought. Further, non-compliance may result in legal action, reputational damage and loss of business opportunities. Notably, it might also be possible to regularize any defect of not obtaining SARB approval timeously by making an application to the SARB, which requires a detailed motivation on why prior approval was not sought.
FDI clearance necessary to close	11 July 2024 Yes, if subject to a mandatory filing requirement. A failure to make a mandatory notification or closing prior to approval by FIC and Competition Authorities will lead to the transaction being legally void. SARB approval of inflow (including subscription by foreign shareholder) and outflow of funds is mandatory, but generally not a burdensome process, as South Africa and welcomes foreign investment. Such approval will however, be mandatory.
Right to appeal	11 July 2024 No right of appeal in terms of FIC where the FIC has identified a security interest.
Special measures in response to COVID-19	11 July 2024 No

Questions

Is FDI subject to restrictions, filing, or review?

11 July 2024

South Africa does not yet have an overarching foreign direct investment regime currently. South Africa has relatively fewer approvals and restrictions in place and welcomes foreign investment.

Approval of the South African Reserve Bank ("SARB") usually through authorised dealers is required for most movements of capital/funds in and out of South African borders. This should not, however, be seen as a restriction because all that is required is obtaining the relevant approval up front by showing that the transaction is for fair value and on arm's length terms.

Once constituted, the FIC will require approval of national security interest-related foreign investment transactions. This approval may be subject to conditions.

What types of deals are subject to the FDI regime?

11 July 2024

In respect of the Competition Act, any M&A transaction involving a foreign acquiring firm where the merger thresholds are met will be subject to the approval of the FIC.

Further, in terms of the anticipated amendments to the Competition Act, the President must identify and publish, as Regulations, a list of national security interests of South Africa, including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the FIC.

Once in effect, the of what constitutes national security interests for purposes must take into account all relevant factors, including the potential impact of a merger transaction—

(a) on South Africa's defence capabilities and interests;
(b) on the use or transfer of sensitive technology or knowhow outside of South Africa;
(c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic wellbeing of citizens and the effective functioning of government;
(d) on the supply of critical goods or services to citizens, or the supply of goods or services to government;
(e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;
(f) on South Africa's international interests, including foreign

relationships;
(g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime; and
(h) on the economic and social stability of South Africa.

In respect of SARB, the requirements apply to any flow of funds in or out of South Africa. This inward flow of funds includes a foreign shareholder investing in a local company through a subscription, which approval is required and effected by endorsing the share certificate issued to the foreign entity as 'non-resident' within 30 days of issuance.

Which are the principal authorities in charge of FDI?

11 July 2024

The SARB and, once constituted in terms of the amendments to the Competition Act, the FIC.

Is there a lookback period?

Once in effect, the FIC may revoke its approval of a merger or, in respect of a conditional approval, make decisions regarding any of the conditions, if—

(i) the approval was based on incorrect information for which a party to the merger is responsible;

(ii) the approval was obtained by deceit; or

(iii) a company concerned has breached an obligation attached to the approval.

If the FIC's approval is revoked, the Competition Authorities' approval or conditional approval of the merger is deemed to be revoked. The Competition Act does not set out a period of time upon which this revocation may take place and this aspect may be regulated in future regulations promulgated in terms of the Competition Act .

Is the FDI filing voluntary or mandatory?

11 July 2024

Once in force, merger transactions that required mandatory filing to the Competition Commission in South Africa, that involve a foreign entity and has an effect in South Africa will also require a mandatory notification to the FIC. The transaction must also satisfy the definition of a merger, as contemplated in section 12 of the Competition Act. A merger is said to occur when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

Foreign acquiring firm is also defined in the Competition Act, and refers to an acquiring firm that was incorporated, established or formed under the laws of a country other than the Republic of South Africa (the 'Republic') or whose place of effective management is outside the Republic. This defined term, however, is also not yet in effect.

In addition, exchange control is immediately triggered where there is a flow of funds into or out of South Africa. This requires mandatory notifications to SARB, and depending on the nature and quantum of the flow of funds, may require SARB approval. The inward flow of funds includes a foreign shareholder investing in a local company through a subscription, which approval is required and effected by endorsing the share certificate issued to the foreign entity as 'non-resident' within 30 days of issuance.

Extra-territorial reach and workarounds?

11 July 2024

No.

What is the FDI procedure?

11 July 2024

In respect of SARB, an in flow of funds will require a notification through an authorised dealer (typically a bank which a company has a relationship with), and that is then confirmed. If a foreign entity wishes to acquire shares in a local South African entity, the share certificate issue to the foreign entity is required to be endorsed as 'non-resident' within 30 days of issuance. If this endorsement does not occur, any returns on its investments (through dividends or otherwise) will not be capable of being repatriated to the foreign shareholder.

The SARB approval process requires an application with supporting documents, such as resolutions approved by the South African company issuing the shares and a copy of the share certificate issued, to be submitted to SARB through and authorised dealer. Thereafter, an arrangement is made for the authorised dealer to stamp the original share certificate as "non-resident".

In respect of the FIC, a notification in the prescribed manner is required to be made to the FIC. The exact nature of this prescribed manner is to be detailed once the Competition Act amendments are fully in force. Within 60 days of receipt by the FIC of this notice, or such further period which the President may agree to, on good cause shown, the FIC must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa identified by the President.

Thereafter, the Competition Act amendments contemplate that within 30 days of the decision, the Minister must publish a notice in the Gazette of the decision to permit, permit with conditions or prohibit the transaction.

What are the penalties of the failure to file?

11 July 2024

The Competition Tribunal may impose an administrative penalty on the parties if the notice to the FIC is not given and further in terms of the Competition Act, the parties proceed to implementing the merger without approval or in contravention. The section refers to the main section of the Competition Act dealing with penalties.

In terms of this section, an administrative penalty imposed may not exceed 10% of the firm's annual turnover in South Africa and its exports from the South Africa during the firm's preceding financial year or 25% where it is a repeat offence.

In respect of SARB, any failure to comply with SARB approval , SARB may impose fines or penalties for such non-compliance. These fines or penalties may also assume the form of attachment and forfeiture of assets. Transactions effected without the requisite approval may also be reversed. The severity of the penalty is dependent on the nature and complexity of the approval being sought. Further, non-compliance may result in legal action, reputational damage and loss of business opportunities. Notably, it might also be possible to regularize any defect of not obtaining SARB approval timeously by making an application to the SARB, which requires a detailed motivation on why prior approval was not sought.

Is FDI clearance necessary to close the transaction?

11 July 2024

Yes, if a transaction with a foreign acquiring entity meets the thresholds of being notifiable to the Competition Commission in South Africa then such transaction will require the approval of the Competition Commission or Competition Tribunal, depending on the size of the merger, before such transaction can be implemented.

In addition, once in force, if the transaction gives rise to a national security risk (as determined by the Regulations), then it will also require the approval of the FIC prior to implementation of the transaction.

SARB approval for a foreign shareholder investing in a company through a subscription is not necessarily required for closing a transaction, but is typically included as a closing obligation. If a foreign entity does not attend to the application for SARB approval, which

approval is required and effected by endorsing the share certificate issued to the foreign entity as 'non-resident' within 30 days of issuance, then any returns on the foreign entity's investments (through dividends or otherwise) will not be capable of being repatriated to the foreign shareholder.

Subject to thresholds being met, SARB approval for an inward or outward flow of funds may be required for closing. These transactions include outward capital transfers, outward loan transfers, loans from non-residents inwards and the like. Should it not be required as upfront approval, notification to SARB (through an authorised dealer) is required to ensure that any returns on the foreign entity's investment in respect of such flow of funds will be capable of being repatriated.

Is there a right to appeal?

11 July 2024

The exact processes regarding the FIC approval is still to be determined by Regulations, as contemplated by the Competition Act amendments.

For SARB approvals, there is no finite review period and timing is dependent on the nature and complexity of the transaction. Additionally, there is scope to engage SARB (through the authorised dealers) to obtain the necessary approval. There is no appeal process.

How to manage the FDI procedure?

11 July 2024

If a transaction involving a foreign acquiring firm requires notification to the Competition Commission in South Africa, such timing and approval must be factored in at an early stage of the transaction. If a transaction is notifiable, the parties must consider whether there may be any public interest concerns or likely conditions to be imposed by the Competition Commission that may be acceptable by the acquirer.

Once the Regulations are promogulated clarifying what constitutes national security interest, it will be important to consider whether a transaction may fall within the purview of the FIC, and therefore requiring additional notification.

If SARB approval is required, this should also be factored into the timing and SARB should be engaged upfront to ensure that there are no unforeseen issues. Additionally, SARB will require that the documentation be provided to it including, a copy of the agreement if there is one, confirmation on source of funding and particulars

regarding the relationship between the parties. Accordingly, parties to a transaction must co-operate in providing such information timeously as may be requested.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

N/A

What are the key trends in FDI enforcement?

11 July 2024

Depending on the sector that a transaction relates to, an acquirer may need to consider the impact of its Black-economic empowered shareholding. In addition, the Competition Authorities generally consider the impact of their decisions on public interest issues such as employment, small and medium enterprises, economic development and participation of previously disadvantaged persons.

Once the FIC provisions in the Competition Act are in force, we will note the key trends of the FIC and its determination of transactions.

What are the recent legal developments?

11 July 2024

As noted above, the promulgation of the intended amendments to the Competition Act that requires approval by the FIC for transactions involving a foreign acquiring entity that may give risk to a national security risk is a recent development. However, as the FIC regime is yet to be in force, there are no other major developments regarding the FDI regime in South Africa.

What future legal developments are expected?

11 July 2024

Regulations regarding the:

- prescribed form of the notification to the FIC;
- intended processes, procedure and timeframes to be followed by the FIC; and

clarity on what may constitute national security interests.

Brazil

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Key Features

Types of deals subject to the FDI regime	04 May 2023 Any deals involving the acquisition of equity in a Brazil company by a foreign investor.
Principal authorities	04 May 2023 The Central Bank of Brazil (*Banco Central do Brasil* – **BACEN**) and the Brazilian National Monetary Council (*Conselho Monetário Nacional* – **CMN**)
Lookback period	11 July 2024 No time limit.
Mandatory / voluntary filing	11 July 2024 Foreign direct investment (**FDI**) must be registered with BACEN's Electronic Declaratory Registration System for Direct Foreign Investment (*Registro Declaratório Eletrônico – Investimento Estrangeiro Direto* - **RDE-IED**).
Substantive test for intervention	11 July 2024 There is no substantive test for intervention. Registration of FDI with RDE-IED is mandatory regardless of the amount of the FDI.
Extra-territorial reach	11 July 2024 The FDI regulation in Brazil applies to all foreign investors, regardless of their location.
Timeline for review (approximately)	11 July 2024 Generally speaking, there is no review as a condition for FDI registration with the RDE-IED. Once investors/investees include relevant FDI information in the RDE-IED, the reported information will be immediately registered with the RDE-IED.

Potential penalties	11 July 2024 Failure to register FDI or report accurate FDI information within the RDE-IED can result in fines as detailed below.
FDI clearance necessary to close	11 July 2024 No FDI clearance is necessary to close an FDI deal in Brazil. Once investors/investees input relevant FDI information in the RDE-IED, the reported information will be immediately registered with the RDE-IED.
Right to appeal	11 July 2024 Not Applicable
Special measures in response to COVID-19	11 July 2024 There have been no special measures in response to COVID-19.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 The primary obligation concerning FDI in Brazil is the need to register any type of investment with the RDE-IED up to 30 days after the applicable FDI event (*e.g.*, a foreign capital injection or transfer of equity held by Brazilians in local entities to foreigners). Registration with the RDE-IED is mandatory and is a condition for any FDI in Brazil, regardless of the amount. Foreign investors that participate in the Brazilian capital markets by investing in publicly traded shares of companies listed on a stock exchange, must: (i) appoint at least one representative in Brazil, with powers to perform actions relating to the investment in question; (ii) appoint an authorized custodian in Brazil for its investment, which must be a financial institution duly authorized by the BACEN or the Brazilian Securities and Exchange Commission (**CVM**); (iii) through its representative, register as a foreign investor with the CVM and the BACEN; and (iv) obtain a taxpayer identification number from the Brazilian tax authorities. In addition, all foreign investors are required to grant a power of attorney to a Brazilian resident with powers to receive service of process in corporate matters and, should a foreign investor be represented by an

attorney-in-fact in the corporate meetings of the Brazilian company, the attorney-in-fact must be a shareholder or a lawyer (in the case of Brazilian corporations, the attorney-in-fact may also be a member of company management).

What types of deals are subject to the FDI regime?

11 July 2024

Any deals involving the acquisition of equity in a Brazilian company by a foreign investor are subject to the FDI regime.

Which are the principal authorities in charge of FDI?

11 July 2024

BACEN and CMN.

Is there a lookback period?

There is no specific lookback period limiting the powers of the authorities to investigate deals from an FDI perspective.

Is the FDI filing voluntary or mandatory?

11 July 2024

In Brazil, registering with the RDE-IED is a must for any Foreign Direct Investment, irrespective of the amount involved.

The mandatory registration of all investments with the RDE-IED must occur within calendar 30 days of the relevant FDI event, such as foreign capital injection or transfer of equity held by Brazilians in local entities to non-Brazilians.

Extra-territorial reach and workarounds?

11 July 2024

The FDI regulation in Brazil applies to all foreign investors, regardless of their location.

What is the FDI procedure?

11 July 2024

The regulation of FDI in Brazil does not rely on any specific legislation. Instead, various laws and regulations contain a number of applicable restriction and rules depending on the structure and nature of the investment in question.

As noted in item 4, the main requirement related to FDI in Brazil pertains to the obligation of registering any investment with the BACEN via the RDE-IED. According to BACEN's Ordinance No. 3,689/2013, registration with the RDE-IED is mandatory and constitutes a prerequisite for any FDI in Brazil, regardless of the amount.

The RDE-IED is designed to enable Brazilian companies that receive FDI and foreign investors to register all relevant FDI events, including but not limited to:

- Registration of foreign investors with the BACEN, as well as any changes to their name, address, or corporate type;
- Registration of every Brazilian company that receives FDI, regardless of the amount, with the BACEN, as well as any changes to their name, address, management, or other information included in the RDE-IED registration - such as periodic updates on economic and financial information, either annually or quarterly, depending on the company's assets and net worth as of 31 December of the preceding year;
- Capital injections and contributions paid in cash, assets, or rights;
- Events related to the repatriation of capital;
- Payment of dividends and equity interest to foreign investors;
- Merger, spin-off, and conversion transactions involving Brazilian companies that receive FDI; and
- The dissolution and liquidation of Brazilian companies that receive FDI, along with payment of the corresponding equity holdings to foreign investors, as applicable.

The RDE-IED is a declaratory system that enables Brazilian companies receiving FDI and foreign investors to file information regarding the aforementioned events. However, it is crucial that these companies and investors produce and maintain the supporting documentation for any event that is registered with the RDE-IED

What are the penalties of the failure to file?

11 July 2024

Federal Laws No. 4,131/1962 and No. 11,371/2006, along with BACEN's Circular No. 3,857/2017, state that failure to declare the required information related to FDI, or failure to present supporting documentation requested by the BACEN, late submission of such information or documentation, or submission of incorrect, incomplete,

or false information and documentation, may lead to administrative penalties. When applying these penalties, the BACEN takes into consideration the following criteria:

- Failure to declare required information or present supporting documentation requested by the BACEN: a fine equivalent to 5 percent of the FDI, with a limit of 125,000 reais;
- Late submission of information or documentation: a fine equivalent to 5 percent of the FDI, with a limit of 25,000 reais. The fine will be reduced by 90 percent for delays of less than 30 days and by 50 percent for delays between 30 and 60 days;
- Submission of incorrect or incomplete information or documentation: a fine equivalent to 2 percent of the FDI, with a limit of 50,000 reais; and
- Submission of false information or documentation: a fine equivalent to 10 percent of the FDI, with a limit of 250,000 reais.

If the BACEN detects any irregularity related to items (1) to (3) mentioned above and the non-compliance is not corrected within a reasonable time, the fines mentioned in those items will be increased by 50 percent.

Is FDI clearance necessary to close the transaction?

11 July 2024

No FDI clearance is necessary to close an FDI deal in Brazil. Once investors/investees upload relevant FDI information in the RDE-IED database, the reported information will be immediately registered with the RDE-IED.

Is there a right to appeal?

11 July 2024

Not Applicable

How to manage the FDI procedure?

11 July 2024

Not Applicable

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

There have been no special measures in response to COVID-19.

What are the key trends in FDI enforcement?

11 July 2024

Reducing barriers to international investment is being identified as an alternative to increasing FDI, as Brazil's post-pandemic economic recovery is primarily centered on privatizations.

What are the recent legal developments?

11 July 2024

The Brazilian Congress is currently contemplating the enactment of new laws aimed at liberalizing the existing restrictions on foreign ownership of rural properties.

What future legal developments are expected?

11 July 2024

As of now, we don't have any knowledge of any possible alterations to the domestic regulations concerning FDI.

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Mexico

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Key Features

Types of deals subject to the FDI regime

11 July 2024

Any participation of foreign investment, directly or indirectly, in the capital stock of a Mexican company.

Principal authorities

11 July 2024

	Foreign Investments National Commission (*Comisión Nacional de Inversiones Extranjeras* – **CNIE**) and the Ministry of Foreign Affairs.
Lookback period	11 July 2024 Up to 5 years.
Mandatory / voluntary filing	11 July 2024 Mandatory but only required in very specific instances as discussed in Question 1 below.
Substantive test for intervention	11 July 2024 Depending on the specific industry, but normally commitments mainly as to a 3-year investment project.
Extra-territorial reach	11 July 2024 No.
Timeline for review (approximately)	11 July 2024 3-6 months.
Potential penalties	11 July 2024 Sanctions may include revocation of authorizations granted, administrative fines and declaration of nullity of the legal acts when so declared by the Ministry of Foreign Affairs.
FDI clearance necessary to close	11 July 2024 Yes, but only in very specific circumstances.
Right to appeal	11 July 2024 Judicial review.
Special measures in response to COVID-19	11 July 2024 No.

Questions

Is FDI subject to restrictions, filing,	11 July 2024

or review?

As a main principle, Mexico is a jurisdiction open to foreign investment. The local statutes together with an important network of bilateral and multilateral investment treaties with countries around the world, make Mexico one of the most open countries to foreign investment in almost all industries (with very few limitations).

Notwithstanding the foregoing, there are certain activities or industries that are exclusively reserved to the Mexican State, others that are exclusively reserved to Mexican nationals, and others where foreign participation is allowed albeit on a limited basis.

Activities exclusively reserved to the Mexican State

These activities are considered as strategic for the State and are therefore reserved to the State without allowing private participation whether national or foreign:

- Exploration and extraction of oil, except for shared participation structures;
- Planning and control of the national electric system, as well as the public service for the transmission and distribution of electric energy;
- Generation of nuclear energy;
- Radioactive minerals;
- Telegraph services;
- Radiotelegraphy;
- Mail services;
- Issuance of legal currency (bills and coins);
- Control, supervision and surveillance of ports, airports and heliports.

Activities reserved to Mexican nationals or Mexican companies with a express foreign exclusion clause.

The following activities are reserved to Mexican investors (individuals or companies). In the case of companies, the requirement of having a "foreign exclusion clause" means that the by-laws of the company shall expressly provide that no foreign investment is allowed (although as will be explained below, a mechanism of neutral investment would allow limited foreign investment participation in these industries):

- National ground transportation, whether freight, passengers or tourism. These restrictions do not include courier services;
- Development banks;
- Professional and technical services, although the authority has never issued a specific list to this end.

Foreign investment cannot participate in these activities whether directly, through trusts, agreements or any other structure for indirect participation, unless investment is made through a neutral investment structure as explained below.

Activities where foreign investment is restricted.

Foreign investment may participate in the following activities up to the percentage referred below:

- 10% for cooperative production companies;
- 49% for the manufacturing and marketing of explosives, firearms, cartages, ammunition and fireworks, without including the acquisition and use of explosive for industrial and extraction activities, nor the preparation of explosive mixtures for the consumption of these activities;
- 49% for the printing and publication of newspapers for exclusive distribution in the national territory:
- 49% for Series "T" shares of companies owning agricultural, cattle raising and forestry grounds. Series "T" shares evidence the contribution for the acquisition of lands for such purposes.
- 49% fishing is fresh water, coastal waters and the economic exclusive zone of Mexico, without including aquaculture;
- 49% for integral port administration;
- 49% for port services for piloting of ships to perform interior navigating operations;

- 49% for shipping companies engaged in the commercial exploitation of ships for the interior navigation and cabotage, except for tourism cruise ships and the exploitation of dragging, and naval artefacts for the construction, maintenance and operation of ports;
- 49% for the provision of gasoline and lubricants for ships, airships and train equipment in ports or airports;
- 49% for radio and TV broadcasting, subject to reciprocity conditions with the country of the foreign investor;
- 49% for national air transportation services, international non-standard air taxi services and specialized air transportation.

As in the case of activities fully restricting foreign investment, these activities cannot exceed the percentages mentioned above, whether directly or indirectly, or through trusts or other agreements, unless through neutral investment.

Activities where an approval is required for foreign investment to exceed 49%.

This approval is granted by the Commission, and requires an explanation as to why the foreign investor is requesting for its participation to be a controlling one:

- Port services for ships to perform interior navigation operations, such as towing, mooring and boating activities:
- Shipping companies engaged in the exploitation of ships exclusively in high traffic:
- Concessionaires of aerodromes for public service:
- School services;
- Legal services; and

Construction, operation and exploitation of railroad tracks that are general communications means and provision of rail transportation services.

Acquisition of 49% or more of the shares of a company which assets exceed the amount of US$1 billion dollars, approximately. This amount is reviewed annually.

The Mexican Constitution provides that foreigners may not acquire real estate property directly in a restricted zone in Mexico, which covers a strip of 100 kilometers through the international borders of Mexico and a strip of 50 kilometers though beaches in the country ("Restricted Zone").

However, foreigners are allowed to acquire real estate property in this restricted zone through trusts operated and managed by credit institutions in Mexico, which require the prior approval from the Ministry of Foreign Affairs. The Ministry of Foreign Affairs will grant the approval considering the economic and social benefit of these potential acquisitions, although in practice these authorizations are normally granted without any special commitments.

Also, Mexican companies that include in their by-laws the commitment of foreign investors to be considered as national for purposes of their investment in the company and waive the right to request the protection of a foreign government, may acquire real estate properties in the restricted zone, provided the real estate will be used for non-residential purposes or mixed purposes (ie, residential and non-residential). To this end, the company in question is required to notify the acquisition within a term of 60 business days.

What types of deals are subject to the FDI regime?

11 July 2024

Share deals, whether purchase of stock or investment in Mexican companies.

Which are the principal authorities in charge of FDI?

11 July 2024

Foreign Investments National Commission and the Ministry of Foreign Affairs.

In addition, all Mexican companies with foreign investments, whether directly or indirectly or through trusts, must be registered with the Foreign Investments National Registry ("RNIE"). In addition, branch

offices of foreign entities performing business activities in Mexico, also require registration with the RNIE, as well as trusts investing in the Restricted Zone and neutral investment trusts.

Is there a lookback period?	Five years.
Is the FDI filing voluntary or mandatory?	11 July 2024 Mandatory, but only under the specific circumstances discussed in Question 1.
Extra-territorial reach and workarounds?	11 July 2024 The FDI regime only applies to transactions directly or indirectly involving a **Mexican target company.**
What is the FDI procedure?	11 July 2024 As explained above, there are only a few instances where an approval from the CNIE is required. This include the following: ◦ Those activities where foreign investment can exceed 49% (activities listed in Section above); ◦ Those activities where neutral investment is allowed; and ◦ Acquisition of 49% or more of the shares of a company which assets exceed the amount of $20,184,671,346.26 pesos (current amount, equal to US$1 billion dollars, approximately). This amount is reviewed annually. **Authorization allowing foreign investment exceeding 49%.** When a foreign investor intends have a participation exceeding 49% in the capital stock of companies engaged in the activities described, a prior authorization from the Commission is required. This authorization is normally granted without restrictions, and will only require a 3-year investment project This authorization is granted in a term of 45 business days from the date any formal requests of information are responded. **Authorization for Neutral Investment**.

There are certain activities foreign investment is allowed through neutral investment. Neutral investment is an investment carried out in a Mexican entity or in trusts which is specifically authorized by the Commission and is not counted for purposes of foreign investment limitations in specific activities where foreign investment is limited.

Neutral investment can be carried out through trusts or the issuance of special series of shares in Mexican companies. In both cases, participation under a neutral investment regime do not grant voting rights or only limited voting rights as expressly approved by the Commission. When limited voting rights are granted, these would normally be constrained to extraordinary matters such as the merger of the company, amendment to the corporate by-laws, liquidation of the company, but control will rely on the Mexican investors. Foreign investor would have economic rights, such as dividend distribution.

There is no rule as to the specific percentage of neutral investment that the Commission may authorize. The general standard is for neutral investment to represent between 25% and 49% of the total investment, but will depend on the specific industry and the criteria of the officers at the moment. However, the Commission has authorized even over 89% of neutral investment in specific cases (national ground transportation).

The Commission has approved neutral investment when dealing with national air transportation, for instance, national ground freight transportation, TV broadcasting, among others.

The Commission has a 35 business day term to resolve a neutral investment authorization, as from the date the requesting party has responded any requests for additional information.

Authorization to acquire more than 49% of shares when assets threshold is reached.

This authorization from the Commission is required only when foreign investment, whether directly or indirectly, exceeds 49% in a Mexican company which assets exceed US$1 billion dollars, approximately.

If foreign investment in a Mexican company already exceeds this percentage, an authorization will not be required, even if the assets threshold is reached.

For this authorization, the Commission will require certain commitments from the foreign investors. These commitments may include:

- *Employment*: Either increasing or maintain employment levels in the specific company;

- *Technology transfer*: Whether the foreign investment will result in innovative technology being transferred to Mexico as part of the transaction;

- *Investments*: Whether the transaction will imply new investments into Mexico, including in productive, distribution or other assets. Normally, the Commission requires a 3-year investment plan.

- *Environmental compliance*, depending on the type of industry; and

- *Training*; Whether the investment will result in training to Mexican employees.

The commitments are reviewed on a case-by-case basis and can include all the elements referred in the list above, or a combination of some of them.

The timeframe for the Commission to resolve is of 45 business days from the date the applicant has responded to all formal requests of information.

What are the penalties of the failure to file?

11 July 2024

Sanctions may include revocation of authorizations granted, administrative fines and declaration of nullity of the legal acts when so declared by the Ministry of Foreign Affairs.

Sanctions may be challenged through a review process before the Ministry of the Economy and the resolution under this proceeding may be subject to appeal through a nullity claim before Administrative Courts. Furthermore, the resolution issued by Administrative Courts may be challenged through a Constitutional Lawsuit (Amparo) before federal courts.

Finally, depending on the origin of the investment, resolutions may be challenged through specific arbitration proceedings under investment treaties

Is FDI clearance necessary to close the transaction?

11 July 2024

Only in the limited cases discussed above.

Is there a right to appeal?	11 July 2024 Sanctions may be challenged through a review process before the Ministry of the Economy and the resolution under this proceeding may be subject to appeal through a nullity claim before Administrative Courts. Furthermore, the resolution issued by Administrative Courts may be challenged through a Constitutional Lawsuit (Amparo) before federal courts.
How to manage the FDI procedure?	11 July 2024 As there are very limited instances where a prior approval is required, what is essential is to analyze the specific industries of the target entity, and the total assets of the acquired company in the cases where foreign investment has not reached 49% prior to the transaction. In addition, post-closing notices may be required.
Are there special measures to protect national assets in response to COVID-19?	11 July 2024 No insofar as the FDI regime is concerned.
What are the key trends in FDI enforcement?	11 July 2024 As explained above, FDI approvals are limited to very specific cases, and therefore, authorities only enforce in the specific sectors and circumstances where an approval is required.
What are the recent legal developments?	11 July 2024 There have been no announcements as to potential review of the specific sectors and criteria for any FDI required approvals.
What future legal developments are expected?	11 July 2024 Not Applicable

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Key Features

Types of deals subject to the FDI regime	11 July 2024 Any transaction that is subject to the jurisdiction of the Committee on Foreign Investment in the United States ("**CFIUS**").
Principal authorities	11 July 2024 CFIUS, a U.S. Government interagency committee that includes as members nine U.S. Government agencies.
Lookback period	11 July 2024 CFIUS retains jurisdiction in perpetuity unless CFIUS: ◦ confirms in writing that the transaction is not subject to its jurisdiction; ◦ clears the transaction; or ◦ refers the matter to the President, and the President takes no action to suspend or prohibit the transaction.
Mandatory / voluntary filing	11 July 2024 Generally voluntary, but mandatory filings for certain transactions.
Substantive test for intervention	11 July 2024 CFIUS may unilaterally request a filing if it believes it has jurisdiction over a transaction that may raise national security considerations.
Extra-territorial reach	11 July 2024

	Yes, in the cases of (i) certain foreign investments in, or acquisitions of, foreign entities that own or control U.S. businesses and (ii) the contribution of a U.S. business to a foreign-controlled entity.
Timeline for review (approximately)	11 July 2024 Approximately 1-2 months for short-form filings; 4-6 months for long-form filings.
Potential penalties	11 July 2024 ◦ Failure to file when legally required: civil penalties up to $250,000 or the value of the transaction, whichever is greater. ◦ Material misstatements or omissions in filing or false certification: civil penalties up to $250,000 per violation (and potential additional penalties under certain other U.S. laws). ◦ Violation of material provision of mitigation agreement or material condition imposed: civil penalties of up to $250,000 per violation or the value of the transaction, whichever is greater.
FDI clearance necessary to close	11 July 2024 No, but if a filing is required, the parties must *file* 30 days prior to closing. Technically, CFIUS *clearance* or conclusion of CFIUS's review is not legally required prior to closing, even if a filing is required. In certain circumstances (very rare), CFIUS may issue an interim order to suspend closing of a transaction, and the President may suspend or prohibit the closing of a transaction
Right to appeal	11 July 2024 The President's determinations to suspend or prohibit a transaction and his/her related findings are not subject to judicial review, and thus effectively may not be challenged on the merits. However, presidential and CFIUS actions may be challenged (e.g., a due process challenge) through a civil action in the U.S. Court of Appeals for the District of Columbia.
Special measures in response to	11 July 2024

COVID-19	Not explicitly. There is no definition of "national security" and the presumptive sensitivity of particular sectors may change based on circumstances, including COVID-19.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 Yes, transactions subject to CFIUS's jurisdiction may be subject to review and if a filing is legally required, the parties must file 30 days prior to closing.
What types of deals are subject to the FDI regime?	11 July 2024 Jurisdiction includes: ◦ transactions that could result in foreign control of a U.S. business; ◦ non-controlling investments, through which a foreign investor acquires certain rights in a "TID U.S. Business" (described below); ◦ certain changes in a foreign investor's rights in a U.S. business; ◦ certain transactions involving purchases of, leases by, or concessions to foreign investors of certain real estate within U.S. ports or within certain distances of sensitive U.S. Government installations; and ◦ transactions designed to circumvent CFIUS's jurisdiction.
Which are the principal authorities in charge of FDI?	11 July 2024 CFIUS member agencies include the U.S. Departments of the Treasury, Defense, Justice, Commerce, Energy, Homeland Security, and State, as well as the White House's Office of the U.S. Trade Representative and Office of Science & Technology Policy
Is there a lookback period?	CFIUS retains jurisdiction in perpetuity unless CFIUS: ◦ confirms in writing that the transaction is not subject to its jurisdiction; ◦ clears the transaction; or

- refers the matter to the President, and the President takes no action to suspend or prohibit the transaction.

Is the FDI filing voluntary or mandatory?

11 July 2024

Generally voluntary, if CFIUS has jurisdiction (as described above), but mandatory filings for certain transactions that are subject to CFIUS's jurisdiction. In particular, CFIUS has two mandatory filing programs, described below:

- Critical Technologies Mandatory Filing Program. Under the CFIUS critical technologies mandatory filing program, the foreign investor and the U.S. business are legally obligated to submit a filing to CFIUS 30 days prior to closing if:

  - The investment affords the foreign investor (i) control/veto rights over the U.S. business, (ii) membership or observer rights on, or the right to nominate an individual to a position on, the board of directors of the U.S. business, (iii) access to material nonpublic technical information in the possession of the U.S. business, or (iv) involvement in certain substantive decision-making of the U.S. business.

  - The U.S. business produces, designs, tests, manufactures, fabricates, or develops "critical technologies," as defined in the CFIUS regulations; *and*

  - A U.S. regulatory authorization would be required for the hypothetical export of the critical technologies to (i) the foreign investor or (ii) any person with a voting interest, held directly or indirectly, of 25 percent or more in the foreign investor. [Note: the hypothetical export destination is determined by the principal place of business of entities and the nationalities of individuals.]

- Foreign Government-Backed Mandatory Filing Program. Under the CFIUS foreign government-backed mandatory filing program, the foreign investor and the U.S. business are legally obligated to submit a filing to CFIUS 30 days prior to closing if:

  - The transaction will result in the foreign investor acquiring,

directly or indirectly, a voting interest of 25 percent or more in the U.S. business;

- A foreign government, directly or indirectly, holds a voting interest of 49 percent or more in the foreign investor; *and*
- The U.S. business is a so-called "TID U.S. Business"—namely, a U.S. business that (i) produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies, (ii) performs certain functions with respect to covered investment critical infrastructure, *or* (iii) maintains or collects sensitive personal data of U.S. citizens.

CFIUS's real estate regulations do not include any mandatory filing programs

Extra-territorial reach and workarounds?

11 July 2024

CFIUS's jurisdiction extends to (i) certain foreign investments in, or acquisitions of, foreign entities that own or control U.S. businesses and (ii) the contribution of a U.S. business to a foreign-controlled entity. If a set of assets to be acquired by a foreign person do not collectively constitute a "U.S. business" or "covered real estate", CFIUS would not have jurisdiction over the transaction.

What is the FDI procedure?

11 July 2024

Parties to any transaction involving a foreign investment in, or acquisition of, a U.S. business should assess whether a CFIUS filing is legally required and, if not, whether the transaction is subject to CFIUS's jurisdiction and might warrant the voluntary submission of a CFIUS filing. Parties to a transaction involving purchases of, leases by, or concessions to foreign investors of U.S. real estate should assess whether the transaction is subject to CFIUS's jurisdiction and whether submission of a voluntary CFIUS filing might be warranted. If the parties are legally obligated to submit a filing or choose to submit one on a voluntary basis, the parties must choose between submitting a short-form declaration and a long-form notice. Given the need to gather information and coordinate with the other party, preparation of a short-form declaration takes approximately two weeks and preparation of a long-form notice takes approximately four to six weeks. The review timelines are set forth below:

- Short-form declaration: 30-day assessment (although one possible outcome of CFIUS's review is a request for a long-form notice, described below);
- Long-form notice:
  - Typically parties submit a draft of the long-form notice first and then formally file after receiving input from CFIUS.
  - 45-day review (with possible 45-day investigation and, very rarely, 15-day extension).
  - If a report is sent to the President, an additional 15 days. Case may be referred to the President if CFIUS recommends suspension or prohibition; CFIUS is unable to reach a recommendation regarding suspension or prohibition; or CFIUS otherwise requests that the President take action.
  - Withdrawal and refiling of filings possible (restarting a 45-day review or sometimes investigation period) with CFIUS approval

No tolling of the 45-day review or investigation while parties answer questions or to allow CFIUS more time (except if there is a lapse in appropriations, such as a U.S. Government shutdown).

What are the penalties of the failure to file?

11 July 2024

Failure to file when legally required may result in civil penalties up to $250,000 or the value of the transaction, whichever is greater.

Is FDI clearance necessary to close the transaction?

11 July 2024

Generally no, but if a filing is required, the parties must *file* 30 days prior to closing. Technically, *clearance* or conclusion of the review is not legally required prior to closing the transaction, even where a filing is required.

CFIUS may issue an interim order to suspend closing of a transaction in certain circumstances (very rare).

Is there a right to appeal?

11 July 2024

The President's determinations to suspend or prohibit a transaction and his/her related findings are not subject to judicial review, and thus effectively may not be challenged on the merits. However, presidential and CFIUS actions may be challenged (e.g., a due process challenge) through a civil action in the U.S. Court of Appeals for the District of Columbia.

How to manage the FDI procedure?

11 July 2024

Parties to any transaction involving a foreign investment into, or acquisition of, a U.S. business should assess whether a CFIUS filing is legally required and, if not, whether the transaction is subject to CFIUS's jurisdiction and might warrant the voluntary submission of a CFIUS filing. Parties to transactions involving purchases of, leases by, or concessions to foreign investors of U.S. real estate should assess whether the submission of a voluntary CFIUS filing might be warranted. Assessing CFIUS implications early is critical given the timelines associated with a CFIUS review.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

Not explicitly. There is no definition of "national security" and the presumptive sensitivity of particular sectors may change based on circumstances, including COVID-19.

What are the key trends in FDI enforcement?

11 July 2024

On August 2, 2022, CFIUS released its Annual Report for 2021. A few key factors from the 2021 report include:

- There was a significant increase in the number of filings in 2021 (436 filings, up from 313 filings in 2020);
- Only a small number of filings (7) involved CFIUS's jurisdiction over real estate transactions;
- CFIUS refined its short-form declaration review process and "cleared" 73% of declarations (vs. 37% in 2019, the first full year in which CFIUS accepted short-form declarations); and

CFIUS continued its aggressive pursuit of non-notified transactions (i.e., transactions over which CFIUS might have jurisdiction but for which filings were not submitted).

What are the recent legal developments?	11 July 2024 President Biden's September 2022 executive order identified five key U.S. national security factors for CFIUS to consider during its reviews, including supply chain resilience and security, effects on U.S. technological leadership in certain areas, the impact of multiple acquisitions or investments in a single sector, the potential for transactions to provide foreign persons or third-parties with access to information databases and systems, and the potential for transactions to allow foreign persons or third parties to exploit sensitive personal data of U.S. citizens. In October 2022, CFIUS issued enforcement guidelines for the first time. The guidelines identify (i) conduct that constitutes a violation of the CFIUS regulations and (ii) aggravating and mitigating factors in CFIUS enforcement matters.
What future legal developments are expected?	11 July 2024 We do not expect substantive changes to CFIUS's jurisdiction or process in the near future, but interested parties should follow our recent publications regarding the potential U.S. outbound investment regime.

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Key Features

Types of deals subject to the FDI regime

11 July 2024

Any investment by a foreign person regardless of its form (greenfield/M&A, equity/asset, onshore/offshore) is subject to FDI restrictions, filing or review.

Negative Lists set out investment sectors in which foreign investment is prohibited or restricted.

Principal authorities

11 July 2024

For National security review (NSR): Office for Foreign Investment Security Review Working Mechanism, established under National Development and Reform Commission (NDRC) and led by NDRC and Ministry of Commerce (MOFCOM).

For Foreign-invested enterprise registration filing/reporting (FIE Filing): State Administration for Market Regulation, MOFCOM and the relevant industry regulator (if applicable).For Foreign Investment Project Filing: NDRC and State Council.

Lookback period

11 July 2024

No time limit.

Mandatory / voluntary filing

11 July 2024

The FDI filings involve:

- NSR: this is mandatory if the investment falls into certain categories (military-related investments, or investments in key sectors leading to acquisition of actual control).
- FIE Filing: this is necessary to establish or acquire a company.
- Foreign investment project approval/record-filing (Foreign Investment Project Filing): this is required for certain projects falling under the Negative Lists or a State Council catalogue, and other fixed-asset construction projects.

Substantive test for intervention	11 July 2024 National security triggers NSR. Regardless of national security concerns, foreign investment restrictions are imposed in certain sectors (listed in the negative lists), and foreign investment project filing is required for certain types of projects.
Extra-territorial reach	11 July 2024 The FDI regime captures indirect investments at the offshore level (but negative lists restrictions typically apply to the direct ownership of equity interests in entities established in Mainland China).
Timeline for review (approximately)	11 July 2024 For NSR: usually up to 15 business days for preliminary review phase, up to 30 business days for standard review phase (if any), and up to 60 business days for special review phase (if any) plus a possible extended review phase. For FIE Filing: usually up to 15 business days to obtain the business license (or longer if Foreign Investment Project Filing is required). For Foreign Investment Project Filing: usually up to 30 business days for approval (but extensions may be granted), or up to seven business days for record-filing.
Potential penalties	11 July 2024 Fines, administrative and criminal penalties; unwinding of investment; impact on credit record in the social credit system.
FDI clearance	11 July 2024

necessary to close	
Right to appeal	11 July 2024 No appeal against NSR decision. If the authorities reject the FIE Filing or the Foreign Investment Project Filing, the applicant can file again.
Special measures in response to COVID-19	11 July 2024 No special measures.

Questions

Is FDI subject to restrictions, filing, or review?

11 July 2024

The mainland of the People's Republic of China (referred to below as China and for identification and differentiation purposes only, not including the Special Administrative Regions of Hong Kong and Macau, and Taiwan) adopts a multifaceted foreign direct investment (FDI) regime.

NSR

Foreign investments into China in certain fields are subject to national security review (NSR) conducted by the Office for Foreign Investment Security Review Working Mechanism (Working Mechanism Office) established under the National Development and Reform Commission (NDRC) and led by NDRC and the Ministry of Commerce (MOFCOM).

Negative Lists

The Negative Lists[1] set out the sectors "restricted" or "prohibited" to foreign investment: in principle, any sector not listed in the Negative Lists is "permitted" and as such fully open to foreign investment.

Foreign investment in "restricted" sectors is allowed but subject to:

- Restrictions on the foreign equity ownership in the foreign invested enterprise (FIE) established in connection with or resulting from the foreign investment (e.g., by requiring a Chinese partner to hold a minimum – majority or minority – equity stake) or the nationality of its senior managers (e.g., by requiring that some of them be Chinese nationals).

- A reviewing process conducted by the State Administration for Market Regulation (SAMR) or the competent industry regulators to examine whether the restrictive requirements under the Negative Lists have been satisfied.

NDRC filing

Based on the black letter law, any foreign investment project must in principle be either approved by or record-filed with NDRC, but in practice this is not always the case (see the answer to question 2).

MOFCOM reporting

Certain information on the foreign investment must be reported to MOFCOM, either by SAMR or by the foreign investor or the FIE (as applicable and depending on local practice).

Industry permits

Certain industry-specific licenses, permits and registrations may be required which may appear to be obtainable on paper, but may not always be available in practice (as they require applications to and review by relevant authorities on a case-by-case basis). They may thereby serve as an additional de facto barrier to foreign equity participation in the market.

For completeness, it must be noted that foreign investment in certain sectors is encouraged under the Catalogue of Encouraged Industries for Foreign Investment (Encouraged Investment Catalogue), first issued by MOFCOM and NDRC on 30 June 2019 and the latest version of which has been issued on 26 October 2022. Favorable policies designed to attract investment may be found in the numerous FTZs and the Hainan FTP.

1. These are:

- *The Special Administrative Measures (Negative List) Foreign Investment [Market] Access (National Negative List), setting out the Chinese government's policy on foreign investment applicable at the national level (excluding the FTZs).*
- *A similar but relatively more favorable list called the Special Administrative Measures (Negative List) Foreign Investment [Market] Access in the Free Trade Zones (FTZ Negative List), applicable only in the Chinese Free Trade*

Zones (FTZs) other than the Hainan Free Trade Port (Hainan FTP).

- *An additional list called the Special Administrative Measures (Negative List) Foreign Investment [Market] Access in the Hainan Free Trade Port (Hainan FTP Negative List and, together with the National Negative List and the FTZ Negative List, Negative Lists), applicable only in the Hainan FTP. The latest versions of the National Negative List and FTZ Negative List took effect on 1 January 2022, replacing the corresponding versions of these Negative Lists issued in 2021. The Hainan FTP Negative List was introduced effective on 1 February 2021.*

What types of deals are subject to the FDI regime?

11 July 2024

Any investment made by a foreign person into China, regardless of its form (greenfield, M&A, and whether equity or asset deal or carried out onshore or offshore) is subject to FDI restrictions, filing or review.

NSR

Any foreign investment that affects or may affect national security is subject to the NSR, and if the foreign investment falls within any of the following categories the parties concerned must proactively make the NSR filing:

- Military-related investments, which refers to investments in industries concerning national defense and security (e.g., military and military-supporting industries) or in areas surrounding military facilities and industrial military facilities.
- Investments in key sectors (to the extent that such investments lead to the acquisition of actual control over the entity that is the recipient of the investment), including key agricultural products, key energy and resources, manufacturing of key equipment, key infrastructure, key transport services, key cultural products and services, key information technology and internet products and services, key financial services, and key technologies.

This means that the NSR filing is mandatory for the foreign investments that fall within the above categories, and that the authorities have in addition the power to review any foreign investment (even if outside the above categories) if it impacts national security.

However, the NSR legislation does not define "national security", and does not provide clarity on the exact scope of the sectors that trigger the mandatory NSR filing. For instance, it does not clarify the size of those buffer zones around military installations and facilities that are not allowed for foreign investments, or the parameters to be considered when grading the "key-ness" of the investment target. This gives the authorities broad discretion to potentially subject any foreign investment to the NSR.

Negative Lists

Several key sectors of interest to foreign investors, particularly in the services sectors, are prohibited or restricted to foreign investment under the Negative Lists, such as basic and value-added telecom services (VATS) (excluding e-commerce, domestic multi-party communications, store-and-forward, and call centers), and education, among others. Most media sectors, such as online publishing or provision of online audio-visual services such as video-on-demand remain off-limits to foreign investment.

The FTZ Negative List and the Hainan FTP Negative List are slightly shorter than the National Negative List, therefore it is possible that a sector that is prohibited or restricted in the National Negative List might be available in the FTZ Negative List or the Hainan FTP Negative List (although the gap between these Negative Lists is narrowing).

NDRC filing

The following types of foreign investment projects must be approved by NDRC (or its local branches, depending on the investment amount of the project):

- All projects in sectors listed under the Negative Lists.
- Certain infrastructure or fixed assets projects set out in the Catalogue of Investment Projects Subject to Governmental Approval issued by the State Council on 12 December 2016 (NDRC Approval Catalogue).

All other foreign investment projects must be record-filed with the local branches of NDRC. In practice, however, NDRC (at least in most cities) tends to interpret "projects" as "fixed-asset construction projects" but not including the mere establishment of an FIE if it does not engage in a "fixed-asset construction project" from the outset.

MOFCOM reporting

Basic information of the investment, the foreign investor, and the actual controllers must be reported to MOFCOM in respect of all greenfield investments and acquisitions of domestic companies. Depending on local practice, this information is reported to MOFCOM directly by SAMR, or by the foreign investor (in case of greenfield investment) or the target company (in case of acquisition) through an online reporting system.

Any subsequent change to information previously reported to MOFCOM must also be reported to MOFCOM. For example, if there is a change to the actual controller of an FIE due to a new acquisition.

Industry permits

As noted in the answer to question 1, industry-specific licenses, permits and registrations may also be required, depending on the industry sector in which the foreign investment is carried out.

Which are the principal authorities in charge of FDI?

11 July 2024

The Working Mechanism Office established under NDRC and led by NDRC and MOFCOM conducts the NSR.

NDRC and MOFCOM issue the Negative Lists and the Encouraged Investment Catalogue.

SAMR is the company registration authority in China. It is also responsible for reviewing whether a foreign investment project falls under the Negative Lists and if it meets the relevant requirements thereunder. However, where a foreign investment project is subject to pre-approval by or record-filing with an industry regulator under sector-specific regulations (i.e., where special industry permits or record-filings are required), the relevant industry regulator (such as the Ministry of Industry and Information Technology for the telecoms sector, or the Ministry of Education for the education sector) will be responsible for the review rather than SAMR.

NDRC administers the approval and record-filing of foreign investment projects. The State Council issues the NDRC Approval Catalogue.

MOFCOM administers the foreign investment information reporting.

Industry regulators are responsible for issuing and administering the relevant industry-specific licenses, permits and registrations.

Is there a lookback period?

There is no time limit beyond which the Chinese authorities can no longer investigate deals closed in the past. If any of the FDI procedures described above is not completed, the relevant Chinese authorities can take actions on their own.

Is the FDI filing voluntary or mandatory?

11 July 2024

All of the filings described below must be completed before the investment can be carried out (i.e., before closing).

NSR

The NSR filing is mandatory if the investment falls within the categories illustrated in the answer to question 2.

The parties responsible to file are the foreign investor or the Chinese co-investor in the project (e.g., a JV partner) in case of greenfield investment, or the Chinese target company in case of acquisition of an existing company. The Working Mechanism Office may take initiative to instruct the parties concerned to make the NSR filing, if they do not do so on their own.

Additionally, the NSR welcomes whistleblowing. Any third parties, such as governmental agencies, enterprises, public organizations, and individuals, may voice their opinions and suggestions to the Working Mechanism Office if they believe a given foreign investment transaction will or may give rise to national security concerns.

Filing with SAMR, MOFCOM, NDRC and industry regulators

In case of greenfield investment, the foreign investor or the Chinese co-investor in the project (e.g., a JV partner) must:

- Conduct a filing with SAMR to establish the company and obtain the company's business license (upon which the company is deemed to be established).
- Conduct a filing with NDRC under certain circumstances (see the answer to question 2).
- Report certain information to MOFCOM (but in practice such reporting is often conducted directly by SAMR – see the answer to question 2).

In case of acquisition of an existing Chinese company (whether a purely domestic company or an FIE) by a foreign investor, the target company must:

- Conduct a filing with SAMR to report the corporate changes resulting from the acquisition and apply to obtain an updated business license.
- If applicable, conduct a filing with NDRC to report any changes to information previously submitted to NDRC resulting from the acquisition.
- Report certain information to MOFCOM including (if applicable) any change to information previously reported (but in practice such reporting is often conducted directly by SAMR – see the answer to question 2).

In each case, the approval of/record-filing with the competent industry regulator will also have to be obtained/completed if required.

Extra-territorial reach and workarounds?

11 July 2024

The Chinese FDI rules (including NSR, NDRC filing and MOFCOM reporting) apply regardless of whether the foreign investment is made directly in China or indirectly at the offshore level. But as regards Negative Lists restrictions, these typically apply to the direct ownership of equity interests in Chinese entities (i.e., a change in the equity ownership of an offshore shareholder of a Chinese entity does not generally trigger Negative Lists restrictions – they would be triggered by a change in the direct equity ownership of the Chinese entity).

If an industry sector is closed to foreign investment under the Negative Lists, other avenues for involvement may be available that do not require direct equity participation, such as targeted cross-border cooperation with a qualified domestic capital entity not involving the creation of a legal presence in China or, where greater control is desired, through a contractual control structure such as the one known as Variable Interest Entity (VIE) structure (but it must be noted that the VIE structure occupies at best a grey area in the Chinese legal system: it is not expressly endorsed nor generally prohibited by the law, although it is widely used, particularly in the TMT sector). But in principle a contractual structure like the VIE structure does not allow to circumvent the NSR.

11 July 2024

NSR

The applicant must submit an application containing a foreign investment report, an investment plan, a statement on whether the foreign investment affects national security, and other materials to the Working Mechanism Office before carrying out the foreign investment.

The Working Mechanism Office conducts a preliminary review within 15 business days to decide if the NSR of the foreign investment is required. If yes, the Working Mechanism Office proceeds to a "standard review" phase of up to 30 business days, to evaluate the impact of the proposed foreign investment on China's national security. If national security concerns are identified, the case enters the "special review" phase which can take up to 60 business days to complete, and can be followed by an "extended review" phase for which the law does not provide a deadline.

The special review (or extended review, if any) concludes with a decision of:

- Clearance: where the authority decides that the proposed foreign investment does not arouse national security concerns.
- Conditional clearance: where the authority identifies national security concerns and imposes conditions through which they can be eliminated.
- Prohibition: where the authority identifies national security concerns which cannot be eliminated.

Filing with SAMR, MOFCOM, NDRC and industry regulators

SAMR will review whether a foreign investment project falls under the Negative Lists, and if the relevant requirements are met, when it reviews the application for company registration (or registration of the corporate changes resulting from the acquisition) – or such review is conducted by the competent industry regulator if approval from/record-filing with the competent industry regulator is required.

SAMR will not issue the business license required for the establishment of the FIE (or the completion of the acquisition of a domestic company by a foreign investor) until such review has been completed and, if applicable, the NSR and the approval from/record-filing with NDRC and

competent industry regulator have been accomplished. The SAMR filing is conducted following the NSR (and, if applicable, following the approval from/record-filing with the competent industry regulator), and can often be conducted simultaneously with the NDRC filing and MOFCOM reporting (depending on local practice). SAMR typically issues the business license within 15 business days of receiving the complete application package (subject to local practice), but the process takes significantly longer to complete if NDRC filings/approvals are required.

As regards the MOFCOM reporting, depending on local practice, the relevant information is reported directly by SAMR, or by the foreign investor through an online reporting system. There is no strict sequential order between MOFCOM reporting and SAMR procedure. In most cases, MOFCOM reporting is done at the same time or after the SAMR procedure. No decision from MOFCOM will be issued. The procedure will be deemed to have been completed upon reporting of the information.

The procedure and timing for the relevant NDRC process depends on whether approval or record-filing is required:

- The NDRC approval procedure involves the submission of a document-intensive application packet by the applicant (including a project application report, various corporate documents and various preliminary review opinions from different agencies, including the relevant departments for land and resources, environmental protection, and energy conservation, where relevant). NDRC approval can take up to 30 business days if extensions are granted (not including the time needed for review opinions or public opinion solicitation, if required). Where approval is granted, NDRC will issue a written approval document. If approval will not be granted, NDRC will state the reasons in writing.

- Record-filing with NDRC is also a document intensive process, but much less so than approval. It is accomplished within seven business days. On completion, the applicant will typically receive a record-filing form evidencing that the process is completed. If the record-filing is rejected, NDRC will issue a written opinion with its comments and stating the reasons.

What are the penalties of the failure to file?

11 July 2024

NSR

If the parties concerned are found to have carried out an investment without having made the required NSR filing, or in breach of the conditions imposed by the Working Mechanism Office, the Working Mechanism Office may order them to make the NSR filing, or achieve compliance with the conditions, and in case of failure to abide it may order them to dispose of the equity or assets in the project and take other measures to restore the status quo ante and eliminate the national security impacts.

Negative Lists

In case of investment in a prohibited sector, the foreign investor and the FIE can be ordered to cease all investment activities, dispose of the equity or assets in the project or take other measures within a given time period to restore the status quo ante, and return the unlawful income generated by the investment, and the FIE established by the foreign investor engaging in such unlawful activities may be ordered to shut down.

In case of investment in a restricted sector in violation of the applicable restrictions, the foreign investor and the FIE can be assigned a cure period to restore compliance, failing which the same consequences illustrated above for prohibited investments would apply.

In addition, the investment agreement (e.g., JV agreement, equity transfer agreement, asset transfer agreement) can be invalidated on the grounds that the foreign investment violates the Negative Lists.

Filing with SAMR, MOFCOM, NDRC and industry regulators

SAMR will refuse to process the company registration formalities (e.g., for the establishment of a new FIE, or the acquisition of a target company) unless it is satisfied that the applicable Negative Lists restrictions have been complied with. Conducting business without the proper license is illegal and may result in administrative and criminal penalties.

Failing to complete the MOFCOM reporting may result in fines imposed by MOFCOM. But this is not an issue in practice as typically (subject to local practice) the MOFCOM reporting is made directly by SAMR.

Failing to complete the NDRC approval or record-filing may result in an order to cease project construction. Additionally, without seeing the NDRC approval or record-filing letter, SAMR may refuse to complete the required registrations, and banks may refuse to provide financing for the project.

In all of the above scenarios, the credit record of the foreign investor and the FIE in the SAMR National Enterprise Credit Information Publicity System and any other social credit system (subject to local practice) may also be affected.

Is FDI clearance necessary to close the transaction?

11 July 2024

NSR

The parties may not complete the investment pending the NSR. The Chinese authorities can investigate any transaction without any limit in time, therefore a transaction that has been closed and is subsequently found to have an impact on national security can be unwound and the other remedies and penalties described above may be imposed (please see question 8).

Negative Lists and filings with Chinese authorities

Failure to comply with the Negative Lists and the approval/filing requirements with SAMR, MOFCOM, NDRC or the industry regulators can result in a violation of the relevant FDI laws and related penalties (please see question 8).

Is there a right to appeal?

11 July 2024

The NSR decision is final, and the law does not contemplate the possibility of an appeal.

If SAMR, NDRC or the industry regulators reject the application of record-filing or approval, the applicant can file again. Additionally, the Negative Lists provide the possibility to apply with the State Council to obtain an exemption from the restrictions applicable to a particular investment.

In general, the Foreign Investment Law of the People's Republic of China promulgated by the National People's Congress and effective on 1 January 2020 provides for the establishment of a working mechanism through which foreign investors or FIEs can lodge complaints where they believe the administrative acts of an administrative organ or its

employees have infringed upon their lawful rights and interests. The Measures on Handling Complaints from Foreign-invested Enterprises promulgated on 25 August 2020 by MOFCOM provide more details on such mechanism, and requires local people's governments to establish a working mechanism responsible for handling the complaints. Some local complaint handling working mechanisms have already issued detailed rules. In addition, generally speaking, any administrative decision (other than NSR decision) can be challenged by filing an application for administrative review or bringing an administrative action in accordance with law.

How to manage the FDI procedure?

11 July 2024

The completion of the NSR and the required filings with the Chinese authorities are typically a condition precedent to the closing of the acquisition, or to the payment of the initial capital contribution to the joint venture. It is also possible to consult with the Chinese authorities to discuss any such requirements.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

The Chinese government has not taken special measures to secure protection of national assets in the wake of the COVID-19 pandemic that would negatively affect FDI. To the contrary, while most of the other jurisdictions strengthened their FDI regimes during the COVID-19 pandemic to protect national companies and assets from foreign acquisitions, China continued to open up its market to foreign investment by introducing a series of liberalizations in various sectors (including by issuing new versions of the Negative Lists, establishing new FTZs and the Hainan FTP, and issuing a new version of the Encouraged Investment Catalogue) so as to attract more foreign investment.

What are the key trends in FDI enforcement?

11 July 2024

FDI enforcement actions or investigations are not public domain in China.

What are the recent legal developments?

11 July 2024

NSR

The NSR regime discussed in this questionnaire is fairly recent. It was introduced by the Measures of Security Review for Foreign Investment jointly promulgated by MOFCOM and NDRC and effective on 18

January 2021 (NSR Measures). The NSR Measures implemented the national security review system referred to in the National Security Law of the People' Republic of China published on 1 July 2015 by the Standing Committee of the National People's Congress, China's first overarching law on national security – a broad brush framework that called for the issuance of further implementing legislation. Compared to the regime in force before the issuance of the NSR Measures, the NSR Measures expanded the scope of security review, revised the NSR procedures (among others, including the possibility to issue a decision of conditional clearance) and introduced specific consequences for noncompliance.

Negative Lists

The latest versions of the National Negative List and FTZ Negative List took effect on 1 January 2022. They are slightly shorter than the previous versions issued in 2021, having opened certain sectors to foreign investment. For example, the 2022 versions reduced the number of "restricted" and "prohibited" sectors by two in the National Negative List (from 33 to 31) and by three in the FTZ Negative List (from 30 to 27). The main changes in the 2022 versions are:

- In both the National Negative List and the FTZ Negative List, the deletion of the restricted sector on automotive manufacturing (this change was expected and in line with the 2020 versions which provided that such restrictions would have been eliminated in 2022) and on the production of satellite television and radio ground receiving facilities and key parts.
- In the FTZ Negative List, additionally, the deletion of the prohibited sector on foreign investment in social surveys (which instead remains a prohibited sector in the National Negative List).

The Hainan FTP Negative List (effective January 1, 2021) is even shorter than the other Negative Lists. Among others, the following sectors, which are still prohibited or restricted under the other Negative Lists do not appear or have explicitly been opened up in the Hainan FTP Negative List:

- Mining of rare earths, radioactive minerals and tungsten.
- The provision of certain legal services of commercial nature

(excluding litigation). As regards VATS, the Hainan FTP Negative List also provides the lifting of the restriction on online data processing and transaction processing business, and permits enterprises established and holding service facilities in the Hainan FTP to conduct internet data center and content distribution network business and other business in the Hainan FTP and internationally.

What future legal developments are expected?

11 July 2024

China is expected to continue to open up its market to foreign investment. The 14th Five Year (2021-2025) Plan provides that China will further improve the foreign investment environment to attract foreign investment particularly in certain key sectors.

On October 26, 2022, NDRC and MOFCOM published a new version of the Encouraged Investment Catalogue (effective on 1 January 2023), which adds 239 items to the 2020 version and is intended to continue to attract foreign investment in three main areas: manufacturing sectors, production-oriented service industries, and regional advanced industries in China's central, western, and north-eastern regions.

On 13 August 2023, the State Council released a statement outlining its 24-point guidelines regarding further optimizing the foreign investment environment and intensifying efforts to attract foreign investment, from six aspects including improving the quality of foreign capital utilization, guaranteeing the national treatment of foreign-invested enterprises, strengthening the protection of foreign investment, improving the facilitation of investment and operation, increasing fiscal and tax support, and improving ways to promote foreign investment. The statement also encouraged all regions to adopt supporting measures in light of local conditions to enhance policy synergy, and the MOFCOM is expected to strengthen guidance and coordination with relevant departments on policy promotion and implementation.

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Hong Kong

Key Features

Types of deals subject to the FDI regime

11 July 2024

There are no restrictions of general application on FDI, although certain sectors do require licenses to be obtained. The only sector subject to FDI regime restrictions is inward investment in the broadcasting industry.

There are:

- Tiered restrictions on acquiring voting control of TV Licensees based on the percentage of voting control acquired.
- A 49 percent cap on ownership of sound broadcasting licensees by (in each case) non-resident corporations or non-permanent resident individuals (unqualified persons).

On attaining each of the stipulated percentage thresholds above, an unqualified person must obtain approval from the Office of the Communications Authority (OFCA).

Principal authorities

11 July 2024

OFCA

Lookback period

11 July 2024

	No time limit.
Mandatory / voluntary filing	11 July 2024 Mandatory notification if an unqualified person holds, acquires or exercises voting control of: ◦ Five percent or more but less than 10 percent. ◦ 10 percent or more but not more than 15 percent. ◦ More than 15 percent, in aggregate of the total voting rights of a TV Licensee.
Substantive test for intervention	11 July 2024 The transfer of voting rights in the TV Licensee reaches certain stipulated percentage thresholds.
Extra-territorial reach	11 July 2024 The FDI regime captures both indirect and direct acquisitions of voting control in the TV Licensee.
Timeline for review (approximately)	11 July 2024 OFCA does not set a fixed timeline. Reviews are conducted on a rolling basis.
Potential penalties	11 July 2024 For TV broadcasting-related violations: fine of HK$1 million and imprisonment for two years. For sound broadcasting-related violations: fine of HK$100,000.
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 TV Licensee may appeal by petition to Chief Executive in Council 30 days within the date of the decision.
Special measures in response to	11 July 2024

COVID-19	No special measures.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 Generally, the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) is characterized by its free-market principles and, apart from the broadcasting sector, does not restrict foreign investment or ownership in local businesses. Hong Kong is a special administrative region of the People's Republic of China (PRC), and notwithstanding the fact that Hong Kong and the mainland of the PRC (Mainland China) operate under different legal systems and traditions (Hong Kong is common law-based while Mainland China is civil law-based), the relationship between the two jurisdictions has grown progressively closer since the return of Hong Kong to Chinese sovereignty in 1997. The central government of the PRC and Hong Kong have entered into various iterations of the Hong Kong Closer Economic Partnership Arrangement (CEPA), a landmark free trade agreement. Under CEPA, Hong Kong-origin goods and services from selected industries are, subject to a certification process, granted preferential access to the Mainland China market. Hong Kong individuals and legal entities can enjoy preferential treatment when setting up a business in most service sectors in Mainland China subject to obtaining a Hong Kong Service Supplier Certificate (HKSS Certificate) from the Hong Kong government under CEPA. CEPA is also potentially relevant to foreign investors in Hong Kong because a foreign service supplier (i.e. one that is not from Hong Kong or Mainland China) that owns more than 50 percent of the equity interests in a Hong Kong service supplier and that has owned such interests for at least one year after the relevant merger or acquisition may be able to apply via the Hong Kong service supplier for a HKSS Certificate. As such, foreign investors in Hong Kong could potentially benefit under the CEPA arrangement provided that all requisite requirements including the minimum holding period requirement are fulfilled. On a regional level, Hong Kong is part of the Greater Bay Area (GBA), which comprises Hong Kong, Macau and nine municipalities within Guangdong Province (being Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing). As detailed in

the Outline Development Plan for the GBA, a focus of the GBA initiative is to build an open community for coordinated innovation within the region, and to encourage domestic and foreign investors to set up R&D institutions and innovation platforms in Guangdong, Hong Kong and Macao. Hong Kong foreign direct investment may, therefore, also serve as a stepping stone to investment in, or cooperation with other entities in, the GBA.

What types of deals are subject to the FDI regime?

11 July 2024

The only industry sector in Hong Kong subject to FDI restrictions is the broadcasting industry, with there being a restriction on foreign ownership of a TV Licensee (as defined below) or Broadcasting Licensee (as defined below). The transfer of five percent or more of the ownership of a TV Licensee to a foreign entity or foreign person is subject to written approval by the OFCA (as defined below).

TV Licensees

Pursuant to the Broadcasting Ordinance (Cap. 562) (BO), domestic free-to-air television program service licenses or domestic pay television program service licenses may only be granted to:

- Corporations which are ordinarily resident in Hong Kong.
- Individuals who are permanent residents and are ordinarily resident in Hong Kong.

Individuals who are not permanent residents that are ordinarily resident in Hong Kong and corporations that are not ordinarily resident in Hong Kong (unqualified persons) must obtain the written approval of the Office of the Communications Authority (OFCA) before holding, acquiring or exercising voting control of:

- Five percent or more but less than 10 percent.
- 10 percent or more but not more than 15 percent.
- More than 15 percent, in aggregate of the total voting control of a domestic free-to-air television program service licensee (TV Licensee).

Furthermore, if the total voting rights exercised by unqualified persons exceed 49 percent of the total voting control of the TV Licensee, the votes cast by the unqualified persons will reduce based on the formula detailed in the BO.

On the other hand, there are no such voting control restrictions pertaining to domestic pay television program service licensees.

Broadcasting Licensees

In addition, under the Telecommunications Ordinance (Cap. 106) (TO), the aggregate of the voting shares that can be held by unqualified persons must not exceed 49 percent of the total number of voting shares of a sound broadcasting licensee (Broadcasting Licensee).

Which are the principal authorities in charge of FDI?

11 July 2024

The OFCA is the statutory body responsible for both the enforcement of the BO and the TO in Hong Kong, and its functions include the FDI review for transactions requiring written approval.

Other than the OFCA, there are no other authorities in charge of FDI in Hong Kong.

Is there a lookback period?

TV Licensees; Broadcasting Licensees

The OFCA is empowered to serve written notice on:

- Any unqualified persons who have failed to obtain the requisite permission from the OFCA to hold, acquire or exercise voting control of five percent or more of a TV Licensee.
- Broadcasting Licensees that have contravened the abovementioned 49 percent voting share threshold.

There is no statutory lookback period that limits the powers of the OFCA to investigate closed deals in the past.

Is the FDI filing voluntary or mandatory?

11 July 2024

TV Licensees

With regard to television broadcasting, an unqualified person must submit a letter application to the OFCA to obtain the requisite permission before it proceeds to hold, acquire or exercise voting control

of five percent or more of the voting control of a TV Licensee.

Extra-territorial reach and workarounds?

11 July 2024

TV Licensees

For the restrictions on voting control of a TV Licensee, the law is drafted widely to encapsulate both direct and indirect voting control in the TV Licensee that can be effected through nominee, trust, agreement or other arrangements. As such, it is not possible to bypass the requirement to obtain prior approval from the OFCA.

What is the FDI procedure?

11 July 2024

TV Licensees

In relation to the requirements in the television broadcasting sector, unqualified persons must submit a letter to the OFCA requesting permission to hold, acquire or exercise voting control of five percent or more of a TV Licensee. There are no designated forms provided by the OFCA, instead, the applicant should set out the details of the application in the form of a letter. The OFCA also does not set a fixed timeline for approving such applications, reviews are conducted on a rolling basis and it is difficult to give a time estimate.

What are the penalties of the failure to file?

11 July 2024

TV Licensees

In terms of television broadcasting, the OFCA is empowered to serve a notice to effect a cessation of any contravention by unqualified persons, which will specify the period within which the directions must be complied with. An unqualified person who fails to comply with such a notice served within the period specified in the notice would have committed an offence, and is liable on conviction to a fine of HK$1 million and to imprisonment for two years.

Broadcasting Licensees

With regard to sound broadcasting requirements, where any transaction, settlement, agreement or understanding has been entered into which constitutes a contravention of the abovementioned statutory requirements, the OFCA is empowered to serve notice on both the Broadcasting Licensee and the unqualified persons to effect a cessation of the exercise of voting rights, or to compel a transfer or disposal of

rights of the unqualified persons. Both the Broadcasting Licensee and any unqualified person who fail to comply with such notice requirements are liable to a fine of HK$100,000.

Is FDI clearance necessary to close the transaction?

11 July 2024

TV Licensees

It is necessary to wait for the approval from the OFCA before closing an OFCA-controlled transaction. As noted above, it is required for applicants to obtain OFCA's approval prior to holding, acquiring or exercising five percent or more of the voting rights of a TV Licensee. Failure to do so would constitute a contravention of the law and remedial action would be imposed.

Is there a right to appeal?

11 July 2024

TV Licensees

A TV Licensee may appeal by way of petition to the Chief Executive in Council no later than 30 days within the date of the decision made. However, the TV Licensee must comply with the order being appealed against pending ultimate determination of the appeal.

How to manage the FDI procedure?

11 July 2024

A closing condition should be included to ensure that all necessary approvals from the OFCA are obtained prior to the closing of the transaction.

Also, as the timeline for approvals is not entirely transparent and the OFCA has discretionary power to process applications on its own timeline, it is important for the parties to maintain lines of communication with the authorities before the transaction takes place, and to plan ahead for any contingencies.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

The Hong Kong government has not implemented any special measures to secure the protection of national assets in the context of the COVID-19 pandemic.

What are the key trends in FDI enforcement?

11 July 2024

FDI enforcement actions or investigations are not public domain in Hong Kong, but from our understanding, are not common.

What are the recent legal developments?

11 July 2024

There have not been any recent legislative changes to the FDI regime in Hong Kong. However, one might consider the possible effect that the passing of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law) might have on potential investors looking to invest in the jurisdiction, as it applies not only to individuals, but to corporate entities and organizations as well.

Under the National Security Law, acts of secession, subversion, terrorism and collusion with a foreign country that endanger national security are outlawed. In the event of a conflict between the laws of Hong Kong and the National Security Law, the latter will prevail. The Standing Committee of the National People's Congress has the authority to exercise its powers under the National Security Law and make interpretations of the legislation.

It is also important to note that there is potential for investigations and prosecutions under the National Security Law to be diverted to a Mainland China process, in which case law enforcement and regulatory authorities in Mainland China would take carriage of investigations.

The above changes may be additional considerations for foreign businesses looking to invest in the city.

What future legal developments are expected?

11 July 2024

The Hong Kong government has not announced any plans to legislate on or restrict foreign direct investment coming into the jurisdiction.

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India

Last updated 11 July 2024

Key Features

Types of deals subject to the FDI regime	11 July 2024 Investment made by a person resident outside India in capital instruments of an Indian company or the capital of an Indian limited liability partnership (LLP) qualifies as FDI. FDI in sectors which are not prohibited can be made either through the Automatic Route or the Approval Route.
Principal authorities	11 July 2024 Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India (DPIIT).
Lookback period	11 July 2024 No time limit.
Mandatory / voluntary filing	11 July 2024 Approval of the DPIIT or the concerned administrative ministries/ departments is required for FDI in sectors falling under Approval Route or FDI beyond prescribed cap in sectors under the Automatic Route.
Substantive test for intervention	11 July 2024 National interest or national security.
Extra-territorial reach	11 July 2024 The FDI policy covers indirect investments into India.
Timeline for review (approximately)	11 July 2024

	The expected timeline for an approval under the Approval Route may vary depending on the sector in which the FDI is proposed. The competent authority takes around eight to 10 weeks to process the complete proposal and convey its approval or rejection to the applicant.
Potential penalties	11 July 2024 Monetary penalty, adjudication and/or enforcement proceedings.
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 No specific provision to appeal a rejection by the competent authorities under the Approval Route.
Special measures in response to COVID-19	11 July 2024 The government amended the FDI Policy to curb opportunistic takeovers/acquisitions of Indian companies during the COVID-19 pandemic.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 India's policy on foreign direct investment (FDI) is embodied in the Consolidated FDI Policy dated 15 October 2020 issued by Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India (as amended from time to time, FDI Policy). The policy pronouncements made under the FDI Policy are notified in the Foreign Exchange Management (Non-Debt Instruments) Rules 2019, under the Foreign Exchange Management Act 1999 (FEMA). Investment through equity instruments by a person resident outside India in an unlisted Indian company (whether greenfield or M&A), or in 10 percent or more of the post-issue paid-up equity capital on a fully-diluted basis of a listed Indian company, qualifies as FDI. This investment can be made under the primary (subscription) route or the secondary (acquisition) route, or by establishing a new company.

Under the FDI Policy, FDI is prohibited in certain sectors or above certain thresholds, and permitted in certain other sectors or up to certain thresholds under the Automatic Route (subject to a post facto filing) or Approval Route (subject to prior approval) – see the answer to question 2.

What types of deals are subject to the FDI regime?

11 July 2024

The following is the list of sectors where FDI is prohibited under the FDI Policy:

- Atomic energy
- Railway operations
- Gambling and betting including casinos; lottery business including government/lottery, online lotteries etc.
- Chit funds
- Nidhi company
- Real estate business or construction of farm houses.
- Trading in transferable development rights
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

In the sectors that are not "Prohibited Sectors", FDI is either permitted up to 100 percent or capped as per thresholds set out in the FDI Policy.

FDI can be carried out under the Automatic Route or the Approval Route. In few sectors, additional conditions (whether under the Automatic Route or the Approval Route) are required to be complied with such as minimum capitalization requirements.

Automatic Route

Under the "Automatic Route", FDI is permitted up to 100 percent in most sectors as set out in the FDI Policy without prior approval (only subject to a post facto filing with RBI – see the answer to question 5). For example, 100 percent FDI under the Automatic Route can be undertaken in entities engaged in manufacturing and agriculture.

Approval Route

FDI beyond the maximum percentage allowed by the Automatic Route is either prohibited or subject to prior approval of the Government as indicated in the FDI Policy (Approval Route). Different sectors are subject to varying trigger points as to when the Approval Route is required (for example, 100 percent FDI is permitted in mining of titanium subject to Government approval while up to 74 percent FDI is permitted in defense beyond which Government approval is required).

Which are the principal authorities in charge of FDI?

11 July 2024

The Department for Promotion of Industry and Internal Trade (DPIIT) (a department of the Ministry of Commerce and Industry, Government of India) along with the concerned ministries/departments is primarily responsible for regulating FDI in India. In addition, the RBI also regulates foreign investment for the purposes of exchange control in accordance with the provisions of the FEMA.

Is there a lookback period?

The DPIIT can challenge any investment which falls foul of the Indian foreign exchange laws (e.g., for being in breach of the investment thresholds discussed in question 2), and can require that action be taken against the defaulting party.

Is the FDI filing voluntary or mandatory?

11 July 2024

Under the Automatic Route there is no requirement of any prior regulatory approval. Only a post facto online filing by the Indian company to the RBI through an authorised dealer bank is required.

Under either of the Automatic Route or Approval Route, prior permission from the RBI is required in certain instances of transfer of equity interests from residents to non-residents.

The approval of the DPIIT or the concerned administrative ministries/departments is required under:

- The Approval Route for:
    - transfers (whether by way of subscription or acquisition) from residents to non-residents that involve transfer of securities of companies engaged in sectors falling under the Approval Route, or
    - establishment by a foreign investor of a new company engaging in sectors falling under the Approval Route, or

- Either of the Automatic Route or Approval Route, where the transfer results are in breach of the applicable sectoral caps.

Extra-territorial reach and workarounds?

11 July 2024

"Externalization" is a strategy of incorporating holding companies in offshore jurisdictions to enjoy certain benefits which the home country does not offer. The strategy is employed by companies to move their corporate structures away from the Indian tax and regulatory regimes. Some of the major reasons for doing so include tax benefits at the time of exit, avoiding Indian exchange control issues, mitigating currency fluctuation risk and better enforceability of rights.

What is the FDI procedure?

11 July 2024

The DPIIT has issued a standard operating procedure (SOP) which sets out a detailed procedure and timeline for applications as well as the list of competent authorities for processing government approvals for FDI in sectors under the Approval Route. The expected timeline for an approval under the Approval Route may vary depending on the sector in which the FDI is proposed.

Under the SOP, investors are required to make an application through the FIFP, supported by specified documents including charter documents, board resolutions and so on. The application is then forwarded to the concerned competent authority and the RBI, for comments from a foreign exchange law perspective within two days.

Any proposals involving FDI of more than INR50 billion go before the Cabinet Committee of Economic Affairs.

The competent authority takes around eight to 10 weeks to process the complete proposal and convey its approval or rejection to the applicant. No specific criteria have been prescribed based on which the competent authorities grant approval under the Approval Route, but investors lacking prior experience in the desired sector in which they propose to invest, or investors coming from non-Financial Action Task Force jurisdictions, may face stricter scrutiny.

What are the penalties of the failure to file?

11 July 2024

The DPIIT can challenge any investment which falls foul of the Indian foreign exchange laws, and can require that action be taken against the defaulting party. However, the DPIIT may, based on the factual

circumstances, either regularize the transaction post facto by requiring the parties to carry out compounding, or require the parties to unwind such transaction.

Violation of the Indian foreign exchange laws may attract a monetary penalty. It may also result in adjudication proceedings and/or enforcement proceedings being undertaken against the defaulting parties. Depending on the nature of the contravention, the parties may also undertake a voluntary compounding process by admitting a contravention, and paying the monetary penalty computed on a prescribed computational matrix.

Is FDI clearance necessary to close the transaction?

11 July 2024

Where FDI is under the Approval Route, the transaction cannot be completed until approval from the competent authority is received.

Failure to comply can result in a violation of the FEMA provisions and parties may be subject to penalties. See the answer to question 8.

Is there a right to appeal?

11 July 2024

While a revised proposal may be submitted for fresh consideration, there is no specific provision to appeal a rejection by the competent authorities under the Approval Route.

How to manage the FDI procedure?

11 July 2024

Transaction documents typically include detailed closing conditions which include:

- Receipt of Government approval in situations where FDI is under the Approval Route.
- Reporting obligations.
- Compliance with pricing norms.

For any concerns regarding interpretation of the FDI Policy, investors can seek informal guidance by filing representations to the DPIIT through industry bodies. This can be followed up with a formal request for clarification made to the DPIIT. An applicant can submit a clarification to the DPIIT listing its query in the prescribed form.

Are there special

11 July 2024

measures to protect national assets in response to COVID-19?	The Government of India through Press Note three (2020 Series) dated 17 April 2020 and notification dated 22 April 2020 amended the FDI Policy to curb opportunistic takeovers/acquisitions of Indian companies during the COVID-19 pandemic. Accordingly, any investment made from Bangladesh, China, Pakistan, Nepal, Myanmar, Bhutan and Afghanistan or where the "beneficial owner" (which term has not been defined) of an investment into India is situated in or is a citizen of any of the aforementioned countries, requires the prior approval of the Government regardless of the sector/activities in which the investment is made.
What are the key trends in FDI enforcement?	11 July 2024 Recently, the government has received complaints from trader and industry associations against marketplace e-commerce entities alleging violation of the FDI Policy in the e-commerce sector.
What are the recent legal developments?	11 July 2024 There have not been any major changes to the FDI regime in the recent past. However, reforms have been undertaken recently across sectors, such as coal mining, contract manufacturing, digital media, single-brand retail trading, civil aviation, defense, insurance and telecom. These reforms include further liberalization of sectoral caps for FDI in these sectors.
What future legal developments are expected?	11 July 2024 The FDI Policy is reviewed on an ongoing basis, to ensure that India remains an attractive and investor friendly destination. Changes are made in the FDI Policy after detailed consultations with stakeholders including industry chambers, associations, representatives of industries/groups and other organizations. It is not expected that India will introduce additional FDI restrictions. India is expected to attract a US$100 billion FDI inflow in 2022- 2023 supported by various ground touching economic reforms and significant ease of doing business in the recent years. Expected future initiatives to attract more FDI include the following: ◦ The Government is considering easing scrutiny on certain foreign direct investments from countries that share a border with India. ◦ The implementation of measures like PM Gati Shakti National

Master Plan (NMP) (which provides for integrated planning and coordinated implementation of infrastructure connectivity projects), single window clearance and GIS (Geographic Information System) mapped land bank (measure to map industrial land parks to facilitate availability for potential investors).

- The Government is likely to introduce at least three policies as part of the Space Activity Bill in 2022. This Bill is expected to clearly define the scope of foreign FDI in the Indian space sector.

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Indonesia

Key Features

Types of deals subject to the FDI regime

11 July 2024

No specific deal is subject to FDI restrictions, except for:

- Acquisition of shares in an existing domestic company that engages in finance and banking business.
- Establishment or acquisition of companies operating in sectors in which FDI is prohibited or restricted under the Positive List of Investment (Positive List).

	Foreign investment in certain sectors is prohibited, subject to a 49 percent cap or (in certain sectors allocated to small-medium enterprises) subject to a requirement to cooperate with small-medium enterprises.
Principal authorities	11 July 2024 The President and the Investment Coordinating Board (BKPM) are responsible for regulating foreign investment in Indonesia. In addition, Bank Indonesia and the Financial Services Authority supervise FDI compliance in the banking and financial services sector.
Lookback period	11 July 2024 No time limit.
Mandatory / voluntary filing	11 July 2024 Unlike the regime in force prior to the Omnibus Law, there is currently no requirement for any prior regulatory approval for the establishment of a foreign investment company or the acquisition of shares by a foreign investor in an existing company. There are different practices for companies in the financial services and banking sectors, which may still require approval from the authorities to ensure compliance with FDI requirements.
Substantive test for intervention	11 July 2024 National interest or national security.
Extra-territorial reach	11 July 2024 The FDI regime only captures foreign investment and acquisitions within the territory of Indonesia.
Timeline for review (approximately)	11 July 2024 There is no specific FDI procedure. Investors only need to comply with the Indonesian Company Law (i.e., Law No. 40 of 2007 as amended under the Omnibus Law), the Positive List and the relevant licensing regulations for establishing a foreign investment company, and with the Indonesian Company Law for shares acquisition.

	On average, it takes approximately two -four weeks to establish a foreign investment company.
Potential penalties	11 July 2024 Filing is no longer required in sectors other than banking and finance. In the banking and finance sectors, failure to file a report or seek approval on the compliance with FDI requirements is subject to sanctions imposed by the Financial Services Authority, ranging from a warning to the revocation of a license (but there are generally no pecuniary or criminal penalties).
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 No specific provision to appeal a rejection by the competent authorities.
Special measures in response to COVID-19	11 July 2024 No special measures.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 Foreign direct investment is regulated by Presidential Regulation No. 10 of 2021 (as amended by Presidential Regulation No. 49 of 2021), known as the Positive List of Investment (Positive List). The Positive List changes the previous regime, i.e., the Negative List of Investment. The Positive List divides business activities into four categories, i.e., ◦ Prioritized businesses. ◦ Businesses allocated for small-medium enterprises. ◦ Business activities with specific requirements. ◦ Other business activities.

There are approximately 60 business activities that are dedicated for small-medium enterprises, for example, online retail trading of food and beverage, tobacco, chemicals, pharmaceutical, cosmetics, and laboratory equipment, online retail trading of textile, clothes, footwear and personal care and online retail trading of household equipment and kitchenware. These "small-medium enterprises" are Indonesian domestic capital companies only, because foreign invested companies are classified as large-scale enterprises with a minimum paid up capital of IDR10 billion. Therefore, foreign investors are generally not allowed to invest in these sectors, other than certain sectors in which foreign investment is specifically allowed by entering into a mandatory cooperation with small-medium enterprises (e.g., cement industry and lime products, and manufacture of engine and turbine components).

Business activities with specific requirements are subject to a 49 percent foreign ownership cap. Businesses that are listed in the prioritized businesses and other business activities are open to 100 percent foreign ownership. Prioritized businesses are eligible to receive incentives.

FDI requirements apply to equity ownership in a foreign investment company (i.e., a company in which a foreign person is a shareholder). Portfolio investment through the capital markets, and businesses located in special economic areas, are exempted from FDI requirements.

There is no national security review or filing in respect of foreign investment into Indonesia.

License

To improve the ease of doing business in Indonesia, the government enacted the so called Omnibus Law in 2020. Under the Omnibus Law, an investment license/permit is no longer required to conduct business activities in Indonesia. Given this, regardless of the transactions or business activities that investors engage in, starting from October 2020, the review and/or approval by the Indonesian Investment Coordinating Board (BKPM) is no longer required (see exception in answer to question 9).

What types of deals are subject to the FDI regime?

11 July 2024

In essence, there is no specific deal that is subject to FDI restrictions, except for the:

- Acquisition of shares in an existing domestic company that

engages in finance and banking business.

- Establishment or acquisition of companies operating in sectors in which FDI is prohibited or restricted under the Positive List.

If a foreigner acquires shares in a domestic company, the status of the company must be converted into a foreign investment company. The foreign shareholding must comply with the Positive List.

A foreigner is prohibited from acquiring Indonesian fixed assets, i.e., land and buildings.

The following are examples of sectors in which FDI is prohibited:

- Activities which are reserved for the central government (e.g., public services and national security).
- Narcotics
- Casino or gambling in any form.
- Chemical weapons industry.
- Traditional products (i.e., batik and traditional cosmetics, traditional medicines).
- Broadcasting
- Business activities that are dedicated for small-medium enterprises as mentioned above.

The following are examples of "business activities with specific requirements" in which, as noted in our answer to question 1, foreign ownership of equity interests is capped at 49 percent:

- Military airplane manufacturing and other military appliances.
- Water transportation
- Air transportation
- Courier

Which are the principal

11 July 2024

authorities in charge of FDI?	The President and the Investment Coordinating Board (BKPM) are responsible for regulating foreign investment in Indonesia. In addition, Bank Indonesia and the Financial Services Authority supervise FDI compliance in the banking and financial services sector. But the Investment Coordinating Board (BKPM) no longer reviews FDI applications. Instead, the public notary has a major role in ensuring compliance with the FDI regulation. In particular, the public notary is responsible for ensuring compliance with the Positive List in each transaction (e.g., the establishment of a foreign investment company and the acquisition of shares by a foreign investor in a domestic company, and the filing to the Ministry of Law and Human Rights' system in respect of the company establishment and the shares acquisition). The shareholders composition of a foreign investment company is set out in a deed of establishment (made before the public notary) which contains the articles of association, and is further reflected in the Online Single Submission Risk Based Licensing system. The system grants automated approval for foreign investment companies that meet the FDI requirements to be registered and apply for necessary licenses and permits.
Is there a lookback period?	Indonesian investment regulation does not recognize a lookback period. The government acknowledges a grandfathering principle. This principle allows investors to use more favorable FDI requirements. A concrete example: if a new regulation mandates stricter foreign ownership requirements for foreign investment companies, an existing foreign investment company is not required to adjust its shareholding structure to comply with the new regulation.
Is the FDI filing voluntary or mandatory?	11 July 2024 Unlike the regime in force prior to the Omnibus Law, there is currently no requirement for any prior regulatory approval for the establishment of a foreign investment company or the acquisition of shares by a foreign investor in an existing company. There are different practices for companies in the financial services and banking sectors, which may still require approval from the authorities to ensure compliance with FDI requirements.

Extra-territorial reach and workarounds?

11 July 2024

Nominee

A nominee structure/arrangement is strictly prohibited under Indonesian Investment Law (i.e., Law No. 25 of 2007 as amended by the Omnibus Law). The nominee would be deemed, by law, as the valid and true owner of the shares, and any nominee arrangement could be declared null and void (in practice, by a court decision).

Control

An offshore transaction would not help to structure around the FDI restriction if the foreign shareholding in an Indonesian company would remain the same.

To obtain control in companies in which foreign ownership is capped at 49 percent, a typical arrangement would be to set two classes of shares: voting shares and non-voting shares. In some cases, a contractual arrangement to achieve control in the day-to-day operation of a company would be possible (particularly in a complex line of business, e.g., mining). In this case, a shareholder agreement or a joint operation agreement can be entered into in order to allow a minority shareholder to, for example, be in charge of the operation (i.e., appointing directors).

In addition, a convertible bonds arrangement may also be used to give to a foreign investor, as the bondholder, certain governance and veto rights in companies with foreign ownership restrictions.

What is the FDI procedure?

11 July 2024

There is no specific FDI procedure in Indonesia. Investors only need to comply with the Indonesian Company Law (i.e., Law No. 40 of 2007 as amended under the Omnibus Law), the Positive List and the relevant licensing regulations for establishing a foreign investment company, and with the Indonesian Company Law for shares acquisition. On average, it would take approximately two to four weeks to establish a foreign investment company.

What are the penalties of the failure to file?

11 July 2024

Filing is no longer required in sectors other than banking and finance.

In the banking and finance sectors, filing is still mandatory. Any failure to file a report or seek approval on the compliance with FDI requirements such sectors is subject to sanctions imposed by the Financial Services Authority, ranging from a warning to the revocation of a license (but there are generally no pecuniary or criminal penalties).

Is FDI clearance necessary to close the transaction?

11 July 2024

Yes, approval from the relevant authority would be one of the conditions precedent to the closing. This requirement applies to the applicable sectoral regulations (for example, transactions in the financial services and banking, mining and oil and gas sectors).

Is there a right to appeal?

11 July 2024

There is no specific right to appeal a decision by the competent authorities (e.g., refusing to grant approval).

Despite this, in general if the notary is satisfied that a transaction has met all requirements (e.g., a foreign investor establishes a company or acquires shares in a domestic company within the limits set out in the Positive List), the notary would simply make a submission with the relevant authority, and the company establishment or acquisition would be deemed to have been completed upon such submission with no additional approval from the authorities being required for such purpose.

But approval from the authorities might be required under applicable sectoral regulations (for example, transactions in the financial services and banking, mining and oil and gas sectors).

How to manage the FDI procedure?

11 July 2024

In general, as raised above, an approval from the relevant authorities (where required) would be one of the conditions precedent to the closing. For the financial and banking sectors, if a foreign shareholder would be entitled to appoint a director or commissioner in the foreign investment company, any nominated persons will be subject to a fit and proper test by the Financial Services Authority, which would also be one of the conditions precedent to the closing.

Are there special measures to protect national assets in response

11 July 2024

No special measures.

to COVID-19?

What are the key trends in FDI enforcement?

11 July 2024

None that we are aware of.

What are the recent legal developments?

11 July 2024

The main recent legislative changes were the issuance of the Positive List replacing the Indonesian Negative Investment List, and the Omnibus Law. These developments aims at improving the ease of doing business in Indonesia and attracting foreign investments. The Positive List has reduced or removed restrictions from more than 350 lines of business that were previously prohibited/restricted to foreign investors.

What future legal developments are expected?

11 July 2024

We do not expect the government to impose additional foreign investment restrictions.

The government intends to boost investment across Indonesia, especially investment in the Special Economic Zones. Four new Special Economic Zones are being developed. The technology, manufacturing, tourism, infrastructure and renewable energy sectors are among the sectors in which the government aims to attract more foreign investment.

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Key Features

Types of deals subject to the FDI regime	11 July 2024 The FDI regime applies to Inward Direct Investment (i.e. certain transactions or acts conducted by foreign investors with respect to certain designated businesses) and Specified Acquisitions (i.e. acquisition by a foreign investor of shares or other equity interests in a domestically unlisted company by transfer from another foreign investor).
Principal authorities	11 July 2024 Minister of Finance and relevant ministries for specific business types. Prior Notifications for covered transactions are made through submissions to the Bank of Japan.
Lookback period	11 July 2024 No time limit.
Mandatory / voluntary filing	11 July 2024 Mandatory depending on the nature of the transaction.
Substantive test for intervention	11 July 2024 National interests or national security.
Extra-territorial reach	11 July 2024 The transfer of shares or other equity interests in an unlisted Japanese company from one foreign investor to another foreign investor may be captured.
Timeline for review (approximately)	11 July 2024 No reported transactions or acts may be carried out until 30 days have elapsed since the date on which the Minister of Finance and the competent minister received the Prior Notification or Prior Notification for Specified Acquisition.
Potential penalties	11 July 2024

	Imprisonment for no more than two years, a fine of no more than JPY1 million, or both (provided, however, that if three times the value of the subject matter of the violation exceeds JPY1 million, the fine is no more than three times that value).
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 Yes
Special measures in response to COVID-19	11 July 2024 Yes. Additional categories of designated businesses were added to protect domestic medical industries.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 Yes, FDI is subject to restrictions, filing, and review in Japan under the Foreign Exchange and Foreign Trade Act[1] (Act No. 228 of 1949 as amended, FEFTA, Gaitamehou). Such requirements apply to Inward Direct Investment and Specified Acquisitions (both as defined in the answer to question 2). **Inward Direct Investment** Subject to certain exceptions, if a foreign investor[2] makes an Inward Direct Investment[3](as defined in the answer to question 2) into Japan (or takes other actions such as appointing directors to a Japanese company, etc.), the foreign investor must file a notification prior to the transaction or act (Prior Notification, Jizentodokede) with both the: ◦ Minister of Finance (MoF) ◦ Competent minister responsible for the business depending on the nature of the business. Such Prior Notification is made through a submission to the Bank of Japan (BoJ), which coordinates the Prior Notification submission and the government's response.[4]

Businesses subject to the Prior Notification requirement include those involved in the following fields (Designated Businesses):

- Manufacture and repair of weapons and aircraft.
- Manufacture of materials, components, manufacturing equipment, etc., specially designed for the manufacture of weapons, aircraft, etc.
- Software services related to programs specifically designed for the use of weapons, aircraft, satellites, etc.
- Manufacture of goods listed in the middle column, rows 1 to 15, of the appended Table 1 of the Export Trade Control Order, as well as businesses in the manufacturing industry, etc. possessing technology pertaining to the design and manufacture of goods listed in the middle column, rows 1 to 15, of the appended table of the Foreign Exchange Order. For example, inward direct investment in companies engaged in the manufacturing of dual use products that can be diverted to the military and inward direct investment in companies that possess technology pertaining to the design and manufacture of dual-use products that can be diverted to the military are subject to the Prior Notification requirement.
- Manufacture of drugs and intermediates of the drugs set out in Article 2, Paragraph 1 of the Law for Ensuring the Quality, Efficacy and Safety of Drugs and Medical Devices.
- Manufacture of highly controlled medical devices and their accessories pursuant to the provisions of Article 2, Paragraph 5 of the Law for Ensuring the Quality, Efficacy and Safety of Drugs and Medical Devices.

Specified Acquisitions

Specified Acquisitions (as defined in the answer to question 2) are subject to prior notification with the MoF and the competent minister for the business through the BoJ under certain circumstances (please refer to question 2).

1. English translation: FEFTA.pdf (mof.go.jp)

2. The term "foreign investor" means any person / entity that conducts Inward Direct Investment or a Specified Acquisition. The persons / entities include: (i) any individual who is a non-resident; and (ii) a corporation or any other organization established under foreign laws and regulations, or a corporation or any other organization that has its principal office in a foreign country.

3. The term "Inward Direct Investment" is defined below and used throughout this note as it has a specific meaning under Japanese law, but in essence it refers to Foreign Direct Investment or FDI.

4. Prior Notification" is a translation of the term in Japanese, although practically speaking the Prior Notification is more akin to an "application for approval" from the Japanese government than it is to a "notification" given the mandatory waiting period and approval process discussed below.

What types of deals are subject to the FDI regime?

11 July 2024

Inward Direct Investment

The following transactions or acts conducted by foreign investors with respect to the Designated Businesses (Inward Direct Investment, Tainaichokutou) are subject to Prior Notification:

- Acquisition of shares or voting rights of domestically listed companies (including over-the-counter publicly traded companies), in which the investment ratio or voting ratio is one percent or more. In this case, the investment and voting ratios include the shares and voting rights of foreign investors who are closely related to the acquirer.
- Acquisition of shares or other equity interests in a domestically unlisted company. This excludes the acquisition of shares or other equity interests by transfer from another foreign investor, which we note may nonetheless require notification as "Specified Acquisitions" as noted below.[1]
- Consent by a foreign investor to:
    - Substantial changes in the business purpose of a domestic company (limited to cases where the company is a listed company, and foreign investors hold one-third or more of the total number of voting rights).
    - A proposal for the election of directors or statutory auditors.

- A proposal for the transfer of the whole business (only applicable to cases where the company is a listed company and the foreign investor holds one percent or more of the total number of voting rights).

- Establishment of a branch office, factory, or other business office (excluding resident offices) in Japan by a non-resident individual or a foreign investor who is a foreign juridical person, or substantial changes to such a business's type or purpose.

- Loans of money with terms exceeding one year to domestic corporations (excluding loans in Japanese currency provided by resident foreign investors) that fall under both bullets included below:
  - The outstanding amount of money lent by the foreign investor to the domestic corporation exceeds the amount equivalent to JPY100 million.
  - The sum of the outstanding balance of money lent by the foreign investor to the domestic corporation, and the outstanding balance of bonds issued by the domestic corporation and held by the foreign investor, exceeds the amount equivalent to 50 percent of the amount specified as the amount of liabilities of the domestic corporation.

- Acquisition of the business from a resident (limited to a juridical person) through an absorption-type demerger or merger (excluding the cases set forth above).

Specified Acquisition

The acquisition by a foreign investor of shares or other equity interests in a domestically unlisted company by transfer from another foreign investor (Specified Acquisition, Tokuteishutoku) is subject to prior notification with the MoF and the competent minister for the business through the BoJ, if the business of the investee or its subsidiary, or the majority of the voting rights of the subsidiary, includes certain designated businesses[2] (Prior Notification for Specified Acquisition).

1. Acquisitions of domestic stocks or equity of non-listed companies by one foreign investor from another foreign investor are Specified Acquisitions, not Inward Direct Investments.

2. Certain designated business for a Specified Acquisition are the same as the Designated Businesses relevant to determining whether a transaction is an Inward Direct Investment such as the manufacture and repair of weapons and aircraft; manufacture of materials, components, manufacturing equipment, etc., specially designed for the manufacture of weapons, aircraft, etc. However, certain businesses are not regulated as a Specified Acquisition but they are regulated as an Inward Direct Investment. For instance, electricity business (limited to those that own nuclear power plants) is regulated as a Specified Acquisition but electricity business (without such limitation) is regulated as an Inward Direct Investment. For further details, see the below lists (in Japanese only):

- *□□□□□□ (boj.or.jp) for Specified Acquisitions.*
- *□□□□ (boj.or.jp) and □□□□ (boj.or.jp) for Inward Direct Investments.*

Which are the principal authorities in charge of FDI?

11 July 2024

The MoF and the competent ministries for each business type are responsible for monitoring investments subject to FEFTA. These ministries include the National Police Agency; Financial Services Agency; Ministry of Internal Affairs and Communications (MIC); Ministry of Education, Culture, Sports, Science and Technology; Ministry of Health, Labor and Welfare; Ministry of Agriculture, Forestry and Fisheries; Ministry of Economy, Trade and Industry (METI); Ministry of Land, Infrastructure and Transport; and Ministry of the Environment.

Is there a lookback period?

There is no specific lookback period limiting the powers of the authorities to investigate deals from an FDI perspective under the FEFTA.

Is the FDI filing voluntary or mandatory?

11 July 2024

Inward Direct Investment

Foreign investors who intend to carry out an Inward Direct Investment must file Prior Notification prior to the Inward Direct Investment. Any foreign investor who has filed a Prior Notification must also file a post completion notification with the MoF and the competent minister via the BoJ within 45 days of the date the investor carried out certain transactions or acts including:

- Acquisition, disposition or discretionary investment of shares, voting rights, etc.
- Provision of a loan or receipt of a repayment.
- Acquisition or redemption of a bond.
- Discontinuation or abolishment of a branch.
- Succession of the business or disposition of the succeeded business.

Specified Acquisition

Foreign investors who intend to carry out a Specified Acquisition must file Prior Notification for the Specified Acquisition prior to carrying out such Specified Acquisition.

When a foreign investor, who has filed a Prior Notification for the Specified Acquisition, acquires shares or other equity interests and subsequently disposes of them, the foreign investor must file a post completion notification with the MoF and the competent minister for the business through the BoJ within 45 days from the date of the act.

Authorities' Action and Whistleblowing Mechanism

Authorities such as the MoF can take action on their own initiative. There is a whistleblowing mechanism under *Whistleblower Protection Act* (Act No. 122 of 18 June 2004).

Extra-territorial reach and workarounds?

11 July 2024

Generally, no Prior Notification or Prior Notification for Specified Acquisition is required as long as no incorporated Japanese entity is involved, and the transaction is a transfer of shares of a parent company incorporated in a foreign country (e.g., a Dutch parent company's shares are transferred to a UK entity).

What is the FDI procedure?

11 July 2024

Prior Notification and Prior Notification for Specified Acquisition must be filed with both the MoF and the competent minister via the BoJ within six months prior to the date on which the transaction or act is to be conducted.

No reported transactions or acts may be carried out until 30 days have elapsed since the date on which the MoF and the competent minister received the Prior Notification or Prior Notification for Specified Acquisition (Prohibited Period). This 30 day Prohibited Period is required in order for the ministries to examine whether the transaction could affect public safety in Japan, etc.

The Prohibited Period will be shortened to two weeks if the transaction or act does not fall within the category of such investments that could potentially undermine national security, etc.

If the notified matters set out in the Prior Notification are deemed to interfere with national security, the MoF and the competent minister for the business may recommend that the investor change or suspend the investment, and the Prohibition Period may be extended to a maximum of five months.

What are the penalties of the failure to file?

11 July 2024

Any violation of the obligation to file a Prior Notification or Prior Notification for Specified Acquisition may result in criminal punishment (Articles 70 and 72 of the FEFTA), an order for the sale of the business, or other measures as determined by the MoF and the competent minister.

A person who has conducted an Inward Direct Investment or Specified Acquisition:

- while either having failed to provide notification or having made a false notification; or
- during the prescribed prohibition period,

is punishable by imprisonment for no more than three years, a fine of no more than JPY1 million, or both (provided, however, that if three times the value of the subject matter of the violation exceeds JPY1 million, the fine is no more than three times that value).

If the MoF and the competent minister extend the Prohibited Period, and such ministries find, as a result of the examination before the expiration of the extended period, that the Inward Direct Investment may have national security implications, etc., they may, after hearing opinions from the Council on Customs, Tariff, Foreign Exchange and Other Transactions

(Council), issue a recommendation that the person who submitted the Prior Notification modify the substance of or discontinue the proposed Inward Direct Investment.

The foreign investor who has received such a recommendation must notify the MoF and the competent minister, within 10 days from the day on which the foreign investor received the recommendation, of whether or not they accept the recommendation. If the foreign investor accepts the recommendation, such investor may only conduct the Inward Direct Investment in compliance with the recommendation. If the foreign investor fails to give notice or refuses the recommendation, the MoF and the competent minister may order such investor to modify the substance of or discontinue the Inward Direct Investment.

If the Prior Notification for the Specified Acquisition has been filed, and the MoF and the competent minister finds it necessary to examine whether the stated Specified Acquisition falls within the category of Specified Acquisitions that are highly likely to undermine national security, the ministers may extend the Prohibited Period for up to four months from the date on which they received the notification. If the MoF and the competent minister extends the Prohibited Period and they find, as a result of the examination, that the Specified Acquisition stated in the notification falls within the category of Specified Acquisitions involving national security, the ministers may, after hearing opinions from the Council, issue a recommendation that the foreign investor who filed the Prior Notification for the Specified Acquisition modify the substance of or discontinue the Specified Acquisition.

The foreign investor who receives such a recommendation must notify the MoF and the competent minister, within 10 days from the date on which the foreign investor received the recommendation, of whether or not such investor accepts the recommendation. If the foreign investor accepts the recommendation, such investor must conduct the Specified Acquisition in compliance with the recommendation. If the foreign investor fails to give notice or refuses the recommendation, the MoF and the competent minister for the business may order that foreign investor modify the substance of or discontinue the Specified Acquisition.

Is FDI clearance necessary to close the transaction?

11 July 2024

It is not possible to close the transaction before the completion of the FDI procedure. It is necessary to wait to receive clearance of the Prior Notification / Prior Notification for the Specified Acquisition.

Is there a right to appeal?

11 July 2024

It is generally possible to appeal decisions made by the authorities, such as suspension orders for Inward Direct Investments.

How to manage the FDI procedure?

11 July 2024

Closing conditions are typically included in the relevant transaction agreements, which require the seller to cooperate with the buyer in connection with FDI-related matters. It is common in Japan to have informal discussions with the regulators in the ministries prior to making any type of formal application. As such, a preliminary consultation with the BoJ/MoF (as well as with the competent minister, such as the METI) can be carried out before filing the Prior Notification or Prior Notification for the Specified Acquisition, and such step is recommended in Japan to ensure the application process proceeds smoothly.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

Yes. For example, on 15 June 2020, the MoF, METI, and MIC, in light of the spread of the new coronavirus infection, took necessary measures, such as adding the following categories to the list of Designated Businesses that require Prior Notification, in order to maintain the domestic manufacturing infrastructure of important medical industries related to the lives and safety of the citizens, and to properly prevent situations that could have a serious impact on Japan's security, human life, or health:

- Manufacturers of drugs for infectious diseases (including pharmaceutical intermediates).
- Manufacturers of highly-controlled medical equipment (including accessories and parts).

The amendment is effective as of 15 July 2020.

What are the key trends in FDI enforcement?

11 July 2024

The MoF is not so active in reviewing and blocking transactions in connection with Inward Direct Investments and Specified Acquisitions. The TCI case discussed below is one of the only transactions we are aware of in which the government of Japan has effectively blocked a transaction subject to FEFTA and the Prior Notification requirements.

TCI case

With regards to a notification filed by the Children's Investment Master Fund (TCI) for the acquisition of shares of Electric Power Development Co., Ltd. (J Power), the MoF and METI advised TCI to suspend their Inward Direct Investment, because the acquisition would affect Japan's policies concerning the stable supply of electricity, nuclear power, and nuclear fuel cycles, and would hinder the maintenance of public order as a result. TCI's Inward Direct Investment was examined, and TCI were interviewed multiple times.

Finally, it was concluded that if TCI acquired a 20 percent share in J Power, it may then have a certain impact on the management of J Power, which may impair J Power's financial position through the exercise of shareholder rights based on the acquisition shares, adversely affecting capital investment, repair costs for future core facilities, and the construction and operation of the Oma Nuclear Power Plant.

Therefore, it was determined that there was no way to eliminate the risk of the acquisition impacting Japan's policies concerning the stable supply of electricity, nuclear power, and nuclear fuel cycles, and that the acquisition carried the possibility of disturbing the maintenance of public order. For this reason, after hearing the opinions of the Council, the government decided to recommend the suspension of the Inward Direct Investment pertaining to TCI's notification.

What are the recent legal developments?

11 July 2024

In addition to the changes discussed in the answer to question 12 relating to COVID-19, cybersecurity is another area that has recently received heightened attention in Japan leading to changes to the FEFTA Prior Notification regime. On 27 May 2019, the MoF, METI and MIC took the following measures with respect to Designated Businesses, for which Prior Notification is required, and industries related to Specified Acquisitions, for which Prior Notification for the Specified Acquisition is required.

- In light of the increasing importance of ensuring cybersecurity in recent years, it is necessary to properly prevent the outflow of technologies that are important to national security, such as Japan's defense production and technological bases. To this end, multiple measures have been taken, including the addition of integrated circuit manufacturing industries to the list of

Designated Businesses subject to the Prior Notification requirement.

- The amendment is effective as of 1 August 2019. Foreign investors conducting Inward Direct Investments in the newly-added industries prior to 30 August 2019 are not required to file Prior Notifications due to transitional measures. However, foreign investors conducting Inward Direct Investments in the newly-added industries after 31 August 2019 are required to file Prior Notifications on or after 1 August 2019. Similar transitional measures apply to Specified Acquisitions.

What future legal developments are expected?

11 July 2024

Over the last several years we have seen FDI regimes tighten considerably with various countries adding further restrictions and review requirements for transactions that could potentially implicate national security, and Japan has clearly been a part of this trend, tightening its rules under FEFTA with recent amendments as discussed above. Notably, however, following amendments to expand the U.S. FDI regime under the Foreign Investment Risk Review Modernization Act of 2018, Japan was not selected by the Committee on Foreign Investments in the United States (CFIUS) as one of the handful of countries that received an excepted investor status from the U.S.

The excepted investor status under the U.S. regime exempts qualifying investors from aspects of the U.S. rules on transactions related to real estate, technology, infrastructure, and sensitive personal data. This provides excepted investors a significant advantage over non-excepted investors when pursuing more sensitive investments in the U.S. It remains to be seen whether Japan will attempt to further amend FEFTA or other national security legislation/regulation in the hopes of eventually being selected as an excepted investor by the U.S.

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Mongolia

Key Features

Types of deals subject to the FDI regime	11 July 2024 The FDI regime applies to equity investments (i.e. acquiring 33 percent or more of the shares) made by foreign state-owned legal entities (i.e. legal entities in which a foreign state directly or indirectly holds 50 percent or more of the issued shares) in companies operating in the following sectors: ◦ Mining ◦ Banking and finance ◦ Media and communications.
Principal authorities	11 July 2024 Ministry of Economy and Development.
Lookback period	11 July 2024

	No time limit
Mandatory / voluntary filing	11 July 2024 Mandatory
Substantive test for intervention	11 July 2024 National interests or national security.
Extra-territorial reach	11 July 2024 The law does not specifically provide for indirect acquisitions. However, given the spirit of the law, it is likely that the government will require indirect acquisitions to be approved.
Timeline for review (approximately)	11 July 2024 45 days of receipt of application.
Potential penalties	11 July 2024 No specific sanction provided by the law but the transaction would be considered invalid.
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 Yes
Special measures in response to COVID-19	11 July 2024 No special measures

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 FDI is primarily regulated by the Investment Law of Mongolia enacted on 3 October 2013 (Investment Law). The Investment Law replaced the Law on Foreign Investment, enacted on 10 May 1993, and the

controversial Law on the Regulation of Foreign Investment in Business Entities Operating in Sectors of Strategic Importance enacted on 17 May 2012 (SEFIL) which curtailed FDI since its adoption.

The Investment Law eased the regulatory approval requirements and streamlined the registration process for FDI. Some of the key features of the Investment Law are:

- It applies to both foreign and domestic direct investments.
- No approval requirements are imposed on foreign private investment.
- The minimum capital requirements for foreign-invested entities in Mongolia (FIEs – defined as companies having 25 percent or more of their shares held by foreign investors) is US$100,000 per foreign investor.
- Approval is required for certain equity investments made by foreign state-owned legal entities (FSOEs – defined as legal entities in which a foreign state directly or indirectly holds 50 percent or more of the issued shares) in certain sectors.
- It provides legal guarantees to protect investment in Mongolia and sets out tax and non-tax incentives so as to promote investment in Mongolia.
- It offers tax stabilization incentives in the form of tax stabilization certificates and investment agreements.

There is currently no negative or positive list of foreign investment. Other than registration with the state registration authority and licensing or other requirements under sector-specific legislation, there are no review or approval requirements imposed on foreign private investment. Each foreign investor must invest (i.e., contribute equity into the company) at least US$100,000 if the company is a FIE. Foreign private investors may invest in any production or services sector which is not prohibited or restricted by law. Prohibited sectors are specified as drugs and narcotics unless provided in law, casino[1], pornography, or profit seeking business through fraudulent pyramid sales or marketing.[2] In terms of restrictions, additional requirements such as foreign equity restrictions, increased minimum share capital requirement compared to that of domestic entities, prior approval, and

requirements applicable to key personnel can apply when foreign investors wish to engage in certain licensed activities such as engaging in insurance related activities, operating in the securities market, provision of tax consultancy and auditing services and engaging in activities relating to explosives and blasting devices etc.

If a FSOE is to hold 33 percent or more of the shares of a company that is operating in certain sectors (see item (d) above), it must obtain an approval from the Ministry of Economy and Development (MED). The specific sectors are:

- Mining
- Banking and finance
- Media and communications.

The incorporation of a FIE (or an entity becoming one) must be registered by the MED and other than the requirement to submit proof of minimum capital requirement, the registration process is same as the process for registration of a purely domestic entity.

1. This prohibition does not apply to free zones.
2. It should be noted that effective from 1 January 2023, the Law on Licensing of Business Entities, enacted on 1 February 2001, which provides for the list of prohibited activities will be replaced by the Law on Permits, enacted on 17 June 2022, which will no longer provide for such list.

What types of deals are subject to the FDI regime?

11 July 2024

General restrictions

Foreign private investors may invest in any production or services sector which is not prohibited or restricted by law (see the answer to question 1 for more details on the prohibited and restricted sectors).

The Investment Law provides that form of investment may be incorporation of a Mongolian incorporated entity, purchase of securities, merger of companies, entry into of concession, production sharing, marketing or management agreements, or franchise or financial leasing agreements.

FSOEs

There is a one-time mandatory filing and review process for investments to be made by FSOEs whereby a FSOE must submit an application to the MED. The investment threshold is holding 33 percent or more of shares of companies operating in certain specified sectors. The law does not differentiate between domestic or cross-border deals.

Other than what is provided in the Investment Law which is rather brief, there is no specific regulation on the filing and review process. The law provides that the following information must be submitted as part of an application:

- A notarized copy of certificate of incorporation of the FSOE issued by a competent registration body.
- A letter of reference from a registration body for the last two years concerning the executive management of the FSOE, its affiliated entities and the Mongolian company;
- Information on the transaction agreed with the Mongolian company, its type, conditions, parties to the transaction, the number of shares to be sold, the amount of shareholding, the contract value, charter and management of the legal entity if agreed to change.
- The financial statements (and adjustments) of the FSOE and the Mongolian company.
- The FSOE investment plan and business plan for the investment to be made in Mongolia.

There is no additional information or guidance on how detailed the information should be. The documents to be supplied must be provided in Mongolian language. The MED has the right to request additional information from the FSOE if it considers necessary.

The law provides that the MED is to take into consideration of the following circumstances when reviewing an application whether the:

- Character of any activity or investment of the investor conflict with the national security policy of Mongolia.
- Investor has satisfied conditions and opportunities to comply with laws and established business practices of Mongolia.
- Investment would restrict competition or establish a position of

dominance in the concerned sector.

- Investment would have a serious impact on budgetary income or other policies or activities of Mongolia.

There is no guideline or information on how the above circumstances are to be assessed or evaluated by the MED. As such, the approval system for investment by a FSOE can be seen as somewhat discretionary.

Which are the principal authorities in charge of FDI?

11 July 2024

The recently established MED is in charge of FDI. Prior to this, the National Development Agency was responsible for FDI.

The Government is currently considering whether to re-establish the Foreign Trade and Foreign Investment Agency, an entity under the MED, to promote FDI and foreign trade.

Is there a lookback period?

There is no time limit beyond which the Government can no longer investigate deals closed in the past. If no filing is made, the MED can take action on its own.

Is the FDI filing voluntary or mandatory?

11 July 2024

The Investment Law does not provide for a specific timeframe as to when an application should be submitted to MED. However, based on the drafting of the relevant provisions, it can be concluded that the application should be submitted any time prior to closing.

The application can be submitted by the FSOE itself directly or through its representative office (if any) or through an authorized representative.

There is no formal whistleblowing mechanism but the MED can act based on information provided from the public.

Extra-territorial reach and workarounds?

11 July 2024

An approval is required if a FSOE is to own 33 percent or more of the shares of a Mongolian entity.

The law does not specifically address the issue of ownership through acquisition offshore or setting up nominee structures or other structures allowing parties to achieve contractual control over the Mongolian

company. It should be noted that these have not been tested and due to the sensitivity of the matter, it is possible for the restriction to be interpreted broadly by the MED or the courts.

Mongolia has implemented a strict ultimate beneficial owner disclosure system, based on OECD guidelines, requiring all new and existing investors to disclose their ultimate beneficial owners in the company registration system, including disclosure of each company in a chain of companies. There is currently no exemption for companies listed on a recognized international stock exchange. As a result of this disclosure regime, it is difficult to structure around FDI restrictions.

What is the FDI procedure?

11 July 2024

There is no specific timeframe upon which an application for an investment by a FSOE (if required) should be submitted, but closing is subject to MED's approval.

The MED is to review the application within 45 days of receipt of application. The MED can obtain comments from relevant organizations when making its determination.

The law does not prescribe the form of the MED decision but it is likely to be issued in the form of formal letter either providing an authorization to make an investment or refusing to grant an approval.

What are the penalties of the failure to file?

11 July 2024

The sanction for not obtaining an approval from the MED is not specifically provided in the law. However, it is unlikely for a FSOE to acquire shares of a Mongolian entity without MED approval as it is not possible to close a deal without obtaining an approval from the MED. At the time of registration with the registration authority, the Mongolian company must submit information concerning its beneficial owners and likely registration would be refused without supplying an approval from the MED.

Is FDI clearance necessary to close the transaction?

11 July 2024

Closing is conditional upon obtaining clearance. The FSOE would not be registered as the shareholder of a Mongolian entity if the parties close before receiving clearance. Further, the transaction would likely be considered invalid/void for breach of applicable legal requirements.

Is there a right to appeal?

11 July 2024

There is no publicly available information on how many applications the MED has received since the adoption of the Investment Law and how many have been rejected and based on what grounds.

In the event that a deal is blocked, the applicant has the right to appeal the decision of the MED to the administrative court of Mongolia.

How to manage the FDI procedure?

11 July 2024

In terms of foreign private investment and investment by FSOEs in certain sectors, other than fulfilling administrative registration-related requirements, there are no restrictions or requirements that could result in deals being blocked by the Government.

In terms of investments to be made by FSOEs in mining, banking and finance and media and communications, it is advised that all information required by the Investment Law is prepared and submitted to MED. It is likely that additional information relating to anti-money laundering and terrorism financing and determining financial standing and expertise of the FSOE in the specific sector would be required. It would help to provide information on how the investment would benefit Mongolia and/or the specific sector.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

The Government has not taken special measures to secure protection of national assets in the wake of the COVID-19 pandemic that would negatively affect FDI.

What are the key trends in FDI enforcement?

11 July 2024

Mongolia has adopted and aims to pursue a more open policy towards FDI. However, sudden policy changes sometimes encouraging FDI and sometimes discouraging FDI, together with historic practices of revocation of licenses on questionable legal grounds, and the possibility of imposition of taxes as a result of tax investigations, together with unsophisticated judicial practice have resulted in currently low levels of FDI.

The Government does not actively review or block transactions.

There is no publicly available information on deals that were blocked since the adoption of the Investment Law. It is likely that the number would be few if not none.

One of the few examples of deals that were blocked include the potential transaction involving the acquisition by a Chinese state-owned company of South Gobi Sands in 2012. The deal was blocked not due to a formal investigation or decision of the Government but rather, as a result of the adoption of the SEFIL by the Parliament.

Given the specific sectors in which the Government clearance would be required, it is likely that there would be rigorous review process compared with the simple review process provided in the Investment Law.

What are the recent legal developments?

11 July 2024

The Investment Law (adopted on 3 October 2013) replaced the Law on Foreign Investment (adopted on 10 May 1993) and the controversial SEFIL (adopted on 17 May 2012 and which curtailed FDI since its adoption). No major changes have been made to the Investment Law since its adoption in 2013.

What future legal developments are expected?

11 July 2024

Taking into consideration of the steady decrease of FDI generally and negative impact of COVID-19 on the economy, the Government is pursuing a policy to stimulate the economy, ensure political and macroeconomic stability and create a favorable business environment for foreign and domestic investors. Some of the specific actions taken by the Government include the establishment of the MED, the approval of the "Vision-2050 – Long Term Development Policy" and the recent "10-year New Revival Policy".

There are ongoing discussions concerning the need to revise the Investment Law to further promote and protect FDI. However, it is not clear when this will happen. The issue of revising the Investment Law to further improve investment environment has been under discussion in recent years. It is unlikely that the Government will introduce a new filing, review or approval process for foreign private investment. However, the approval process for FSOEs most likely would remain in place. Some of the changes discussed by the Government include positive and negative lists for foreign investment, detailed regulation on the role and responsibilities of state entities, remedying damage caused

by illegal actions of the Government, further guarantees to protect investment, and incentives for investors with regard to taxes, land and visas.

For more information contact Chris Melville, Partner, M&E, Ulaanbaatar and Erdenedalai Odkhuu, Partner, M&E, Ulaanbaatar

Singapore

Key Features

Types of deals subject to the FDI regime

11 July 2024

Transactions within key sectors such as real estate, broadcasting, financial services and banking, and professional services are subject to foreign investment controls.

Principal authorities

11 July 2024

The Ministry of Trade and Industry (MTI) generally oversees matters relating to trade and investments. The Economic Development Board is the lead government agency under the MTI. The Competition and Consumer Commission of Singapore is a statutory board under the MTI which administers competition-related matters.

Specific authorities oversee the particular key sectors:

- Real estate: Singapore Land Authority, Housing and Development Board, Jurong Town Corporation.
- Broadcasting: Info-Communications Media Development Authority.
- Financial services and banking: Monetary Authority of Singapore.
- Professional services: Legal Services Regulatory Authority.

Lookback period

11 July 2024

No time limit.

Mandatory / voluntary filing	11 July 2024 No general FDI filing obligations but prior approvals are mandatory to be sought under the relevant statutes relating to businesses in the key sectors described above.
Substantive test for intervention	11 July 2024 Foreign ownership in the key sectors described above.
Extra-territorial reach	11 July 2024 The FDI regime captures the indirect acquisition of ownership in the key sectors described above.
Timeline for review (approximately)	11 July 2024 Depends on which sector the application process is under.
Potential penalties	11 July 2024 For cases where real estate is acquired in contravention of the foreign ownership restrictions, the transfers will be null and void. For cases where controls are implemented through the licensing regimes, a licence will not be granted and it is an offence to carry out licensable activities without a licence. Penalties include fines and imprisonment terms and depend on the particular legislation breached.
FDI clearance necessary to close	11 July 2024 
Right to appeal	11 July 2024 Generally possible to appeal decisions made by authorities.
Special measures in response to COVID-19	11 July 2024 No special measures.

Questions

Is FDI subject to	11 July 2024

restrictions, filing, or review?	Singapore has relatively minimal restrictions on FDI except in a few specific sectors such as the sectors referred to in the responses to question 2. There is no separate law governing foreign investments in Singapore and foreign investments in these sectors are regulated by sector-specific regulators.
What types of deals are subject to the FDI regime?	11 July 2024 As mentioned above, transactions within the key sectors subject to foreign investment controls will be subject to FDI restrictions, filing or review. Some key sectors and the relevant main regulatory bodies/legislative restrictions are set out below. **Real estate** This sector is regulated by the Singapore Land Authority, the Housing and Development Board and the Jurong Town Corporation, depending on the type of real estate involve. Landed residential properties are subject to foreign ownership restrictions[1] while private high-rise residential units, industrial and commercial real estate are generally not subject to foreign ownership restrictions. **Broadcasting** This sector is regulated by the Info-Communications Media Development Authority (MDA). The Broadcasting Act 1994 (Broadcasting Act) prohibits the receipt of any foreign-sourced funds to finance certain broadcasting service without the prior consent of the IMDA and the granting of any broadcasting license to a company substantially controlled by foreign sources.[2] The Newspaper and Printing Presses Act 1974 (NPPA) also prohibits the acceptance of any funds from a foreign source without the prior approval of the concerned Minister and places restrictions on shareholder composition of newspaper companies, restricting foreign control.[3] **Financial services and banking** The Monetary Authority of Singapore (MAS) oversees all financial institutions in Singapore and regulates foreign investment in financial institutions. The Banking Act 1970 (Banking Act) provides for the licensing and regulation of the business of banks and related financial institutions in Singapore. It imposes certain ownership restrictions such as by requiring any person becoming a substantial shareholder of a bank incorporated in Singapore to first obtain the concerned Minister's approval and imposes relevant restrictions on banking activities that can

be carried out by foreign financial institutions through relevant licensing conditions attached to the licenses granted to these financial institutions under the Banking Act.

Professional services

The Legal Services Regulatory Authority (LSRA), a department established under the Ministry of Law, oversees the regulation, licensing and compliance of all law practice entities and the registration of foreign lawyers in Singapore. All law practices are subject to a licensing regime that determines the Singapore law-related services that they can offer. For example, a foreign law firm that is seeking to establish in Singapore may:

- apply to the LSRA to operate as a foreign law practice (FLP) offering legal services in the area of foreign and international law, except in the context of international commercial arbitration; or
- obtain a qualifying foreign law practice license[4] or enter into a joint law venture or formal law alliance with a Singapore law practice[5] that may allow it to undertake Singapore law-related legal services. FLPs and regulated foreign lawyers who hold interests in Singapore law practices are subject to certain threshold requirements including limits on the ratio of regulated foreign lawyers to Singapore qualified lawyers as well as restrictions relating to directorships, partnership interests and shareholdings.

All entities that provide public accountancy services must be under the control and management of partners who are public accountants residing in Singapore. If the firm has more than two partners, two thirds of the partners must be public accountants residing in Singapore. Only public accountants who are members of the Institute of Singapore Chartered Accountants in Singapore and registered with the Singapore Accounting and Corporate Regulatory Authority may practice in Singapore as an auditor of financial statements and as a judicial manager under the Accountants Act 2004.

1. *Section 3, Residential Property Act 1976 (Residential Property Act)*
2. *Sections 43 and 44, Broadcasting Act*

3. Section 19, NPPA

4. Section 171, Legal Profession Act 1966 (Legal Profession Act)

5. Section 169, Legal Profession Act

Which are the principal authorities in charge of FDI?

11 July 2024

The Ministry of Trade and Industry (MTI) is the government body that generally oversees matters relating to trade and investments, with a mission to ensure that Singapore's economy continues to be competitive and is able to attract investments. The Economic Development Board is the lead government agency under the MTI that formulates investment promotion policies and plans to develop the Singapore economy, including facilitating and supporting foreign investments into Singapore.

The Competition and Consumer Commission of Singapore (CCCS) is another statutory board under the MTI which administers, inter alia, competition-related legislation including the control of practices which may have an adverse effect on competition in Singapore. CCCS also represents Singapore in respect of competition matters in the international arena and has a statutory duty to advise the government or other public authorities on national needs and policies in respect of competition matters.

Specific authorities oversee the particular key sectors listed in the responses to question 2.

Is there a lookback period?

There is no specific lookback period limiting the powers of the authorities to investigate deals from an FDI perspective.

Is the FDI filing voluntary or mandatory?

11 July 2024

There are no general FDI filing obligations since there is no separate law governing foreign investments in Singapore. However, if a transaction or deal falls under one of the key sectors described above, prior approvals from the relevant regulatory body will be required before foreign ownership or foreign-sourced funds are allowed for the relevant transaction/deal.

Prior approvals are mandatory to be sought under the relevant statutes relating to businesses in the key sectors described above. Examples of approvals to be sought are set out below.

Foreign ownership of landed residential property

- A foreign person who wishes to purchase a landed residential property is required to seek approval under the Residential Property Act 1976.

Receipt of foreign funds for any newspaper

- A person receiving any foreign-sourced funds on behalf of or for the purposes of any newspaper must seek the Minister's prior approval. If such funds are sent to the person without the person's prior knowledge, consent or solicitation, that person must report to the Minister within three days of receipt of such funds the circumstances of receipt.[1]

Receipt of foreign funds for purposes of certain broadcasting service

- A person receiving any foreign-sourced funds for the purposes of financing any broadcasting service must seek prior consent of the IMDA and if such funds are sent to the person without the person's prior knowledge, consent or solicitation, the person must report to the IMDA within seven days of the receipt of such funds the circumstances of receipt.

1 Section 19(3), NPPA.

Extra-territorial reach and workarounds?

11 July 2024

The foreign ownership restrictions and restrictions on foreign-sourced funds in the key sectors described above are strictly mandatory. However, ultimately it is within relevant Minister's discretion to decide whether or not to grant the necessary approvals. Likely factors the relevant authorities will take into account include whether the activity will have a substantial positive or negative impact in Singapore.

For instance, each application for the foreign ownership of landed residential property is assessed on a case-by-case basis, taking into consideration, including but not limited to, the following factors:

- The person should be a permanent resident of Singapore for at least five years.

- The person must make exceptional economic contribution to Singapore.

What is the FDI procedure?

11 July 2024

The procedure for the necessary applications to obtain approval for foreign ownerships and foreign-sourced funds varies under the relevant statutes set out above. Below are some procedures for the applications in a few key sectors described above.

Foreign person's application to own landed residential property

An application for the foreign ownership of landed residential property takes approximately one month. The processing time includes verifying the information with other agencies, checking if the applicant or his spouse owns restricted property[1], as well as the assessment of the application by the Residential Property Advisory Committee before the final recommendation is sent to the Minister for consideration.

The conditions of approval are that the:

- Property must solely be used for the applicant's own occupation and that of the members of the applicant's family as a dwelling house and not for rental or any other purpose.
- Applicant shall not dispose of the property within 5 years from the date of legal completion of the purchase of the property or, if the property is under construction, 5 years from the date of issue of the Temporary Occupation Permit (a temporary permit that allows residents to reside in a development that is habitable but incomplete) or Certificate of Statutory Completion (a permit that is granted once all building requirements have been met) (whichever is issued earlier) for the property.
- Applicant shall not subdivide the property without approval.

Application for licensing and authorization of banking business

There are no specific rules for foreign applicants for bank or merchant bank licenses. However, for digital full bank licenses, a foreign company must form a joint venture with at least one local company and the joint venture must be anchored in Singapore, be controlled by Singaporeans and headquartered in Singapore. In assessing an application for a banking license or to operate as a merchant bank, MAS considers the

strength of the home country supervision and wiliness and ability of the home supervisory authority to co-operate with MAS. MAS may also impose certain specific conditions together with the license issued to foreign applicants.

1. Restricted property includes vacant residential land, terrace houses, semi-detached houses and townhouses. Permanent residents can only buy restricted residential properties that do not exceed 15,000 square feet and which are not situated within a good class bungalow area unless they make exceptional economic contributions.

What are the penalties of the failure to file?

11 July 2024

Where foreign ownership restrictions are imposed as legislative restrictions, non-compliance with such restrictions is an offence under the relevant statutes described above. In particular, for cases where real estate is acquired in contravention of the foreign ownership restrictions, the transfers will be null and void and any person contravening such restrictions will be guilty of an offence.

Separately, in cases where controls are implemented through the licensing regimes, a licence will not be granted and it is an offence to carry out licensable activities without a licence. The penalties for committing an offence include fines and imprisonment terms. The amount of fines or length of imprisonment term imposed vary, and are set out in the various statutes and laws governing each sector.

Is FDI clearance necessary to close the transaction?

11 July 2024

No. The relevant approvals must be sought in relation to the foreign ownership or foreign-sourced funds for the regulated activities or businesses set out above.

Is there a right to appeal?

11 July 2024

It is generally possible to appeal decisions made by the authorities. For instance, any applicant who fails to be granted a bank licence under the Banking Act may appeal in writing to the Minister within 30 days from the decision of the MAS.[1] Any person not granted approval by the Minister to receive on behalf or for the purposes of any newspaper any funds from a foreign source may appeal to the President, whose decision is final.[2] A company not granted to hold a broadcasting licence by the Minister due to the presence of a foreign source may also appeal to the Minister, whose decision is final.[3]

1. *Section 11A, Banking Act*

2. *Section 19, NPPA*

3. *Section 45, Broadcasting Act*

How to manage the FDI procedure?

11 July 2024

Businesses operating in the key sectors described above looking to accept foreign ownership or foreign-sourced funds should find out early on if necessary approvals and licenses are required and work with the relevant regulatory bodies to obtain them before conducting the relevant regulated activities in Singapore.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

No. Singapore's economic development policy has always been based on a strategy to attract FDI and Singapore is a regional hub for foreign investors seeking to deploy their capital in the region. The Singapore government has not introduced any additional FDI restrictions in Singapore in the wake of the COVID-19 pandemic.

What are the key trends in FDI enforcement?

11 July 2024

As mentioned in the answer to question 12, Singapore's economic development policy has always been based on a strategy to attract FDI. In general, there have been more policies and incentives aimed at attracting FDI, and FDI enforcement on existing foreign ownership restrictions has remained relatively unchanged over the years, including post the COVID-19 pandemic.

Nevertheless, despite a general policy that is attractive towards FDI, the authorities actively penalize persons who try to circumvent foreign ownership restrictions. For instance, a woman was sentenced to two weeks' jail in January 2022 for buying three semi-detached properties on behalf of foreigners with the intention of transferring ownership of the properties to these foreigners once they obtained Singapore citizenship. She was caught to violate the Residential Property Act 1976 of Singapore for purchasing these residential properties with the intention of holding it in trust for a foreigner.

What are the recent legal developments?

11 July 2024

While there have not been changes to the above legislative restrictions on the FDI regime in Singapore, there have been increasing incentives offered by the government to attract FDI. The Global Investor Program (GIP), for instance, has been updated in 2020. The GIP was introduced to offer permanent resident status to select groups of high net worth individuals and business owners to relocate to Singapore if they can demonstrate a plan to infuse capital injection into the Singapore economy and create employment opportunities for Singaporeans.

The changes include having:

- The minimum revenue requirements for established business owners to qualify for the GIP being increased from S$50 million to S$200 million.
- The GIP made available to new categories of investors such as founders of fast growing companies.

What future legal developments are expected?

11 July 2024

No particular development is expected to Singapore's FDI regime in respect of foreign investment control. The FDI regime will likely remain relatively supportive of attracting FDI to Singapore, without imposing additional FDI restrictions.

As Singapore actively looks to expand its connections with the rest of Asia and APAC and with some foreign investors questioning Hong Kong's traditional role as a focal point for investments into mainland China, Singapore's strategic importance for investors as a staging post for Asian FDI looks set to increase.

The Singapore government is likely to continue offering investment incentives to attract foreign investors. While historically a large portion of FDI into Singapore has been in the semiconductor as well as the energy and chemicals sector, Singapore looks to future drivers of economic growth and will participate in an innovation-led economy going forward. The Enterprise Singapore (a governmental body) has been formed by merging other ministries overseeing international investment and is tasked to attract foreign investors in such participation of the new innovation-led economy. The Singapore Economic Development Board also supports and sometimes is a co-investor in companies that plan to expand Singapore's presence overseas.

For more information contact Stephanie Keen, Partner, Singapore

Vietnam

Key Features

Types of deals subject to the FDI regime	11 July 2024 Any investment project made in a conditional sector or by foreign investors or foreign-controlled companies is subject to the conditions and market access restrictions. Such investment projects must also be registered with investment licensing authorities.
Principal authorities	11 July 2024 Provincial level Departments of Planning and Investment (DPIs) or Management Boards of Economic and Industrial Zones or Management Boards of Industrial Zones are responsible for issuing Investment Registration Certificates (IRCs). Prior in-principle approvals by the National Assembly of Vietnam, the Prime Minister or the People's Committees of provinces and centrally administered cities may also be required. The Ministry of Planning and Investment (MPI), the Ministry of Science and Technology (MOST) and the State Bank of Vietnam (SBV) are also frequently involved in the FDI approval process.
Lookback period	11 July 2024 No time limit
Mandatory / voluntary filing	11 July 2024 Mandatory
Substantive test for intervention	11 July 2024 Conditional sector, market access restrictions and national security / public order.
Extra-territorial	11 July 2024

reach	No
Timeline for review (approximately)	11 July 2024 FDI pre-approval (if required): no timelines for the National Assembly and the Prime Minister. Provincial-level People's Committees must issue or refuse to issue in-principle approvals within 35 days. The timeline for the DPI or Management Board of an Economic Zone/Industrial Zone to issue an IRC is 15 days. IRCs for projects with in-principle approval are issued within five working days after the in-principle approval is issued and the approval of selection of investor is obtained. The timelines for ERC issuance is three working days. In practice, the legally prescribed timelines are often exceeded.
Potential penalties	11 July 2024 Without an IRC, a foreign investor will not be able to incorporate a company (obtain an ERC) to implement the investment project.
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 In theory, it is possible to initiate legal actions against such decisions in court based on the Law on Administrative Procedures. However, the outcome of such claims will be uncertain.
Special measures in response to COVID-19	11 July 2024 No special measures

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 After over 30 years of economic reforms which started in late 1980s, Vietnam has achieved significant progress in market liberalization. Large and stable foreign direct investment (FDI) inflows have helped propel the country from a low-income to a lower middle-income country. Vietnam has become one of the most open economies in South-East

Asia, with a single investment law applicable to both domestic and foreign investors. The forms of investment available to foreign investors are now the same as those used by domestic investors. Only a number of restrictions remain as set out further below. There is also a national security review process, and if land to be used in a project is located in areas sensitive to national security and defense, the approval process may involve local authorities consulting with central Ministries before issuing relevant approval, which may further delay the process.

INVESTMENT REGIMES

(a) Common investment regime

The following common rules apply to foreign investors in Vietnam (and incidentally are also applicable to domestic investors). The rules are based on a "negative list" approach: i.e., the prohibitions or restrictions apply only to the sectors expressly mentioned in the relevant lists. All activities which are not listed can be carried out freely without any conditions.

Prohibited investments

Investment projects in industries / sectors or locations that may potentially affect national defense, national security, cultural and historical heritage, traditional customs and morality, or the ecological environment are prohibited.

Conditional business lines

The Law on Investment provides a detailed list of business lines where investment (both foreign and domestic) is subject to conditions (Appendix four). There are currently 227 conditional business lines.

The specific conditions applicable to each conditional business line are set out in the relevant industry laws and regulations. Investment in some industries requires prior satisfaction of conditions established by the government (e.g. the establishment of credit institutions); in other industries, the conditions can be met after establishment of the legal entity (e.g. payment intermediation service providers).

Typical investment conditions include:

- **Minimum capital**: frequently used in early stages of economic reforms by Vietnamese authorities, minimum capital requirements remain as a condition to investment in only a few

sectors. Banking is an example where minimum charter capital is a key condition. Some other industries where minimum legal capital requirements apply are insurance, finance leasing, securities and securities services.

Although there is no minimum capital requirement in most sectors, it is important to note that the authorities have a certain degree of discretion in assessing the adequacy of the capital investment allocated to a project.

A draft SBV regulation on foreign borrowing would provide that a low charter capital would correspondingly reduce the capacity of a foreign-invested company to obtain loans from foreign lenders.

- **Investor capability**: Some sectors, such as insurance and banking, generally require the foreign investor to already be licensed to provide the same services in its home jurisdiction and have sufficient international experience.
- **Activity-specific conditions (commonly referred to as "baby licenses" or sub-licenses)**: for instance, trading in medicine or medical devices requires further registrations or licenses.

(b) Additional investment requirements applicable to foreign investors (market access conditions)

Additional investment requirements: Additional investment requirements apply to:

- Foreign natural persons and legal entities established under foreign laws (Foreign Investors).
- Foreign invested enterprises (FIEs) controlled by Foreign Investors, which include:
    - **First level subsidiaries**: Vietnamese companies where more than 50 percent of the charter capital is held by Foreign Investors.
    - **Second level subsidiaries**: Vietnamese companies where more than 50 percent of the charter capital is held

by first level subsidiaries.

- **Third level subsidiaries**: Vietnamese companies where more than 50 percent of the charter capital is held by Foreign Investors and first level subsidiaries.

Prohibited investments: List A of Appendix 1 to Decree 31/ 2021/ND-CP provides a list of 25 industries and sectors where investment by Foreign Investors and FIEs is not permitted.

Conditional investments: List B of Appendix one to Decree 31/ 2021/ND-CP. Typical market access conditions applicable to Foreign Investors and FIEs for conditional investments (currently 59 sectors) are:

- Foreign ownership limits.[1]
- Form of investment.
- Scope of investment activities.
- Capacity (e.g. financial or technical) of investors.
- Requirement for partners participating in investment activities.

SPECIAL ECONOMIC ZONES

To attract foreign direct investment, the Vietnamese government created a special regime for Economic Zones and Industrial Zones (EZ/IZ) where foreign investments benefit from enhanced incentives and simplified investment licensing procedures. FIEs located within an EZ/IZ are administered by Management Boards of the province or of that EZ/IZ, acting in many instances as a "one-stop-shop" for licensing and various administrative procedures involving foreign investment. EZ/IZs frequently have special import/export, environment, labor, and other rules. Generally, these special rules are more favorable than the commonly applicable rules. For instance, companies operating in an EZ/IZ typically benefit from corporate income tax (CIT) exemptions and reductions. The government recently issued a new Decree 35/2022/ND-CP dated 28 May 2022 on the Management of Industrial and Economic Zones.

1. Such limits must comply with Vietnam's international treaties. Sector-specific foreign ownership caps are set out in the Law on Credit Institutions, Law on Civil Aviation, Law on Education, Law on Securities, Law on Insurance Business, Law on Petroleum, etc.

For publicly listed companies operating in industries or sectors which are subject to market access conditions, the default maximum foreign ownership limit is 50 percent of the charter capital. Special sector laws may be subject to a different cap. A publicly listed company's general shareholders meeting can also set a different cap and such approved cap must be stipulated in the charter of the company.

If an FIE has multiple business lines subject to foreign ownership limits under international treaties or Vietnamese laws, then the maximum foreign ownership ratio in such a company is the limit applicable to business line with the lowest permissible foreign ownership ratio.

What types of deals are subject to the FDI regime?

11 July 2024

Any investment project made in a conditional sector or by Foreign Investors or foreign-controlled FIEs is subject to the conditions and restrictions described in question 1. Such investment projects must also be registered with investment licensing authorities (please see question 5).

Which are the principal authorities in charge of FDI?

11 July 2024

All investment projects in Vietnam implemented by Foreign Investors or foreign-controlled FIEs must be registered with provincial level authorities responsible for issuing Investment Registration Certificates (IRCs). Depending on the specific parameters of each investment project, prior in-principle approvals may also be required. There are three levels of authorities for in-principle investment approvals:

The National Assembly of Vietnam is responsible for pre-approval of:

- Projects having significant impact or a potentially serious impact on the environment and human habitat, such as construction of nuclear power plants.
- Projects that require changing the land use purpose of a land area of 500 hectares or more where rice cultivation yields two annual crops.
- Projects that require the relocation and resettlement of 20,000 people or more in mountainous areas or 50,000 people or more

in other areas.

- Projects that require application of a special mechanism or policy that should be decided by the National Assembly.

The National Assembly must also approve certain categories of public investment projects under the Law on Public Investment.

The Prime Minister has the authority to approve:

- Projects in the following sectors, irrespective of the source of investment (domestic or foreign) and amount of invested capital:
  - Projects that require the relocation and settlement of 10,000 people or more in mountainous areas and 20,000 people in other areas.
  - Construction of airports and runways, international airports, airport cargo terminals with a capacity of 1 million tons or more per year.
  - Projects in air passenger transportation.
  - Large scale ports and port infrastructure.
  - Petroleum processing projects.
  - Investment projects in gambling and casino activities, except for video games with prizes for foreigners.
  - Development of residential housing projects and urban areas with an area of 300 or more hectares or with a population of 50,000 or more people.
  - Investment in certain cultural heritage projects.
  - Development of infrastructure in industrial and export processing zones.
- Investment projects of Foreign Investors[1] in telecommunications services business with network infrastructure, afforestation, publishing, and journalism.
- Investment projects which fall under the approval authority of at

least two provincial-level People's Committees.

- Other investment projects subject to in-principal approval or approval of the Prime Minister.

Although not expressly mentioned in the Law on Investment, in practice, the Prime Minister also approves investments in power projects not included in a national power development plan. This is done through the mechanism of amendment of the relevant power development plan.

People's Committees of provinces and centrally administered cities are responsible for approving:[2]

- Projects that use land allocated or leased by the State without auction or bidding or transfer.
- Projects that require changes of land use purposes.[3]
- Development of residential housing projects and urban areas with an area of less than 300 hectares or with a population of less than 50,000 people.
- Investment in certain cultural heritage projects, except for those subject to Prime Minister approval.
- Golf course construction projects.
- Foreign investment projects implemented in areas potentially affecting national defense and security.

Certain public investment projects under the Law on Public Investment may also be subject to approval by provincial level People's Committees.

At the provincial or centrally administered city level, two bodies are authorized to register investment projects and the companies established to implement them:

- Departments of Planning and Investment (DPIs) issue IRCs and register corporate entities established to implement approved or registered investment projects and issue Enterprise Registration Certificates (ERCs).
- Management Boards of Economic and Industrial Zones or

Management Boards of IZs are authorized to issue IRCs and ERCs for projects located within their respective EZs or IZs.

Other government agencies involved in the investment approval process are the following:

- Ministry of Planning and Investment (MPI)

  The MPI is the government agency in charge of investment activities of both domestic and foreign investment in the country. In addition to its key role in proposing or adopting laws and regulations affecting investment activities (elaboration of national strategic plans, such as national power development plans, laws, government decrees, ministerial circulars, guidance, etc.), the MPI is responsible for evaluating important investment projects subject to Prime Minister pre-approval.

- Ministry of Science and Technology (MOST)

  Vietnam encourages foreign investment in high-tech industries. The Law on High-Technology No. 21/2008/QH12 dated 13 November 2008 (as amended) sets out general incentives applicable to investment in high technology industries through a series of preferential treatments and incentives. Many such projects benefit from land rental exemptions for extended periods. Tax incentives include tax exemptions or reductions. For instance, the CIT rate for high-tech projects are in the range of 10 percent to 15 percent, while the standard CIT rate is 20 percent. In certain especially encouraged industries preferential personal income tax rates may also be granted. MOST is consulted in relation to high-tech projects prior to the issuance of IRCs.

- State Bank of Vietnam (SBV)

  The SBV issues and enforces capital control and foreign exchange regulations applicable to capital and current transactions. As the banking industry supervisor, it issues establishment and operation licenses to subsidiaries, branches and representative offices of foreign credit institutions (mainly commercial banks and finance companies).

1. Although it is not specified, we believe that this rule also applies in practice to

foreign-controlled FIEs.

2. Centrally administered cities are the country's most important cities administered directly by the Communist Party of Vietnam and central government, e.g. Hanoi, Ho Chi Minh City, and Danang. The People's Committees of such cities have equivalent powers and authority as the People's Committees of provinces.

3. Certain exceptions apply.

Is there a lookback period?

The Law on Investment provides that if a more recent law or regulation is adopted providing for a less favorable investment regime than the one initially granted to investors, then the initial investment incentives and benefits will be maintained. There are only limited exceptions to this rule:

- Protection of public interest, rights and interests of the entities regulated by the more recent law or regulations.
- In criminal cases, a law can only be applied retroactively if it is more favorable to the convicted person. The Law on Enterprises also allows retroactive regulatory review of enterprise registration dossiers. If it is discovered that false information was submitted when registering a company, then the company's ERC could be withdrawn.[1]There is no time limitation for the licensing authorities to issue this penalty.

1. Article 212.1(a) of the Law on Enterprises.

Is the FDI filing voluntary or mandatory?

11 July 2024

FDI filing in Vietnam is a pre-condition to implementation of investments by Foreign Investors and foreign controlled FIEs. Please see question 1 for a description of the FDI approval and registration procedures.

Extra-territorial reach and workarounds?

11 July 2024

Offshore acquisition structures

Offshore structures are commonly used to facilitate corporate transfers and circumvent onshore approval processes. They typically use foreign governing law, and disputes are referred to foreign jurisdictions.

Offshore structures are also perceived to allow greater certainty in respect of enforceability of shareholder agreements. However, there are some significant obstacles to their effectiveness:

- Corporate and governance aspects of the transaction are still greatly influenced by mandatory provisions of Vietnamese investment and company laws (for instance, domestic corporate governance structures must be consistent with the Law on Enterprises, and the charter of the domestic company will prevail over any bilateral arrangements between investors).
- Transfers of shares in listed companies are subject to Vietnamese stock-exchange rules.
- An existing offshore structure of an acquisition target must be in place to facilitate a wholly offshore indirect transfer of the domestic target.

Nominee structures

Nominee structures were very commonly used by foreign investors in Vietnam, especially at early stages of the country's economic reforms when many restrictions on foreign ownership persisted. However, there is no legal framework for nominees in Vietnam and, as a civil law jurisdiction, the common law legal concept of trust is not recognized. As a result, disputes arising from the use of nominee structures are quite frequent and many foreign investors have suffered significant financial losses and were exposed to serious reputational risks. These structures must be approached with caution and appreciation of the relevant risks.

What is the FDI procedure?

11 July 2024

As discussed in question 1, the regulatory frameworks applicable to domestic and foreign investments are converging towards a common investment regime with foreign investment restrictions and limitations currently confined to relatively short negative lists of market access conditions, and the additional requirement imposed on Foreign Investors and foreign-controlled FIEs to register their investment projects before they can incorporate a legal entity. There is also a national security review process, which involves local licensing authorities consulting with the Ministry of Defense and the Ministry of

Public Security. This applies to foreign investments in localities at the national border, sea side and other localities having an impact on national defense and security.

Investment Registration

The first stage of implementation of a foreign investment project is investment registration and issuance of an IRC. The issuance of the IRC may be subject to prior in-principle approval by the National Assembly, the Prime Minister, or the provincial People's Committee as discussed in our answer to question 3.

The timelines for the authorities to issue the in-principle approval vary depending on the authority whose pre-approval must be sought. The legally prescribed time limit for the provincial-level People's Committees to examine applications and issue in-principle approvals is 35 days from the date of receipt of a complete application dossier. For higher value investment projects requiring pre-approvals by the National Assembly or the Prime Minister there are no timelines for the issuance of in-principle approvals.

The time limit for a licensing authority (in most cases, provincial DPI) to consider and issue an IRC is 15 days if the investment project is not subject to the in-principle approval requirement. IRCs for projects with in-principle approval are issued within five working days after the in-principle approval is issued and the approval of selection of investor is obtained. In practice, the legally prescribed timelines are often exceeded.

The IRC mentions the specifics of the investment project and the incentives to which a "preferential" or "especially preferential" project is entitled to (if any).

Company incorporation

Once an investment project is registered and the corresponding IRC has been issued, the foreign investor can conduct business in the Vietnamese market and is allowed to implement the registered investment project through the same types of legal vehicles used by Vietnamese investors. The corporate forms most commonly used by foreign investors are limited liability companies and joint-stock companies. These companies must be incorporated by way of applying for and obtaining an ERC. The established company will become a foreign-invested company and will be able to implement the registered investment project. An FIE may carry out multiple investment projects.

Post-licensing

The registration of an investment project and incorporation of a legal entity to implement it are the two main stages of the foreign investment licensing process. However, in many business sectors, further licenses may apply. The process is often referred to as "post-licensing". Indeed, the project may require other approvals, such as construction permits, trading licenses, etc.

What are the penalties of the failure to file?

11 July 2024

Foreign investment registration and company incorporation procedures require engagement of competent government agencies at every stage of the procedure. Failure to file would result in the absence of investment registration and impossibility to incorporate a project vehicle in Vietnam. Therefore, it is difficult to imagine a situation where an unregistered investment project with no established vehicle could do business in Vietnam.

Is FDI clearance necessary to close the transaction?

11 July 2024

Investment registration (obtaining an IRC) is a mandatory step and must be completed before an investment project can be implemented. Without an IRC it is not possible for Foreign Investors or FIEs to incorporate a new legal entity to implement the investment project (see our answer to question 7).

Is there a right to appeal?

11 July 2024

The Law on Investment is silent on the possibility to challenge decisions of investment licensing authorities. In theory, it is possible to initiate legal actions against such decisions in court based on the Law on Administrative Procedures. However, the outcome of such claims will be uncertain given the very broad discretion of the authorities in the assessment of investment projects, and difficulties to prove that the challenged decision violates the investor's legitimate rights and benefits.

How to manage the FDI procedure?

11 July 2024

The issuance of an IRC for a foreign investment project (and of an ERC) is typically a major condition precedent in sales and purchase agreements. The parties also frequently use escrow structures to ensure all required regulatory approvals are in place before the transaction is settled.

For high-value projects requiring National Assembly or Prime Minister approval, it is critical to engage early with the authorities at both local (provincial People's Committees) and national levels. Formal and informal prior consultations allow the relevant government authorities to avoid surprises (and hence unfavorable reactions) and to better understand the benefits and risks related to the proposed project. Strong support by government agencies of the investor's home country (embassies, trade representatives, development agencies) is also very often critical.

In many sectors, such as renewable energy or banking and finance, reliable and well connected local partners / consultants may be very useful in managing government relations.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

The Vietnamese government has not adopted special measures aimed at securing the protection of national assets in the wake of the COVID-19 pandemic to the detriment of foreign investors in the country. Immediately after easing COVID-19 related restrictions in early 2022, the government made great efforts to ensure recovery of pre-pandemic FDI inflow levels and to capture investments redirected from the People's Republic of China (China) to shelter from the ongoing U.S.-China trade tensions and strict lockdowns in China.

What are the key trends in FDI enforcement?

11 July 2024

Until now, the Vietnamese government has not applied formal minimum legal capital requirements, except in limited highly regulated industries. However, in practice in many locations licensing authorities do evaluate the financial capacity of foreign investors and FIEs, as there are still many foreign invested companies established with a rather thin capitalization. This may change in the near future. The authorities' approach does not seem to be the imposition of a direct thin capitalization rule. However, this may be achieved through the introduction of a cap on foreign borrowing for investment projects calculated as a multiple of the charter capital of the foreign invested company in Vietnam if the draft SBV circular is adopted in its current form.

What are the recent legal developments?

11 July 2024

Vietnam's legal framework for foreign investment has been in constant evolution since the adoption of the first Law on Foreign Investment in 1987. The currently applicable rules are set out in two fundamental laws: the Law on Enterprises No. 59/2020/QH14 and the Law on Investment No. 61/2020/QH14. Both laws were issued on 17 June 2020 and became effective on 1 January 2021, and both laws were further amended in January 2022. The two laws are supplemented by a series of implementing regulations, such as:

- Decree No. 01/2021/ND-CP dated 4 January 2021 on Enterprise Registration.
- Decree No. 31/2021/ND-CP dated 26 March 2021 detailing and guiding implementation of some articles of the Law on Investment (this decree contains the negative lists of business sectors where foreign investment is prohibited or conditional).
- Decree No. 47/2021/ND-CP dated 1 April 2021 providing guidance on certain articles of the Law on Enterprises.

What future legal developments are expected?

11 July 2024

The SBV recently published a draft circular to regulate off-shore borrowing by companies incorporated in Vietnam (including FIEs). If adopted in its current form, the new circular will restrict foreign borrowing by limiting the permitted purposes of such loans, imposing stricter limitations on the size of foreign borrowing, and introduce hedging requirements and caps on the cost of foreign borrowing. There will also be an express prohibition on the use of foreign borrowing for financing of share or equity acquisitions in Vietnam.

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Key Features

Types of deals subject to the FDI regime	11 July 2024 Acquisition by a non-French investor of: ◦ the exclusive or joint control of a French legal entity via a share acquisition; or ◦ the exclusive or joint control of all or part of a French branch of activity. Acquisition by an investor who is not from the EU, EEA or from a jurisdiction that has an administrative assistance agreement on combating tax evasion with France of: ◦ 25% of the voting rights of a French entity; or ◦ 10% of the voting rights of a French entity listed on stock exchange (until December 31st, 2023).
Principal authorities	11 July 2024 FDI Office (Multicom 4) within the Directorate General of the Treasury of the French Ministry for the Economy.
Lookback period	11 July 2024 If a transaction has been implemented without prior approval, the FDI Office may impose penalties (see answer to question 8). Apart from criminal sanctions – which are time-barred within 6 years – there is no specific lookback period for other administrative penalties. However, the FDI Office indicated that such sanctions would only be imposed within a "reasonable time frame", taking into account the closing date, the date

	on which the infringement was revealed, the date on which the FDI Office started to launch investigations, as well as specific features of the case. Irrespective of sanctions, the investor may be ordered to: ◦ file an application for clearance; ◦ modify the transaction; or ◦ divest its shares in the target. The FDI Office may also order periodic penalty payments to ensure compliance with the above. The FDI Office clarified that such orders may not be time-barred as they essential to the State's authority
Mandatory / voluntary filing	11 July 2024 Filing is mandatory and includes a stand-still requirement pending clearance of the FDI Office. A foreign investor (or the French target company) may also make a voluntary filing to get the FDI Office's opinion on whether activities of the target fall in the scope of French FDI rules.
Substantive test for intervention	11 July 2024 The French FDI procedure consists in ensuring that an investment operation is not likely to undermine public order, public safety or the national defense interests.
Extra-territorial reach	11 July 2024 Indirect investments are also covered (i.e., a foreign-to-foreign transaction would be reportable to the FDI Office if there are French subsidiaries or French assets whose activities fall in the scope of FDI rules).
Timeline for review (approximately)	11 July 2024 Phase 1 of review may last up to 30 business days and Phase 2 accounts for an additional 45 business days (i.e., 75 business days in total). However, requests for information suspend Phase 1 statutory period. In practice, clearance may be obtained in about 3 months.
Potential	11 July 2024

penalties	Fines up to the higher of (i) twice the amount of the investment; (ii) 10% of the target's annual turnover; or (iii) €5 million for companies (and/or €1 million for private individuals). Criminal sanctions up to 5 years imprisonment.
FDI clearance necessary to close	11 July 2024 Yes.
Right to appeal	11 July 2024 Yes, if a party does not agree with a decision of the Ministry for the Economy, an administrative appeal before the Minister for the Economy or a contentious appeal before the Administrative Court can be made within two months.
Special measures in response to COVID-19	11 July 2024 Yes, the threshold for reporting acquisition of voting rights in listed French companies was lowered from 25% to 10%.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 As a matter of principle, FDI is not subject to prior approval in France. However: ◦ Pre-closing clearance of the FDI Office of the Ministry for the Economy is required if (i) the investor qualifies as a foreign investor; (ii) the transaction qualifies as an investment; and (iii) activities of the target fall in the scope of FDI review rules (see answers to questions 2 and 5 and Article L. 151-3 of the French Monetary and Financial Code). ◦ Any FDI worth more than €15 million should be reported to the French Central Bank within 20 days after closing. This mandatory filing (irrespective of the activities of the target) is made only for statistical purposes (i.e., the French Central Bank does not issue any clearance with respect to the transaction). This filing is mentioned for sake of completeness and is not further described below although more information is available here (Article R. 152-3 of the French Monetary and Financial

Code).

What types of deals are subject to the FDI regime?

11 July 2024

Assets and share deals are equally reportable to the FDI Office, while greenfield investments are not subject to FDI Office approval.

In practice, an investment qualifies for FDI control if it amounts to an acquisition of control (1) or if it meets a certain voting rights threshold (2) of a French company (Article R. 151-2 of the French Monetary and Financial Code), (3) unless an exemption is available.

1. **Acquisition of control**

A transaction qualifies as an investment for FDI rules if a non-French investor acquires:

- the exclusive or joint control of a French legal entity via a share acquisition; or
- the exclusive or joint control of all or part of a French branch of activity.

Control is understood as (i) the majority of voting rights in general assembly (*de facto* or *de jure*); (ii) the right to appoint or dismiss the majority of the members of the board; or (iii) holding more than 40% of the voting rights with no other shareholders having higher rights (see Article L. 233-3 of the French Commercial Code).

Joint control may result from a concerted action or a shareholders agreement granting veto rights on strategic decisions of the company, such as appointment / dismissal of managers, investments or contracts irrespective of any thresholds (or with low thresholds), approval of the budget or business plan.

Change from joint to exclusive control (and *vice versa*) for a given foreign investor is not reportable to the FDI Office.

2. **Meeting voting rights thresholds**

A transaction qualifies as an investment under FDI rules if an investor (and any of its affiliated entity) who is not from the EU, EEA or from a jurisdiction that has an administrative assistance agreement on combating tax evasion with France, acquires:

- 25% of the voting rights of a French entity; or

- 10% of the voting rights of a French entity listed on stock exchange (until December 31st, 2023).

These thresholds may be met by a single investor (or by several investors acting jointly).

Meeting the 25% threshold is not reportable to the FDI Office if the investor already received FDI clearance for meeting the 10% threshold in a French listed company.

3. **Exemptions**

Furthermore, for the sake of completeness, it is worth noting that exemptions to filing requirements are available, in particular:

- in case of intra-group transactions (i.e., subject to all parties being at least 50% owned by the same shareholder),
- where the investor already received FDI clearance for acquiring control of the French target and subsequently meets the 25% voting rights threshold, and
- where the foreign investor already received FDI clearance for meeting the 25% voting rights threshold and subsequently acquires control of the target (i.e., in such case, the FDI Office should be informed of the transaction, which it may opposed within 30 days).

These exemptions are not available where the transaction would (i) impede compliance with previous remedies adopted by the FDI Office, or (ii) if the transaction would transfer all or part of a branch of activity abroad) (Article R. 151-7 of the French Monetary and Financial Code).

Which are the principal authorities in charge of FDI?

11 July 2024

FDI Office (Multicom 4) of the Directorate General of the Treasury, attached to the Ministry for the Economy.

Is there a lookback period?

If a transaction has been implemented without prior approval, the FDI Office may impose penalties (see answer to question 8). Apart from criminal sanctions – which are time-barred within 6 years – there is no specific lookback period for other administrative penalties. However, the FDI Office indicated that such sanctions would only be imposed within a "reasonable time frame", taking into account the closing date, the date

on which the infringement was revealed, the date on which the FDI Office started to launch investigations, as well as specific features of the case.

Irrespective of sanctions, the investor may be ordered to:

- file an application for clearance;
- modify the transaction; or
- divest its shares in the target.

The FDI Office may also order periodic penalty payments to ensure compliance with the above (Articles L. 151-3-1 of the French Financial and Monetary Code). The FDI Office clarified that such orders may not be time-barred as they essential to the State's authority

Is the FDI filing voluntary or mandatory?

11 July 2024

Transactions that fall in the scope of FDI rules are subject to mandatory pre-closing clearance (1), although a voluntary filing may also be made in advance to make sure that the transaction is reportable (2).

1. **Mandatory pre-closing clearance**

A transaction is subject to mandatory pre-closing clearance if it meets the following three conditions:

- The direct investor (or any entity or natural person within its chain of control, up to its ultimate parent) is a foreign investor, which means:
  - Not French (in case of an acquisition of control), which means (i) any natural person who is not of French nationality, (ii) any French national who is not a French tax resident, (iii) any foreign entity, or (iv) any French entity controlled by a foreign person/entity (Article R. 151-1 of the French Monetary and Financial Code); or
  - Not from the the EU, EEA or from a jurisdiction that has an administrative assistance agreement on combating tax evasion with France (in case of voting rights thresholds).
- The transaction qualifies as an investment (see above answer to question 2); and

- The French target carries out sensitive activities, which are as follows (the detailed list is available at Article R. 151-3 of the French Monetary and Financial Code):

Core Strategic Activities are inherently sensitive and objectively relate to national security and public order (such as direct or indirect supply to the French military / defense sector);

- **Strategic Infrastructures, Goods and Services.** These activities relate to critical infrastructures, goods and services, such as, *inter alia*, energy, telecom, transport, water supply, public health, or food security. They are deemed strategic only to the extent that they meet a sensitivity test (i.e., depending on clients, applications, know-how, hazardous nature of products, or market shares); and

- **R&D Strategic Activities** cover R&D in relation to specific technologies that may have an impact on national security and public order when applied to Core Strategic Activities or o Strategic Infrastructures, Goods and Services. The list of such technologies is available at Article 6 of the Government Order of December 31st, 2019 on foreign investments. It includes: cybersecurity, artificial intelligence, robotics, additive fabrication, semi-conductors, quantum technologies, energy storage, biotechnologies, and technologies used for producing renewable energy.

When a transaction meets the above mentioned criteria, it may not be closed until it has received approval of the FDI Office. There is no derogation for distressed M&A, although the FDI Office may take the financial situation of the target into account for its assessment.

2. **Voluntary consultation of the FDI Office**

A foreign investor, the seller or the target may voluntarily file a request for the FDI Office to determine whether French activities fall in the scope of FDI rules (Article R. 151-4 of the French Monetary and Financial Code).

This procedure provides legal certainty ahead of the transaction and provides the FDI Office with the opportunity to become more familiar with the French target (which may speed up the process once the transaction is formally filed).

Extra-territorial reach and workarounds?

11 July 2024

Indirect investments are also covered (i.e., a foreign-to-foreign transaction would be reportable to the FDI Office if there are French subsidiaries or French assets whose activities fall in the scope of FDI rules).

What is the FDI procedure?

11 July 2024

1. **Mandatory pre-closing clearance**

The French FDI procedure consists in two distinct phases for a maximum duration of 75 business day (Article R. 151-6 of the French Monetary and Financial Code):

- Phase 1 lasts 30 business days from the date of filing. This period is suspended when the FDI Office sends requests for information to the purchaser to complete the filing. During this phase, the FDI Office consults with the other relevant ministries (Armed Forces, Energy, etc.) or with the European Commission on the opportunity to impose remedies.
- Phase 2 may last up to 45 additional business days. Although phase 2 is not systematic, it is nevertheless used when (i) the FDI Office intends to make the clearance conditional on commitments from the acquirer; or (ii) an additional period is required to finalize the assessment of the case.

In practice, the FDI Office tries to take into account the target closing date and usually does not delay transactions. Even when a phase 2 is opened, the FDI Office generally does not wait for the 45 business days to expire before granting its clearance.

In practice, the whole process usually takes 3 months on average.

The FDI Office may impose remedies as a condition to clearing the transaction. Most frequent remedies include:

- Maintaining the sensitive activities in France, under the control of a French company;

- Ensuring the continuity of the sensitive activities in France;
- Maintaining commercial relations with French clients under market conditions;
- Maintaining patents and know-how in France and filing any patent application in France as a priority; or
- Designating of an operational contact point in charge of reporting compliance with remedies to the FDI Office.

In most critical cases, the FDI Office may also impose specific conditions relating to security and governance (typically in the defense sector), such as: requiring the CEO to be a French national, requiring a member of the French army to be appointed as censor at the board of directors, requiring a majority of EU nationals at the board of directors, selling a minority stake to a third party investor approved by the FDI Office, or creating a "restricted access zone" within the company.

2. **Voluntary consultation of the FDI Office**

Statutory period for the FDI Office to issue its opinion is 2 calendar months (which is subject to suspension as long as the filing is not deemed complete or pending replies to requests for information).

What are the penalties of the failure to file?

11 July 2024

Closing a transaction without the prior approval of the FDI Office would result in:

- Nullity and voidness of the transaction (Article L. 151-4 of the French Monetary and Financial Code);
- Fines, up to the higher of (i) twice the amount of the investment or (iii) 10% of the French target's turnover or (iii) €5 million for companies (or €1 million for a natural person) (Article L. 151-3-2 of the French Monetary and Financial Code);
- Criminal penalty: 5 years imprisonment for natural persons; dissolution, disqualification from practice, placement under judicial supervision, permanent closure and exclusion from public contracts for legal entities (Article 459 of the French Customs Code).

Is FDI clearance necessary to close the transaction?	11 July 2024 A FDI clearance is necessary to close the transaction in France when a filling is mandatory. Furthermore, once clearance is obtained, the investor shall inform the FDI Office within 2 months after closing of (i) the closing date, (ii) the final shareholding structure of the target, (iii) the final amount of the transaction, and (iv) any change in the chain of control of the target (Article R. 151-11 of the French Monetary and Financial Code).
Is there a right to appeal?	11 July 2024 The decisions of the Minister for the Economy can be appealed in two ways : (i) an administrative appeal before the Minister for the Economy or (ii) a contentious appeal before the Administrative Court. Appeals must be made within two months of the notification of the decision.
How to manage the FDI procedure?	11 July 2024 The FDI aspect of a transaction should not be overlooked. The scope of FDI filing requirements is indeed quite broad and may cover a target whose activities would not obviously be deemed sensitive (either because of their nature or because they only generate limited turnover). Therefore, it is important to include an FDI assessment as early as possible in the transaction process – since such filing may have an impact on the transaction's timeline. A well-documented self-assessment is also very useful if the foreign investor ultimately considers that the transaction is not reportable. In case the FDI Office subsequently takes an opposite view, such self-assessment.
Are there special measures to protect national assets in response to COVID-19?	11 July 2024 In respond to Covid-19 crisis, the threshold for acquisition of voting rights by foreign investors in listed French companies was lowered from 25% to 10%. This measure was extended until December 2023.
What are the key trends in FDI enforcement?	11 July 2024

The FDI Office imposed remedies in 54% of transactions in 2021. It is therefore an important trend and foreign investors should consider this as a likely outcome of the process.

However, the extent of such remedies should not be overemphasized. As mentioned above (answer to question 7), remedies are usually limited to ensure continuity of activities of the activities of the French target.

What are the recent legal developments?

11 July 2024

Since July 2020, the threshold for reporting acquisition of voting rights in listed French companies was lowered from 25% to 10%.

Since January 1st, 2022, technologies involved in the production of renewable energies are included in the scope of R&D Strategic Activities code.

In September 2022, the Ministry of Economics and Finance published guidelines on the control of foreign investments in France (*link – only available in French*).

What future legal developments are expected?

11 July 2024

We understand that the FDI regime will not significantly change in the near future. That being said, we expect the FDI Office to issue an English version of its guidelines, as well as its 2022 Annual Report, in the course of 2023.

Furthermore, several appeals are pending against decisions of the FDI Office.

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Key Features

Types of deals subject to the FDI regime	11 July 2024 Any acquisition of a relevant stake in a German company by an investor from outside the European Union and the European Free Trade Association. Special rules for all non-German investors apply to investments in companies operating in certain strategic sectors, mostly in the area of defence.
Principal authorities	11 July 2024 Federal Ministry for Economic Affairs and Climate Action (Bundesministerium für Wirtschaft und Klimaschutz – **BMWK**)
Lookback period	11 July 2024 Up to 5 years
Mandatory / voluntary filing	11 July 2024 Depending on the business activities of the target company and the origin of the investor, thresholds for a mandatory filing start as low as 10% of the voting rights, although for the majority of critical technology covered by mandatory rules the threshold is 20%. *Ex officio* investigations can target any sector and voluntary filings can be advisable if at least 25% of the voting rights in the target company are acquired.
Substantive test for intervention	11 July 2024 Depending on the type of FDI procedure applicable, either likely impairment of essential security interests of Germany or likely effect on public order or security of Germany, of another Member State of the European Union or in relation to projects or programmes of Union interest.
Extra-territorial reach	11 July 2024 No.

Timeline for review (approximately)	11 July 2024 2-6 months (in complex cases often much longer)
Potential penalties	11 July 2024 Fines and up to 5 years imprisonment for breach of standstill obligation, i.e. implementation of an acquisition without clearance.
FDI clearance necessary to close	11 July 2024 Yes, if acquisition is subject to a mandatory FDI filing.
Right to appeal	11 July 2024 Limited judicial review.
Special measures in response to COVID-19	11 July 2024 Yes, investments in the health sector are subject to enhanced scrutiny.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 While there are **no general restrictions** on FDI, in principle, any acquisition of a relevant stake in a German company by an investor from outside the European Union (EU) and the European Free Trade Association (EFTA) can be subject to an **FDI review**. Special rules apply to investments in companies operating in certain strategic sectors, e.g. mandatory FDI filing, extension of the scope of the FDI regime to all foreign investors (including those from the EU and EFTA) and lower thresholds (as low as 10% of the voting rights) – see answer to question 5. Depending on the type of FDI procedure applicable, the review considers whether the investment is likely to impair **essential security interests**, or whether it is likely to affect the **public order or security** – see answer to question 7. If the investment does not raise any concerns, it is **cleared**. Potential concerns can be mitigated through **remedy agreements** or **instructions**. As a last resort, the investment can be **prohibited**. Prohibitions used to be rare, but have recently been issued in some cases – see answer to question 13.

What types of deals are subject to the FDI regime?

11 July 2024

Covered business activities

The FDI regime is not limited to certain business activities of the target company. However, it distinguishes between two review procedures, each with its own special rules:

- the sector-specific review, focuses on target companies active in the defence sector, and
- the cross-sector review, applies to all other transactions, but provides special rules for certain strategic sectors – see answer to question 5.

The FDI regime is not subject to any minimum purchase price, minimum turnover or minimum number of employees of the target company.

Covered transaction structures

In principle, the FDI regime applies to any type of M&A transaction:

- share deals that meet certain thresholds in terms of voting rights acquired in a German company (10%, 20% or 25% depending on the type of FDI procedure applicable – see answer to question 5, but also stakebuilding above those thresholds, i.e. 40%, 50% and 75%), and
- asset deals, provided that the acquired assets constitute a definable part of the business or all the essential operating equipment of a German company.

Share deals that do not meet the relevant thresholds can also be subject to an FDI review, if control rights are acquired that enable the investor to exercise influence over the target company or to gain access to sensitive information. However, in this case of an so called atypical acquisition of control a FDI filing is only mandatory within the sector-specific review.

Greenfield investments are currently not covered by the FDI regime. Internal restructurings are excluded if the ultimate parent company remains the same, changes are limited to within the ownership chain, and no shareholder from a previously uninvolved jurisdiction is added.

Which are the principal

11 July 2024

authorities in charge of FDI?

The **Federal Ministry for Economic Affairs and Climate Action** (*Bundesministerium für Wirtschaft und Klimaschutz* – **BMWK**) is responsible for FDI review.

Depending on the type of the review procedure applicable, a prohibition can require the approval of the Federal Government. The issuance of orders requires the consent of other Federal Ministries, namely the Federal Foreign Office, the Federal Ministry of the Interior and Community and the Federal Ministry of Defence.

In practice, the BMWK regularly consults other Federal Ministries concerned in a particular case (due to the business activities of the target company or the origin of the investor), which in turn can involve subordinate agencies.

Is there a lookback period?

The BMWK can initiate an FDI review *ex officio* within two months of obtaining knowledge of the transaction, but no later than **five years** after the transaction agreement was signed.

Is the FDI filing voluntary or mandatory?

11 July 2024

Whether a transaction is subject to a mandatory FDI filing depends on whether the German target company is active in one of the listed strategic sectors, whether the relevant voting rights threshold is met and the origin of the investor.

Sector-specific review

Under the sector-specific review, an FDI filing is mandatory for any direct or indirect acquisition by a **foreign investor** (including from the EU or EFTA) of at least **10% of the voting rights** or for an atypical acquisition of control (see answer to question 2) by a foreign investor in a German company operating in one of the following highly strategic sectors, primarily related to **defence**:

- goods as defined in Part I Section A of the Export List (Ausfuhrliste) (this largely corresponds to the Common Military List of the European Union and United States Munitions List),
- military goods covered by a classified patent,
- products with IT security functions for processing classified state material or key components thereof, or
- facilities essential to defence capabilities.

The subsequent acquisition of additional voting rights triggers another mandatory FDI filing if, as a result, 20%, 25%, 40%, 50% or 75% of the voting rights in the target company are held.

Cross-sector review

Under the cross-sector review, an FDI filing is mandatory for any direct or indirect acquisition by an **investor from outside the EU and EFTA** of at least **10% of the voting rights** in a German company operating in one of the following strategic sectors, primarily related to **critical infrastructure** (subject to certain size thresholds enshrined in a separate regulation) and **media**:

- operator of critical infrastructure in the energy, water, IT & telecommunication, finance & insurance, health, transport, and food sectors,
- software specifically designed for critical infrastructure,
- surveillance of telecommunications,
- provision of cloud computing services,
- infrastructure for telematics,
- media, or
- government communication infrastructure.

An FDI filing is also mandatory for any direct or indirect acquisition by an i**nvestor from outside the EU and EFTA** of at least **20% of the voting rights** in a German company active in one of the following sectors, primarily related to **health** and **critical technologies**:

- personal protective equipment,
- essential pharmaceutical products,
- specific medical products,
- specific in-vitro diagnostics,
- operator of high-quality earth exploration satellites,
- artificial intelligence,
- autonomous driving or flying,
- robots with specific qualities or abilities,

- semiconductors and optoelectronics,
- cyber security,
- aerospace,
- nuclear technology,
- quantum technologies,
- 3D printing,
- data networks,
- smart meter gateways,
- employment of persons working in a security-sensitive position in an essential facility,
- raw materials as defined in the EU List of Critical Raw Materials,
- classified patents, or
- farming of an agricultural area larger than 10,000 hectares.

The subsequent acquisition of additional voting rights triggers another mandatory FDI filing if, as a result, 20% (relevant for critical infrastructure and media only), 25%, 40%, 50% or 75% of the voting rights in the target company are held.

Ex officio review and voluntary filing

All other transactions are not subject to a mandatory FDI filing. The BMWK can initiate an FDI review **ex officio** if an investor from outside the EU and EFTA directly or indirectly acquires at least **25% of the voting rights** (or comparable control rights – see answer to question 2) in a German company. This also applies to transactions that have already been closed at the time the BMWK obtains knowledge of them.

In this case, it can be in the best interest of the parties to proactively apply for a **certificate of non-objection** to avoid the five-year legal uncertainty during which the BMWK can initiate its review – see answer to question 4. An application for a certificate of non-objection is particularly advisable if one or more of the following criteria are met:

- the target company is active in semiconductors, artificial intelligence, batteries, autonomous driving, communications, network technology, electricity, fossil fuels, aerospace, digital

infrastructure, satellites or robotics (without meeting the requirements for a mandatory FDI filing),

- the target company has sales to federal, state or local government agencies or authorities, or state-owned companies, or other customers relevant to public order or security, including, without limitation, companies in the aerospace and defence sectors,
- the target company has or had access to classified information under applicable government regulations, and/or
- the investor is a (wholly or partially) state-owned entity or under the influence of a foreign state or from a state subject to enhanced scrutiny by the BMWK, i.e. currently in particular China and Russia.

Extra-territorial reach and workarounds?

11 July 2024

The FDI regime only applies to transactions directly or indirectly involving a **German target company** and a relevant **foreign investor**, i.e. non-German in the case of a sector-specific review and non-EU/EFTA in the case of a cross-sector review – see answer to question 5. In determining whether an investor qualifies as foreign, the BMWK considers not only the direct acquirer, but the entire ownership chain up to the ultimate parent company.

If the investor is not foreign, the FDI regime still applies if there are indications that the specific transaction structure is abused to circumvent an FDI review. Indications of such an **abusive approach** include, in particular, cases where the acquisition vehicle

- has no significant business operations of its own, or
- no permanent establishment, including offices, staff and equipment, within the relevant jurisdiction.

What is the FDI procedure?

11 July 2024

Both the sector-specific and the cross-sector reviews consist of **two phases**: a general review (Phase I) and, if necessary, an in-depth review (Phase II).

There is no procedural difference between the sector-specific review and the cross-sector review. In fact, the BMWK can apply both in parallel or switch from one to the other at any time. Only the substantive test for intervention is different: in the case of a sector-specific review, the BMWK considers whether the investment is likely to impair **essential security interests** of Germany, while in the case of a cross-sector review, the BMWK considers whether the investment is likely to affect the **public order or security** of Germany, another EU Member State, or projects or programmes of EU interest.

Phase I

The BMWK has **2 months** to decide whether to open a Phase II. The review period begins as soon as the BMWK obtains knowledge about the transaction through a filing (mandatory or voluntary), or in any other way. If the BMWK does not open a Phase II within 2 months, the transaction is deemed cleared.

The direct acquirer can submit a filing already **before signing**, as long as there is a clear intention to acquire the company at that point in time and the transaction structure is sufficiently clear. In practice, this means that the transaction should have reached term sheet level. Even after signing, there is **no deadline** to file, provided that the parties do not close the transaction before the BMWK has cleared it – see answer to question 9. The filing fees in Phase I are €800.

The FDI filing must contain information on the transaction, the (direct and indirect) acquirer, the German target company, and their respective business activities. The details are set out in a general administrative act. While the law does not provide a specific form or document for filing, the BMWK has issued an Excel form that is typically submitted together with a more extensive written statement.

The FDI review is confidential. The BMWK does not publish any decisions or notices regarding the transactions. Neither the filing, the review, nor the outcome are made public. However, there have been cases where entire draft prohibition decisions have been leaked – see answer to question 13.

Phase II

If a Phase II is opened, the investor must provide the BMWK with additional information specified in the opening notice and a general administrative act.

The transaction can be restricted or prohibited only within **4 months** after the full set of documents has been submitted, otherwise it is deemed cleared. In complex cases, the BMWK can extend the review period by 3 months. If the transaction particularly affects defence interests, the BMWK can extend the review period by another month upon request of the Federal Ministry of Defence. Requests for information and negotiations of remedy agreements stop the clock. The fees in Phase II can amount to between €2500 and €6000 and accumulate at between €10.000 up to € 30.000 if the BMWK issues special safeguarding measures during or after the screening.

EU cooperation mechanism

Since the EU FDI Screening Regulation 2019/452 came into force in October 2020, the BMWK informs and coordinates with the European Commission and other EU Member States in case of an opening of a Phase II investigation, which can further affect the timeline. The EU does not have the power to intervene in the outcome of the FDI review. The final decision is made by the BMWK.

What are the penalties of the failure to file?

11 July 2024

A transaction that is subject to mandatory FDI filing is deemed **void** until clearance is received, whether or not a filing has been submitted. In addition, a **standstill obligation** applies – see answer to question 9. Particularly sensitive actions, such as the exercise of voting rights in the target company or the disclosure of certain particularly sensitive information, are prohibited under penalty of **criminal law** (fines and up to 5 years imprisonment).

A transaction that is not subject to a mandatory FDI filing is fully effective and can be closed. If the BMWK initiates an FDI review *ex officio* and prohibits the transaction post-closing, there are no individual penalties, but the transaction must be **unwound** retroactively.

Is FDI clearance necessary to close the transaction?

11 July 2024

A transaction subject to a mandatory FDI filing is subject to a standstill obligation and the parties must await clearance before closing.

Is there a right to appeal?

11 July 2024

In principle, a decision of the BMWK is final and there is no appeal body within the BMWK. However, decisions can be reviewed by the courts. **Judicial review** is limited to whether the procedural rules have been

complied with, whether the facts of the case have been correctly established, whether the decision contains an error in the evaluation of those facts or whether the BMWK has abused its discretion.

How to manage the FDI procedure?

11 July 2024

The FDI procedure can be a **key factor** in M&A transactions, especially if investors from the Far East and target companies in the high-tech sector are involved. The parties should not underestimate the complexity and time required to complete the procedure. In complex cases, the FDI review often takes much longer than the generally prescribed maximum of 6 months.

The parties should therefore make sure to address potential risks of delay or even failure of transactions from the outset, for example by:

- identifying whether the German target company is active in one of the listed strategic sectors,
- mapping the political landscape and preparing a strong storyline to explain the benefits of the transaction,
- proactively considering solutions to mitigate potential concerns, for example by offering certain commitments or carving-out highly strategic business operations,
- defining (deemed) clearance as a **closing condition**,
- including a **right of termination** in the event that the deal is not cleared before a certain long stop date,
- specifying how the parties will respond to a prohibition or instructions and who bears the costs, and
- considering a **break-up fee** to be paid by the buyer in the event of a prohibition.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

Since June 2020, medical protective equipment, certain pharmaceutical products and medical products for the treatment of highly contagious diseases have been added to the listed strategic sectors. Any direct or indirect acquisition by an investor from outside the EU and EFTA of at

least 20% of the voting rights in a German company active in one of these sectors triggers a mandatory FDI filing under the cross-sector review – see answer to question 5.

What are the key trends in FDI enforcement?

11 July 2024

There has been a significant increase in FDI enforcement in recent years: in 2020, the BMWK counted 189 cases; in 2022, this number jumped to approximately **560 cases**. Not all of these transactions were subject to a mandatory FDI filing. The BMWK appears to be more open to initiating an FDI review *ex officio* if it is not sure whether a transaction raises concerns.

FDI reviews tend to **take longer** and a Phase II is opened for more relatively simple cases. As a result, the BMWK more often requires the parties to enter into remedy agreements and commitments.

The **level of scrutiny** has increased particularly and noticeably for Chinese investors. As the BMWK has discretion as to what it considers to be for *"essential security interests"* or *"public order or security"*, and there have been no successful court challenges of such decisions to date, there is a risk that FDI reviews are used to address objectives, such as industrial and geo-economic policy, in addition to their primary task of securing technological and economic sovereignty, security of supply and political independence. In the spotlight of reviews are high-tech and communications sectors, such as semiconductors, artificial intelligence, batteries, autonomous driving, 5G, encryption and secure data storage.

The **most relevant cases** in recent years were:

- On 2 December 2020, the Federal Government prohibited the acquisition of the communications technology company IMST GmbH by the Chinese investor Addsino Co. Ltd, a subsidiary of the Chinese state-owned defence group China Aerospace and Industry Group Co. Ltd. (CASIC). The entire draft prohibition decision was leaked to the public, providing rare insight into the government's approach to FDI. The prohibition was challenged in court and proceedings were initiated. Shortly before the hearing, the complaint was withdrawn.

- In December 2020, Taiwan's GlobalWafers made a bid to acquire Siltronic AG, a producer of silicon wafers, an essential resource in chipmaking. The deal failed because the review procedure did not conclude before the bid expired on 31

January 2022. In the subsequent judicial review, GlobalWafers failed in its attempt to force a deemed clearance.

- On 27 April 2022, the BMWK prohibited the acquisition of the medical device manufacturer HEYER Medical AG by Oricare (HK) Ltd., a wholly owned subsidiary of Beijing Aeonmed Co., Ltd. The draft prohibition decision was leaked again.

- China Ocean Shipping Company's (COSCO) planned 35% strategic investment in one of Hamburg's container terminals has been highly controversial and has caused political tensions within the Federal Government. The vast majority of stakeholders in the decision-making process would have preferred to prohibit the entire transaction. However, due to a looming deadline in the review procedure, which would have resulted in the transaction being deemed cleared, Federal Chancellor Olaf Scholz was able to withhold his consent to a prohibition as leverage for a partial clearance. COSCO reduced its stake to 24.9% and the transaction was cleared on that basis on 26 October 2022.

- On 9 November 2022, the BMWK prohibited two planned Chinese investments in Elmos Semiconductor SE and ERS Electronic GmbH, both active in the semiconductor sector. Together with the failed attempt of GlobalWafers to acquire Siltronic AG, these two decisions demonstrate that the German government heavily scrutinises non-EU acquirers, especially from China, regarding target companies in the semiconductor industry. In this respect, the decisions can be seen as closely related to the EU's plan of becoming more independent in this sector.

- On 14 September 2023, the BMWK prohibited the redemption of the minority shareholder' shares of the eightyLeo Holding in the German-Chinese satellite joint venture KleoConnect by the Chinese investor Shanghai Spacecom Satellite Technology (SSST), thereby preventing SSST from becoming the sole shareholder instead of previously holding 52% of the shares. The case is remarkable in several respects. On a purely legal level, the BMWK expanded the concept of an "acquisition" under

German FDI rules by analogously applying it to a rdemption of shares under German corporate law. In addition, the case demonstrates that the decision-making practice of the BMWK is highly dependent on current political developments. In 2018, the BMWK issued a certificate of non-objection for this project. Against the backdrop of a tougher approach towards Chinese investors and the use of SpaceX's functionally comparable – but already operable – Starlink system in Ukraine, the BMWK assessed the risk differently. Lastly, it is also unusual that the prohibition was sought by a stakeholder to prevent a transaction comparable to a hostile takeover

What are the recent legal developments?

11 July 2024

Within Europe, Germany is at the forefront of tightening FDI review in strategic sectors.

The FDI review is mainly governed by the **Foreign Trade and Payments Act** (AWG) and the **Foreign Trade and Payments Ordinance** (AWV). While the AWG sets out the main legal framework for the FDI review, including procedure, deadlines and penalties, the AWV specifies the provisions of the AWG in practice, notably defining which categories of investments are subject to the FDI review in general and enhanced scrutiny in particular.

Especially in 2020 and 2021, the FDI regime underwent significant reforms, partly to implement the EU Screening Regulation. The most notable legal developments were:

- As of July 2020, any transaction subject to a mandatory FDI filing is subject to a **standstill obligation** – see answer to question 9. Previously, this applied only to sector-specific reviews. The **substantive test** for intervention has also been revised: the shift from the requirement of an *"actual threat"* to essential security interests (in the case of a sector-specific review) or public order and security (in the case of a cross-sector review) to a *"likely impairment"* or *"likely effect"* respectively allows for a more forward-looking FDI review. Implications for other EU Member States and projects or programs of EU interest are now also taken into account – see answer to question 7.

- In April 2021, **16 additional strategic sectors**, primarily related to critical technologies, were introduced to the cross-sector review. An FDI filing is mandatory for any direct or indirect acquisition by an investor from outside the EU and EFTA of at least 20% of the voting rights in a German company active in one of these sectors – see answer to question 5.

What future legal developments are expected?

11 July 2024

In the first quarter of 2024, a preliminary draft of the new Investment Control Law (Investitionsprüfungsgesetz "IPG") is expected to be released. However, as of now, only internal documents from the BMWK are available on this matter. The BMWK has suggested to expand the scope of the German FDI regulations as follows: for the first time, certain licensing agreements should potentially be included in the screening process, as well as certain greenfield investments and specific research agreements within a narrow scope. The categories triggering a mandatory filing are slated for revision, with some being clarified or eliminated. The exception for intra-group restructuring is expected to be broadened. There is also ongoing discussion about an outbound investment screening, but specific proposals for this are not yet available. It does not appear that such a screening will be a part of the new IPG.

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Key Features

Types of deals subject to the FDI regime	11 July 2024

Permanent regime

Acquisitions of a relevant shareholding by foreign investors in a Hungarian company carrying out business activities deemed as sensitive to national security.

Temporary regime

A temporary foreign investment screening mechanism in respect of strategic industries was introduced by the Hungarian Government with the aim of protecting Hungarian companies active in the relevant strategic sectors in the context of the Covid-19 pandemic. This regime was further extended and will remain in force until the end of the state of emergency enacted due to the war in Ukraine.

Pursuant to the temporary FDI regime, strategic industries include among others, building, tourism and waste management sectors, as well as 'traditional' strategic sectors (e.g. energy, transport, communications). The list of strategic sectors or activities are listed in the Annex of the Government Decree 561/2022 (XII. 23.) (the "**Temporary FDI Decree**"). The Hungarian companies active in the strategic sectors are deemed as strategic companies.

The temporary FDI regime applies to any transactions with respect to strategic companies regarding (i) the transfer of share/quota under any legal title, (ii) capital increase, (iii) transformation, merger and division, (iv) issuance of convertible bonds, bonds with subscription rights or equity bonds, and (v) establishment of usufruct right on share/quota if such transactions result in the following investments (provided that the total value of the investment reaches or exceeds HUF 350 million, approx. EUR 875,000) and (vi) asset transfers where the ownership or right of use or operation of infrastructure and assets necessary for pursuing strategic activities are transferred or if such infrastructure or assets are provided as security.

The Temporary FDI Decree applies to transactions of both foreign and EU or EFTA investors.

Principal authorities	11 July 2024 **Permanent regime** The minister responsible for the operation of the civil national security services (the "**Minister**"). **Temporary regime** The Minister for Economic Development (the "**Minister**").
Lookback period	11 July 2024 **Permanent regime** Up to 5 years after the date of closing. **Temporary regime** Up to 5 years.
Mandatory / voluntary filing	11 July 2024 **Permanent regime** A mandatory notification is required in the case of acquisition of a direct or indirect interest of more than 25% (10% in the case of public limited companies) or a majority control as defined by the Hungarian Civil Code, or acquisition of any interest provided that the aggregate participation of foreign investors in the company (with the exception of listed companies) exceeds 25%, in a Hungarian company carrying out business activities in sectors deemed as sensitive to national security. Besides the above share transactions, the establishment of a company or a branch and the acquisition of assets necessary to operate or use sensitive infrastructure also require notification. **Temporary regime** Transactions caught by the Temporary FDI Decree must be notified to the Minister.

Substantive test for intervention	11 July 2024 **Permanent regime** The review done by the Minister is based on whether the notified transaction may give rise to a risk to national security. **Temporary regime** The Minister reviews the transaction to verify whether it could potentially infringe or endanger the public interest, public safety of Hungary or the basic social needs of its citizens. The assessment also covers the investor's ownership structure, financing and activities.
Extra-territorial reach	11 July 2024 **Permanent regime** No. **Temporary regime** No.
Timeline for review (approximately)	11 July 2024 **Permanent regime** Approximately 2 to 5 months (the Minister has 8 + 60 days to adopt a decision which can be extended by a further 60 days). **Temporary regime** 2 to 3 months.
Potential penalties	11 July 2024 **Permanent regime** Fines up to HUF 10 million, approx. EUR 25,000. At the same time as issuing the fine, the Minister decides on whether the transaction should be approved. In the case of a negative decision, the investor must dispose of the investments within three months. **Temporary regime** A fine up to the double the transaction value, but at least 1% of the net revenues of the target company in the preceding year.

FDI clearance necessary to close	11 July 2024 **Permanent regime** Yes, if the transaction triggers a notification (standstill obligation). **Temporary regime** Yes, if the transaction triggers a notification requirement.
Right to appeal	11 July 2024 **Permanent regime** Limited judicial review. **Temporary regime** Limited judicial review.
Special measures in response to COVID-19	11 July 2024 **Permanent regime** The extension of the „foreign investor" definition under the permanent FDI control regime to cover EU and EFTA investors is not applicable since 1 June 2023 (the end of a 12 month-period from the end of the COVID-19 pandemic related state of emergency situation in Hungary). **Temporary regime** The temporary FDI regime was introduced in April 2020 in the context of the Covid-19 pandemic. The regime was extended and now is applicable for the duration of the war in Ukraine.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 **Permanent regime** The permanent FDI regime was introduced by Act LVII of 2018 on control of foreign investments violating the security interests of Hungary (the "**FDI Act**") and entered into force on 1 January 2019. The FDI Act only applies to transactions that are signed after its entry into force. There are no exceptions under the FDI Act. If a transaction falls within the scope of the FDI Act, a notification to the Minister is mandatory and approval is needed to close the transaction.

Temporary regime

The temporary FDI regime is a rather strict foreign investment screening mechanism that is applicable parallel to the permanent FDI regime in respect of strategic industries.

Under the temporary FDI regime a transaction involving a Hungarian target company pursuing strategic activities and involving certain types of transactions by foreign investors or EU investors (in the case of certain type of transaction exceeding a deal value threshold) must be notified to the Minister for approval.

What types of deals are subject to the FDI regime?

11 July 2024

Permanent regime

Covered transaction structures

The FDI Act applies to both share and asset deal types of M&A transactions:

- **share deals** implying direct or indirect acquisition of interest of more than 25% (10% in the case of public limited companies), acquisition of majority control as defined by the Hungarian Civil Code, or acquisition of any interest provided that the aggregate participation of foreign investors in the company (with the exception of listed companies) exceeds 25%, and
- **asset deals** involving the acquisition of the right to use or operate infrastructure, equipment and devices, which are essential for carrying out business activities deemed as sensitive to national security.

Majority control under the Hungarian Civil Code is a relationship where a natural person or legal entity controls over 50% of the voting rights in a legal entity, or in which it has a dominant influence, which means that it is a member of or shareholder in the given company with a participating interest, and:

- it has the right to appoint and recall the majority of the executive officers or supervisory board members of the legal entity; or

- other shareholders in the given legal entity are committed under agreement with the holder of the participating interest to vote together, or they exercise their voting rights through the holder of the participating interest, provided that together they control more than half of the votes

Under the FDI Act **greenfield investments** are also covered such as (i) the establishment of a new company or branch office pursuing activities deemed as sensitive to national security, and (ii) the commencement of any such activity specified in the FDI Act by an existing company in which foreign investors hold an interest above the thresholds specified in the FDI Act (see above).

Covered business activities

The permanent FDI regime applies if the business activities of a Hungarian target company are deemed to be sensitive to national security, such activities are set out in the FDI Act and further specified by the Government Decree 246/2018 (XII. 17.) (the "**FDI Decree**") on the implementation rules of the permanent FDI regime.

The business activities deemed sensitive to national security are the following:

- production of arms and ammunition,
- production of military technology products and certain secret service devices,
- production of dual-use products,
- provision of certain financial services and the operation of payment systems,
- provision of certain services regulated by the acts on electronic communication and the supply of water, electricity, natural gas,
- establishment, development and operation of electronic information systems of the State and municipal bodies, and
- provision of insurance and reinsurance services.

The permanent FDI regime is of general application and hence is not subject to any minimum purchase price, minimum turnover or minimum number of employees of the target company.

Temporary regime

Covered target companies and activities

Limited liability companies and public or private companies limited by shares incorporated in Hungary that pursue any of the strategic activities listed below and within sectors regarded as being of strategic importance, including energy, transportation, communications, and others listed in Article 4(1) of Regulation (EU) 2019/452 of the European Parliament as strategically important (e.g. critical infrastructure, critical technologies, supply of critical input like energy or raw materials, food security, access to sensitive information, media, etc.) are referred to as 'strategic' companies.

Under the Temporary FDI Decree, strategic activities include, among others, the following activities:

- chemical sector: production of pharmaceuticals and other chemicals, manufacture of petroleum products
- telecommunications
- trade and repair of motor vehicles and motorcycles
- retail and wholesale trade
- critical industrial sector: manufacture of electronic equipment, electric equipment, vehicles, machines, metal products
- defence sector: manufacture of arms and military vehicles
- construction of dams and water facilities
- energy sector: production, transmission, distribution, and trade of electricity; manufacture, distribution, and trade of gas; steam and air conditioning supply
- services relating to the state of emergency situation
- financial sector: financial intermediation, insurance, pension funds, fund management, ancillary financial activities
- transport industry and logistics
- manufacture of food products and agriculture
- IT services

- construction: construction of buildings and other infrastructure
- production of construction material
- waste management
- temporary employment agency activities
- hotel services
- mining of raw materials of critical importance
- education

The above activities are referenced by activity codes which are usually included in the articles of Hungarian companies or reported to the Hungarian Tax Authorities.

Covered foreign investors

Under the Temporary FDI Decree, a foreign investor is defined as:

- any company registered in Hungary, the EU, the EEA or in Switzerland pursuing a strategic activity where their majority owner is a citizen of, or is incorporated in, a country other than the above (**Foreign European Investor**), or
- any citizen of or entity incorporated in a country other than specified above (**Foreign Third Country Investor**)–note that only the second category includes investors who are natural persons.

In addition to the above, any entity incorporated in or citizen of the EU, the EEA, or Switzerland (**EU or EFTA Investors**) are also caught in relation to certain types of transactions (see further below).

Covered transactions

The temporary FDI regime applies to any transaction with respect to strategic companies regarding (i) the transfer of share/quota under any legal title, (ii) capital increase, (iii) transformation, merger and division, (iv) issuance of convertible bonds, bonds with subscription rights or equity bonds, and (v) establishment of usufruct right on share/quota if such transactions result in the following investments:

- direct or indirect acquisition of majority control in a strategic company by any Foreign European Investor, or EU or EFTA Investors, provided that the deal value exceeds HUF 350 million (approx. EUR 875,000)
- direct or indirect acquisition of at least a 5% shareholding in strategic companies (3% in the case of public limited companies) by a Foreign Third Country Investor, provided that the deal value exceeds HUF 350 million (approx. EUR 875,000)
- acquisition of 10%, 20% or 50% shareholding in a strategic company by a Foreign Third Country Investor
- acquisition of any interest by a Foreign Third Country Investor provided that the aggregate interest held by Foreign Third Country Investors and Foreign European investors in the company (with the exception of listed companies) exceeds 25%.

In addition to the above, the temporary FDI regime also applies to asset transfers where the ownership or right of use or operation of infrastructure and assets necessary for pursuing strategic activities are transferred or if such infrastructure or assets are provided as security to a Foreign Third Country Investor or a Foreign European Investor or any other entity in which such investors have a controlling interest.

Exemptions

It should be highlighted that transactions with respect to foreign entities resulting in the indirect acquisition of a Hungarian entity (being subsidiary of the foreign legal entity, qualifying as a strategic company) fall outside the scope of the temporary FDI regime. Thus, transactions that do not involve a direct change in the ownership of the Hungarian entity (even if this latter qualifies as strategic company) are not caught, hence cross border transactions (e.g. any sale where there is a holding structure outside Hungary) are exempt from the notification obligation.

Intragroup corporate restructurings (transactions between related undertakings) are also exempt from the notification obligation.

Which are the principal authorities in charge of FDI?

11 July 2024

Permanent regime

The permanent FDI regime introduced by the FDI Act is administered by the minister responsible for the operation of the civil national security services (the "**Minister**"). The decision on the approval or prohibition of a transaction remains within the exclusive competence of the Minister without any further governmental decision.

The Constitution Protection Office is responsible for the enforcement of the legislation and monitoring whether investors comply with the relevant provisions of the FDI Act.

Temporary regime

The Minister is responsible for the temporary FDI review and the decision on the approval or prohibition of a transaction remains within the exclusive competence of the Minister without any further governmental decision.

Is there a lookback period?

Permanent regime

The Minister can initiate an FDI review of a transaction ex officio within 18 months of obtaining knowledge of the transaction but no later than 5 years after closing.

The FDI Act only applies to transactions that are concluded after its entry into force, 1 January 2019.

Temporary regime

The Minister can initiate an FDI review of a transaction ex officio within 6 months of obtaining knowledge of the transaction but no later than 5 years after closing.

Is the FDI filing voluntary or mandatory?

11 July 2024

Permanent regime

The notification of a transaction caught by the FDI Act is mandatory irrespective of the origin of the foreign investor or the business sector where the target company is active.

Temporary regime

The notification of a transaction caught by the Temporary FDI Decree is mandatory.

Extra-territorial

11 July 2024

reach and workarounds?

Permanent regime

The permanent FDI regime only applies to transactions involving (i) directly or indirectly a Hungarian target company (carrying out business activities deemed sensitive to national security) and (ii) a foreign investor.

A foreign investor is any

- individual or entity from a country other than EU and EEA member states and Switzerland,
- entity registered in Hungary, another EU or EEA member state, or in Switzerland, provided that the shareholder having majority control in such entity is a natural or legal person from a country other than an EU and EEA member state or Switzerland.

Temporary regime

The temporary FDI regime only applies to certain type of transactions involving a direct or indirect acquisition of a Hungarian target company (qualifying as strategic company) by foreign or EU investors.

Transactions with respect to foreign entities resulting in the indirect acquisition of a Hungarian entity (being subsidiary of the foreign legal entity, qualifying as a strategic company) fall outside the scope of the temporary FDI regime.

What is the FDI procedure?

11 July 2024

Permanent regime

Notification obligation

If a transaction is caught by the permanent FDI regime, a notification must be made **within 10 days** from the signing of the relevant agreement. The notification must be made by the foreign investor.

Notification

Nor the FDI Act or the FDI Decree provides for a specific document or form to be completed or submitted to the Minister, but the notification must include the following information:

- a description of the transaction;
- the corporate data of the Hungarian target;

- the corporate data and contact data of the foreign investor;
- the UBO data of the foreign investor;
- the group chart of the foreign investor's group along with its certified Hungarian translation;
- the company extract and deed of foundation of the foreign investor along with their certified Hungarian translation;
- documents produced in connection with the approval of the transaction and/or signing of the transactional documents (such as corporate resolutions) along with their certified Hungarian translation;
- the transactional documents (or an extract of it) along with its certified Hungarian translation.

According to a recent amendment the above list of information to be disclosed to the Minister as part of the FDI notification must be extended with the following information set out in the EU Regulation:

- the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital,
- the approximate value of the foreign direct investment,
- the products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed,
- the EU member states in which the foreign investor and the undertaking in which the foreign direct investment is planned or has been completed conduct relevant business operations,
- the funding of the investment and its source
- the date when the foreign direct investment is planned to be completed or has been completed.

Where any notified data changes after the notification, such change must be notified to the Minister within 5 days of the change taking place.

The notification is not subject to any procedural or filing fee.

Procedure

The Minister must confirm receipt of a notification and inform the foreign investor within 8 days from the notification.

Based on the notification, the Minister must verify whether the transaction risks the national security interests of Hungary.

The Minister has 60 days to adopt a decision, which, may be extended by a further 60 days in justified cases. The Minister may also issue a request for information, which can have a maximum deadline to respond of 90 days (45 days which may be extended by an additional 45 days).

The permanent FDI legislation (the FDI Act and the FDI Decree) does not detail any rules regarding the decision-making of the Minister, and therefore it is entirely within the discretion of the Minister to decide whether an investment would be a violation of national security interests. At the end of the Minister's procedure, the transaction will either be acknowledged (approved) or prohibited by the Minister, conditional decisions cannot be adopted.

Temporary regime

Notification obligation

If a transaction is caught by the permanent FDI regime, a notification must be made within 10 days from the signing of the relevant agreement. The notification must be made by the foreign investor. Legal representation is compulsory in the proceedings.

Notification

The notification must include the following information:

- identification data of the investor,
- description of its activities,
- documents to establish its ownership structure and its ultimate beneficial owner,
- power of attorney granted to the legal advisor,
- the transactional documentation and ancillary key transaction documents (e.g. resolutions approving the transaction, if any).

All documents must be in Hungarian or accompanied by a certified Hungarian translation.

Procedure

The Minister must confirm receipt of a notification and inform the foreign investor within 8 days from the notification.

Based on the notification, the Minister must verify whether the transaction risks the national security interests of Hungary.

The Minister must adopt the decision within 30 business days from the notification which can be extended by further 15 days. The Minister can issue a request for additional information/documents (with a deadline of maximum 20 calendar days), the deadline will be suspended until the request is fulfilled.

The Temporary FDI Decree does not detail any rules regarding the decision-making of the Minister, and therefore it is entirely within the discretion of the Minister to verify whether an investment could potentially infringe or endanger the public interest, public safety of Hungary or the basic social needs of its citizens or the investor's ownership structure, financing and activities may give rise to any risk.

At the end of the Minister's procedure, the transaction will either be acknowledged (approved) or prohibited by the Minister, there no conditional decisions can be adopted.

What are the penalties of the failure to file?

11 July 2024

Permanent regime

In case the foreign investor fails to notify the transaction, the Minister (in its *ex officio* investigation) may impose a fine up to HUF 10 million (approx. EUR 25,000).

If the Minister would have prohibited the transaction in the case it was notified, the Minister will prohibit the transaction and order the foreign investor to sell its stake in the Hungarian target company within three months (where the Hungarian State will have a pre-emption right).

Temporary regime

If the foreign investor fails to notify the transaction, the Minister (in its *ex officio* investigation) may impose a fine up of to double of the transaction value, but at least 1% of the net revenues of the target

company in the preceding year.

If the Minister would have prohibited the transaction in the case it was notified, the Minister will prohibit the transaction and the transaction will be deemed as null and void.

Is FDI clearance necessary to close the transaction?

11 July 2024

Permanent regime

Transactions that are subject to notification must not close until approved by the Minister.

Temporary regime

Transactions that are subject to notification must not close until approved by the Minister.

Is there a right to appeal?

11 July 2024

Permanent regime

A judicial review request against the decision of the Minister can be submitted to the Metropolitan Court of Budapest. The judicial review is limited as it only investigates whether substantial procedural provisions were violated.

The court makes its judgement in a simplified procedure and if it establishes an infringement, it repeals the Minister's decision and orders the Minister to repeat its procedure.

Temporary regime

A judicial review request against the decision of the Minister can be submitted to the Metropolitan Court of Budapest. The judicial review is limited as it only investigates whether substantial procedural provisions were violated or the reasoning was well grounded.

The court makes its judgement in a simplified procedure within 30 days and if it establishes an infringement, it repeals the Minister's decision and orders the Minister to repeat its procedure.

How to manage the FDI procedure?

11 July 2024

Taking into account the complexity of the FDI rules in Hungary (e.g. the existence of two sets of rules, the permanent and the temporary FDI regimes), a thorough assessment is needed in the structuring phase of M&A transactions to avoid any potential pitfalls.

The parties to a transaction should be prepared to address certain issues well in advance such as:

- checking complex and complicated structures as to whether it involves any FDI requirements,
- assessing whether the target company is active in any sectors or pursuing any activities deemed as sensitive for national security,
- inserting FDI approvals as condition precedent to closing of the transaction,

including a mechanism in the case the transaction is not approved (e.g. right of termination, break-up fee, costs sharing).

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

Permanent regime

The extension of the „foreign investor" definition under the permanent FDI control regime to cover EU and EFTA investors is not applicable since 1 June 2023 (the end of a 12 month-period from the end of the COVID-19 pandemic related state of emergency situation in Hungary).

Temporary regime

The temporary FDI regime was introduced in April 2020 in the context of the Covid-19 pandemic. The regime was extended and now is applicable for the duration of the war in Ukraine.

What are the key trends in FDI enforcement?

11 July 2024

The FDI decisions adopted by the Minister are not public, and any information is not disclosed about the reviews, irrespective of the fact that a transaction is approved or prohibited.

Based on the above, and in the absence of any official statistics or communication about FDI reviews, it is quite difficult to identify any trends or draw general conclusions about FDI decisions.

What are the recent legal

11 July 2024

developments?

Currently there are two foreign direct investment screening mechanisms applicable in Hungary. Besides the permanent FDI regime, a temporary FDI regime was introduced by the Hungarian Government with the aim of protecting Hungarian companies active in the relevant strategic sectors in the context of the Covid-19 pandemic. Such regime was further extended and is now applicable until the end of the state of emergency enacted due to the war in Ukraine.

The two regimes while having some similarities are not identical. Under the temporary FDI regime, transactions that do not involve a direct change in the ownership of the Hungarian entity qualifying as a "strategic company", carrying out strategic activities (e.g. a wide variety of activities such as building, tourism and waste management sectors, as well as 'traditional' strategic sectors, including among others energy, transport, communications) are not caught (i.e. any sale where there is a holding structure outside of Hungary) as well as intragroup corporate restructurings are exempt from the temporary FDI control.

The extension of the „foreign investor" definition due to COVID-19 under the permanent FDI control regime to cover EU and EFTA investors is not applicable since 1 June 2023 (the end of a 12 month-period from the end of the COVID-19 pandemic related state of emergency situation in Hungary).Recently, together with the extension of the application of the temporary FDI regime, the list of activities deemed as strategic activities was also extended.

As the FDI screening mechanism was used in several cases in the past in a protectionist manner, the compliance of the FDI regimes with EU laws was assessed by different EU authorities. The European Court of Justice (the "**ECJ**") has ruled recently in a landmark decision *(Xella Magyarország - C-106/22*) that there is no *carte blanche* for EU Member States to prohibit transactions under national FDI screening rules, the sheer fact that a third country entity is involved in the ownership chain of the investor is not sufficient alone for a veto, a fundamental interest of society must also be affected.

What future legal developments are expected?

11 July 2024

Based on the ECJ's decision referred above, we expect that the FDI regimes will be amended in order to ensure their compliance with fundamental EU law principles guaranteed by the EU Treaties, such as freedom of establishment and reflect the requirement of principle of proportionality in case of any restriction to be imposed. Therefore, the notification obligation under the temporary FDI regime in the case of

potential investments by genuine EU investors (without any link to third countries) should also be abolished as it is a clear infringement of fundamental principles of EU law.

As explained above, the temporary FDI regime is applicable only until the end of the state of emergency enacted by the Hungarian Government due to the war in Ukraine.

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Ireland

Key Features

Types of deals subject to the FDI regime

10 January 2025

In line with international and European developments, Ireland has introduced a new regime (the "**Regime**") to provide for a process to allow for certain transactions that may present risks to the security or public order of the State to be reviewed by the Minister for Enterprise, Trade and Employment (the "**Minister**"). The legal framework for the Regime is contained in the Screening of Third Country Transactions Act 2023 (the "**Act**") which came into force by Ministerial Order on 6 January 2025.

The Act covers transactions with all of the following characteristics:

1. a third country undertaking, or a person connected with such an undertaking, as a result of the transaction—
    a. acquires control of an asset or undertaking in the State, or
    b. changes the percentage of shares or voting rights it holds in an undertaking in the State—

i. from 25 per cent or less to more than 25 per cent, or

ii. from 50 per cent or less to more than 50 per cent;

2. the value of the transaction is equal to or greater than an amount to be specified under Irish law (or, in the absence of specification, €2,000,000 in a period of 12 months);

3. the same undertaking does not, directly or indirectly, control all the parties to the transaction; and

4. The transaction relates to:

   a. critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;

   b. critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009(15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;

   c. supply of critical inputs, including energy or raw materials, as well as food security;

   d. access to sensitive information, including personal data, or the ability to control such information; or

   e. the freedom and pluralism of the media.

Principal authorities	11 July 2024 The Minister.
Lookback period	11 July 2024 Up to five years from the date of completion of the transaction or 6 months from when the Minister becomes aware of the transaction, whichever is later. The Minister can also exercise a 'call in' power to review transactions which do not trigger the requirements to notify. This 'call in' power cannot be exercised for a non-notifiable transaction more than 15 months after the transaction has been completed.
Mandatory /	11 July 2024

voluntary filing	Mandatory for notifiable transactions, as defined in Section 9 of the Act and set out at 'Types of deals subject to the FDI regime' above.
Substantive test for intervention	11 July 2024 To 'call in' transactions for review (including transactions that are non-notifiable), the Minister must have reasonable grounds for believing that they would affect, or would be likely to affect, the security or public order of Ireland. Under the Act, the Minister cannot 'call in' transactions once 15 months has passed from the completion of the transaction.
Extra-territorial reach	10 January 2025 No, the Regime applies to shareholdings in Irish undertakings and assets which are physically located within the territory of Ireland, and in the case of an intangible asset, where it is owned, controlled or otherwise in the possession of an undertaking in Ireland.
Timeline for review (approximately)	11 July 2024 90 days, but may be extended to 135 days by the Minister.
Potential penalties	11 July 2024 A fine not exceeding €4,000,000 or imprisonment for a term not exceeding 5 years, or both.
FDI clearance necessary to close	11 July 2024 Yes for notifiable transactions. Where a screening notice has been issued by the Minister, the transaction cannot be completed until the Minister makes a screening decision approving the transaction.
Right to appeal	11 July 2024 Yes, to an independent adjudicator, as detailed in the Act. The Irish High Court can also decide points of law relating to the appeal.
Special measures in response to COVID-19	11 July 2024 No express reference to Covid-19.

Questions

Is FDI subject to restrictions, filing,	10 January 2025

or review?

In line with international and European developments, Ireland has introduced the Regime to provide for a process to allow for certain transactions that may present risks to the security or public order of the State to be reviewed by the Minister. The proposed legal framework for the Regime is contained in the Act which came into force by Ministerial Order on 6 January 2025.

What types of deals are subject to the FDI regime?

10 January 2025

The Regime covers transactions with all of the following characteristics:

1. A third country undertaking, or a person connected with such an undertaking, as a result of the transaction—
    a. acquires control of an asset or undertaking in the State, or
    b. changes the percentage of shares or voting rights it holds in an undertaking in the State—
        i. from 25 per cent or less to more than 25 per cent, or
        ii. from 50 per cent or less to more than 50 per cent;
3. The value of the transaction is equal to or greater than an amount to be specified under Irish law (or, in the absence of specification, €2,000,000 in a period of 12 months);
4. the same undertaking does not, directly or indirectly, control all the parties to the transaction; and
5. The transaction relates to:
    a. critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
    b. critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
    c. supply of critical inputs, including energy or raw materials, as well as food security;
    d. access to sensitive information, including personal data, or the ability to control such information; or
    e. the freedom and pluralism of the media.

	The Minister also has the power to 'call in' transactions for review (including transactions that are non-notifiable). In order to do so, the Minister must have reasonable grounds for believing that they would affect, or would be likely to affect, the security or public order of Ireland. Under the Act, the Minister cannot 'call in' transactions once 15 months has passed from the completion of the transaction.
Which are the principal authorities in charge of FDI?	11 July 2024 The Minister.
Is there a lookback period?	Up to five years from the date of completion of the transaction or 6 months from when the Minister becomes aware of the transaction, whichever is later.
Is the FDI filing voluntary or mandatory?	11 July 2024 Mandatory for notifiable transactions, as defined in Section 9 of the Act.
Extra-territorial reach and workarounds?	10 January 2025 No, insofar as the Regime relates to assets within Ireland where they are physically located within the territory of Ireland, and in the case of an intangible asset, where it is owned, controlled or otherwise in the possession of an undertaking in Ireland.
What is the FDI procedure?	11 July 2024 As soon as soon as practicable after commencing a review of a transaction, the Minister will provide all parties to the transaction, and any other person the Minister considers appropriate, with a Screening Notice" setting out, amongst other things, why the transaction is being reviewed. The Minister will then commence their review and issue a "Screening Decision" within a period of 90 days, but this period may be extended to 135 days by the Minister. During the review period, the Minister may issue a "notice of information" requiring further information from a party to the transaction. This has the effect of "stopping the clock" on the time periods set out above.
What are the	11 July 2024

penalties of the failure to file?	A fine not exceeding €4,000,000 or imprisonment for a term not exceeding 5 years, or both.
Is FDI clearance necessary to close the transaction?	11 July 2024 Yes for notifiable transactions. Where a screening notice has been issued by the Minister, the transaction cannot be completed until the Minister makes a screening decision approving the transaction.
Is there a right to appeal?	11 July 2024 Yes, to an independent adjudicator, as detailed in the Act. The Irish High Court can also decide points of law relating to the appeal.
How to manage the FDI procedure?	11 July 2024 The FDI procedure can be a key factor in M&A transactions, especially if target companies in the high-tech sector are involved. The parties should not underestimate the complexity and time required to complete the procedure. The parties should therefore make sure to address potential risks of delay or even failure of transactions from the outset, for example by: ◦ identifying whether the Irish target company is active in one of the listed strategic sectors, ◦ mapping the political landscape and preparing a strong storyline to explain the benefits of the transaction, ◦ proactively considering solutions to mitigate potential concerns, for example by offering certain commitments or carving-out highly strategic business operations, ◦ defining (deemed) clearance as a closing condition, ◦ including a right of termination in the event that the deal is not cleared before a certain long stop date, ◦ specifying how the parties will respond to a prohibition or instructions and who bears the costs, and ◦ considering a break-up fee to be paid by the buyer in the event of a prohibition.

Are there special measures to protect national assets in response to COVID-19?	11 July 2024 No specific references to Covid-19.
What are the key trends in FDI enforcement?	10 January 2025 There have not yet been any enforcement actions under it.
What are the recent legal developments?	10 January 2025 The Act came into force by Ministerial Order on 6 January 2025.
What future legal developments are expected?	10 January 2025 The Act empowers the Minister to make ministerial orders or regulations where required to address technical or policy issues as they arise.

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Key Features

Types of deals subject to the FDI regime	11 July 2024 Acquisition of control, acquisition of qualified stakes, corporate resolution impacting on ownership and disposal of strategic assets, and incorporation of companies.
Principal authorities	11 July 2024 Presidency of the Council of Ministers.
Lookback period	11 July 2024 No time limit.
Mandatory / voluntary filing	11 July 2024 If the transaction falls within the scope of FDI rules, then notification is mandatory.
Substantive test for intervention	11 July 2024 The general test concerns the assessment of whether the deal generates current or potential threats to national security and public order, or is prejudicial to essential interests of the State.
Extra-territorial reach	11 July 2024 No.
Timeline for review (approximately)	11 July 2024 Depending on the sectors, 45 working days or 30 working days – this term can be suspended in case of a request for information or EU coordination.
Potential penalties	11 July 2024 Pecuniary penalties, unwinding of the transaction, voidness of acts
FDI clearance necessary to close	11 July 2024 Yes.
Right to appeal	11 July 2024

Yes, FDI decisions can be appealed before the administrative judges.

Special measures in response to COVID-19

11 July 2024

A special temporary regime was introduced during the COVID-19 emergency and applied until 31 December 2022. No specific COVID-related measures are currently in place.

Questions

Is FDI subject to restrictions, filing, or review?

11 July 2024

FDI is not subject to restrictions. However for certain type of transactions occurring in sectors considered as strategic, FDI is subject to a mandatory notification and review procedure.

What types of deals are subject to the FDI regime?

11 July 2024

Covered transaction structures

In principle, the FDI regime applies to any type of M&A transaction.

1. **Defence and national security:**
    - **Corporate resolution** resulting in a change in the ownership, control, or availability of the strategic assets, including those determining the merger, demerger, transfer of going concern of controlled companies, transfer abroad of the company business seat, change in the corporate object, unwinding of the company, change in certain statutory clauses, use of the assets as collateral.
    - **Share deals** resulting in the acquisition by non-EU entities or EU (including Italian) entities of:
        - for listed companies 3% stake and further increases leading to a stake above 5%, 10%, 15%, 20% 25% or 50%.
        - for non-listed companies, 5% stake and further increases leading to a stake above 10%, 15%, 20% 25% or 50%.
    - **Incorporation of a new company** holding strategic assets**.**
2. **5G**

- **Acquisition** by EU (including Italian) and non-EU entities, through agreements, of goods or services connected with the design, implementation and maintenance of communication services based on 5G technology as well as of high-tech components necessary for the purpose indicated above and of goods and services relevant for cybersecurity and cloud technology.

3. **Energy, communication, transportation, and specific sectors covered by Reg. 452/2019 (health, agriculture and food, financial, credit, insurance):**

   - **Corporate resolutions** in favor of non-EU and EU (including Italian) entities resulting in a change in the ownership, control, availability or destination of the strategic assets, including those determining the merger, demerger, transfer of going concern of controlled companies, transfer abroad of the company business seat, change in the corporate object, unwinding of the company, change in certain statutory clauses, use of the assets as collateral.
   - **Acquisition of control** over a company holding strategic assets by non-EU and EU entities (including Italian).
   - **Share deal** resulting in the acquisition by non-EU entities of 10% share capital of voting rights by means of an investment of at least €1 million and further acquisitions leading to a stake above 15%, 20%, 25% or 50% regardless of the amount of the investment.
   - **Incorporation of a new company** holding strategic assets if non-EU entities hold a participation equal to 10% of share capital or voting rights.

4. **Other sectors covered by Reg 2019/452 (water, media, data processing/storage, aerospace, electoral infrastructure, AI and robotics, dual use):**

   - **Corporate resolution** in favor of non-EU entities resulting in a change in the ownership, control, or availability, of the strategic assets, including those determining the merger, demerger,

transfer of going concern of controlled companies, use of the assets as collateral, transfer abroad of the company business seat.

- **Corporate resolution** resulting in a change of assets destination, change in the corporate object, unwinding of the company, change in certain statutory clauses.
- **Acquisition of control** over a company holding strategic assets by non-EU entities.
- **Share deal** resulting in the acquisition by non-EU entities of 10% share capital of voting rights by means of an investment of at least €1 million and further acquisitions leasing to a stake above 15%, 20%, 25% or 50% regardless of the amount of the investment.
- **Incorporation of a new company** holding strategic assets, if non-EU entities hold a share of the capital or voting rights of at least 10%.

Internal restructurings are also covered by FDI rules and subject to notification although less likely to determine the exercise of special power.

Which are the principal authorities in charge of FDI?

11 July 2024

The Presidency of the Council of Ministers.

The review of the transaction is coordinated by the Department of Administrative Coordination, which is an office within the Presidency of the Council of Ministers.

The Department of Administrative Coordination coordinates the review which also involves the so-called 'Coordination Group', the ministry responsible, depending on the sector involved, for the preliminary investigation and the proposal for the exercise of the special powers.

The Coordination Group is a committee composed, inter alia, by the Secretary of the Presidency of the Council of Minister, as well as by the chiefs of the Offices of the Ministers. The Coordination Group is in particular responsible for the identification of the minister competent for reviewing the transaction, depending on the sectors concerned.

Is there a lookback period?	The Presidency has the power to review, ex officio, all transactions which have not been notified in violation of FDI rules. No time limitation is provided for the exercise of this power.
Is the FDI filing voluntary or mandatory?	11 July 2024 If the transaction falls within the scope of FDI rules, then notification is mandatory.
Extra-territorial reach and workarounds?	11 July 2024 No.
What is the FDI procedure?	11 July 2024 The procedure differs depending on the sector and type of deal concerned by the transaction. 1. **Defense and national security** Corporate resolutions need to be notified to the Presidency before their adoption. For share deals the law indicates that filing shall occur within 10 working days from the acquisition. However, the law is not entirely clear on this point as it indicates that notification shall concern the acquisition project; it is therefore customary to file after the signing of the agreement and then suspend closing until clearance. Incorporation of a new company, no clear indication is provided in the law. The general interpretation is that notification shall occur before implementing the incorporation of the company. In all cases, the Presidency has 45 working days to review the filing. Such term can be suspended once, for a maximum of 10 working days, if additional information is requested from the parties concerned, and for a maximum of 20 working days, if information is sought from third parties. The term can be further suspended for the operation of the EU coordination mechanism. 2. **5G** Before implementing the acquisition, the company intending to acquire goods or services in this sector needs to notify an annual plan providing

information on, inter alia, plan of purchases, potential suppliers, information on active contracts, any other information useful to provide an overview on developments of digitization systems.

The annual plan needs to be notified every year prior to its implementation. Updates to the plan may also be notified quarterly.

The Presidency then has 30 working days to review the filing. This term can be prolonged up to 20 business days in total in case an in-depth analysis is necessary and of further 20 working days for particularly complex cases.

Such term can be further suspended once, for a maximum of 10 working days, if information is requested from the notifying party, and for a maximum of 20 working days, if information is sought from third parties.

3. **Energy, communication, transportation and specific sectors covered by Reg. 452/2019 (health, agriculture and food, financial, credit, insurance)**

Corporate resolutions need to be notified within 10 working day from their adoption and in any case before their implementation.

For share deals (acquisition of control or acquisition of a qualified stake), the law indicates that filing shall occur within 10 working days from the acquisition. However, the law is not entirely clear on this point

as it indicates that notification shall concern the acquisition project; it is therefore customary to file after the signing of the agreement and then suspend closing until clearance.

For incorporation of a new company, no clear indication is provided in the law. The general interpretation is that notification shall occur before implementing the incorporation of the company.

In all cases, the Presidency then has 45 working days to review the filing. Such term can be suspended once, for a maximum of 10 working days, if information is requested from the parties involved, and for a maximum of 20 working days, if information is sought from third parties.

4. **Other sectors covered by Reg 2019/452 (water, media, data processing/storage, aerospace, electoral infrastructure, AI and robotics, dual use)**

Corporate resolutions need to be notified within 10 working day from their adoption and in any case before their implementation.

For share deals (acquisition of control or acquisition of a qualified stake), the law indicates that filing shall occur within 10 working days from the acquisition. However, the law is not entirely clear on this point as it indicates that notification shall concern the acquisition project, it is therefore customary to file after the signing of the agreement and then suspend closing until clearance.

Incorporation of a new company, no clear indication is provided in the law. The general interpretation is that notification shall occur before implementing the incorporation of the company.

In all cases, the Presidency then has 45 working days to review the filing. Such term can be suspended once, for a maximum of 10 working days, if information is requested from the parties involved, and for a maximum of 20 working days, if information is sought from third parties.

What are the penalties of the failure to file?

11 July 2024

transaction and in any case not below 1% of the combined turnover achieved by the companies involved in the transaction.

In the 5G sector, fines can be up to 3% of the turnover of the company under a duty to notify.

In addition to financial penalties, in all sectors, acts or resolution adopted in violation of a duty to notify are considered null and the Presidency can also impose an order restoring the situation existing prior to the infringement.

In the 5G sector, the Presidency has the possibility to apply periodic penalties for every month of delay in the implementation of an order to restore the situation existing prior to the infringement. Penalties amount to 1/12 of the fine applicable for failure to notify.

Is FDI clearance necessary to close the transaction?

11 July 2024

The law provides that until clearance voting rights shall be suspended and only after clearance can the transaction be implemented.

Is there a right to appeal?

11 July 2024

FDI decisions can be challenged at first instance before the Regional Administrative Tribunal of Rome. First instance judgments can be appealed before the Council of State.

How to manage

11 July 2024

the FDI procedure?	The parties to an M&A transaction involving strategic assets need to factor in the timing for FDI filing preparation and review. Depending on the kind of activity carried out by the target (e.g., active in the defense, health sector, R&D, agriculture, and food), parties shall also account for the possibility that the procedure be suspended as a result of a request for information by the Presidency.
Are there special measures to protect national assets in response to COVID-19?	11 July 2024 No.
What are the key trends in FDI enforcement?	11 July 2024 The increase in the number of filings experienced since 2020 was confirmed in 2022 when the number of filings submitted to the Presidency rose 22%, jumping from 496 notification in 2021 to 608 in 2022. Most of the filings concerned the sectors recently captured by FDI rules as a result of implementation of Reg. 452/2019. More details will be made available in the annual report on enforcement of FDI rules, which is likely to be published soon. As a general trend, few transactions have been vetoed – examples including: ◦ Attempted acquisition by ChemChina's Syngenta of Verisem, an Italian company active in the seeds production which was vetoed on grounds of national security. This decision has been recently (January 2023) confirmed by the Council of State. ◦ Attempted acquisition of an additional stake by Chinese Effort Intelligent Equipment in Robox, an Italian company active in the design and production of electronic equipment, programming languages and robotics developments (June 2022). ◦ Attempted acquisition by Mars, a Chinese company, of 75% of share capital in Alpi Aviation, a company active in the drone production. This case is interesting as it was investigated ex officio by the Presidency because the company failed to notify the transaction. However, no sanction for failure to notify was

imposed while the company was forced to restore the situation existing before the transaction and the acts adopted in the meantime were declared null (March 2022).

As the decisions above indicate, generally the level of scrutiny and the tendency to intervene to block the transaction has been particularly significant when Chinese investors were involved.

What are the recent legal developments?

11 July 2024

Recent important integration to the FDI rules was introduced as of March 2022 which expanded the scope of the law to cover also greenfield investments. In addition, an amendment was introduced in respect of the 5G sector providing that filing should no longer concern each single acquisition but rather the annual plan of purchases, which should in principle allow the authority to gather a full view over the activity planned and carried out by investors in this sector. Finally, in the energy sector it was specified that strategic assets also include those which form the object of concessions for large hydroelectric derivations and for cultivation of geothermal resources.

Lastly, a pre-filing procedure was introduced that may allow the parties to gather the view of the Presidency on whether a given transaction falls within the scope of FDI, and the likelihood that the transaction might entail the exercise of the special power.

Depending on the facts of the case, this is an option that might also be considered, although it risks an increase in the length of the overall procedure. Pre-filing procedure can indeed last up until 30 days.

What future legal developments are expected?

11 July 2024

The tendency in the last years has been to extend progressively the scope of the law in terms of both the categories of strategic assets and of type of deals covered. We consider it likely that this trend will continue in the near future and FDI rules will be used to protect those sectors or goods which are considered strategic also depending on the geo-political context.

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Luxembourg

Key Features

Types of deals subject to the FDI regime	11 July 2024 Any investment in a **Luxembourg law governed entity** ("**Entity**") **carrying out Critical Activities** (as defined below) **in Luxembourg** and that grants an investor (natural or legal person) who is not a national of a Member State or of the European Economic Area ("**Foreign Investor**"), the **Control** (as defined below) either alone, in concert or through an intermediary of such Entity (each being a foreign direct investment or "**FDI**") is within the scope of the FDI regime. An exception is made for acquisitions of securities of Entities made with the intention of making a financial investment and which do not enable the Foreign Investor to exercise, directly or indirectly, Control over such Entity ("**Portfolio Investments**").
Principal authorities	11 July 2024 For the FDI procedure itself the minister responsible for Economic Affairs (the "**Minister**") and as regards cooperation with the other Member States and the European Commission, the Minister for Foreign and European Affairs.
Lookback period	11 July 2024 None.
Mandatory /	11 July 2024

voluntary filing	A **mandatory notification** to the Minister is required for every FDI prior to the investment being made. Additionally, if following a change in capital distribution, a Foreign Investor crosses a threshold of 25 per cent of the voting rights in an Entity, a mandatory notification has to be made within 15 calendar days of such crossing. There is **no voluntary notification procedure.** Upon receipt of a notification, the Minister will assess the documents submitted to it and decide whether a screening procedure is necessary (the "**Screening Procedure**") or whether the FDI may be carried out.
Substantive test for intervention	11 July 2024 There will be reasonable grounds for intervention (and, as the case may be, prohibition of the FDI) from the Minister if the FDI grants Control or at least 25 percent of the Entity's voting rights to a Foreign Investor in an Entity whose activities are Critical Activities (as defined below) and if such investment is likely to concern national security or the public order. Consideration shall also be given to the Screening Factors (as defined below.
Extra-territorial reach	11 July 2024 Where a Screening Procedure is initiated, the Minister for Foreign and European affairs shall notify the other Member States and the European Commission.
Timeline for review (approximately)	11 July 2024 **First step – Notification** : maximum two months after the receipt of a notification to decide whether or not a Screening Procedure is required. **Second Step (if needed) – Screening Procedure**: within 60 calendar days after its initiation. The mentioned periods shall be suspended until any additional information that has been requested is obtained.
Potential penalties	11 July 2024 Suspension of voting rights and of the exercise of Control over the Entity for the Foreign Investor until the situation is regularised or restoration of the previous situation at the Foreign Investor's expense.

If conditions are attached to the authorization of the FDI and are not complied with, the Minister may also order specific sanctions including the withdrawal of the authorisation.

If the Foreign Investor does not comply with the injunctions imposed on it by the Minister within one month of the notification, the Minister may impose a fine of **up to EUR 1,000,000 if the Foreign Investor is a natural person and up to EUR 5,000,000 if it is a legal entity.**

FDI clearance necessary to close

11 July 2024

In order to close the acquisition the Minister's authorization is, in principle, not needed unless in the event the Screening Procedure is triggered, in which case the FDI may not be made until a decision authorizing the FDI in question has been taken.

If the Foreign Investor closes the acquisition without notifying the Minister or without his or her authorization, the above-mentioned sanctions can be imposed.

Right to appeal

11 July 2024

Yes, the Minister's decision may be appealed before the Luxembourg Administrative Court. The appeal must be lodged within one month of the date of notification of the decision, failing which it shall be barred.

Special measures in response to COVID-19

11 July 2024

No.

Questions

Is FDI subject to restrictions, filing, or review?

11 July 2024

Through Luxembourg Law, which passed on 14 July 2023 and entered into force on 1 September 2023, a national screening mechanism has been established with respect to foreign direct investment in the Grand Duchy of Luxembourg that may affect security or public order (the "**Law**"). For the purpose of implementing EU Regulation 2019/452 establishing a framework for screening direct investment in the Union, all FDIs, as defined above, are subject to notification and, as the case may be, authorization through a Screening Procedure by the Minister in case the FDI is likely to be detrimental to security or public order.

The Screening Procedure is undertaken by the Minister which can approve, deny, or condition the authorization for the FDI. If the FDI is conditioned, the decision shall be accompanied by an obligation for the Foreign Investor to report on the implementation of these conditions, in accordance with the terms and conditions set by the Minister in the authorization.

What types of deals are subject to the FDI regime?

11 July 2024

Investments in Entities carrying out in Luxembourg an activity listed below (each a "Critical Activity") made by Foreign Investors with the aim of exercising Control over these Entities:

- the development, exploitation, and trade of dual-use items (i.e., items, including software and technology, which can be used for both civil and military purposes);
- in the energy sector: electricity production and distribution, gas conditioning and distribution and oil storage and trading; quantum and nuclear technologies;
- in the transport sector: land transport, water transport and air transport;
- in the water sector: the abstraction, treatment and distribution of water, the collection and treatment of waste water, and the collection, treatment and disposal of waste;
- in the health sector: health care activities and medical analysis laboratories; nanotechnologies and biotechnologies;
- in the communications sector: wireline telecommunications, and wireless telecommunications, satellite telecommunications and postal and courier services;
- in the data processing or storage sector: computer facilities for data processing, hosting of information services and internet portals; technologies concerning artificial intelligence, semiconductors, cybersecurity;
- in the aerospace sector: space operations and exploitation of space resources;

- in the defense sector: activities related to national defense; production of and trade in arms, ammunition, powder and explosive substances for military purposes or war materials;
- in the financial sector: the activities of the central bank as well as infrastructures and systems for the exchange, payment and settlement of financial instruments;
- in the media sector: publishing, audio-visual and broadcasting activities;
- in the agri-food sector: activities related to food safety.

As well as:

- research activities directly related to the activities listed above;
- production activities directly linked to the activities listed above;
- related activities that may allow access to sensitive information, including personal data, that are directly linked to the activities listed above;
- related activities that may provide access to the premises where the activities listed above are carried out.

"Control" means, for the purpose of this Law:

- to have directly or indirectly:
- a majority of the voting rights of the shareholders or partners of an Entity; or
- the right to appoint or remove the majority of the members of the management or supervisory body of an Entity and to be at the same time a shareholder or partner of that Entity; or
- to be a shareholder or associate of an Entity and to control, by virtue of an agreement with other shareholders or partners of that entity, a majority of the voting rights of the shareholders or partners of that Entity;
- or, directly or indirectly, crossing the threshold of 25 per cent of the voting rights of an Entity.

Which are the principal authorities in charge of FDI?	11 July 2024 As regards the FDI procedure itself, the Minister. As regards cooperation with the other Member States and the European Commission, the Minister for Foreign and European Affairs (single national contact point for the exchange of information).
Is there a lookback period?	No.
Is the FDI filing voluntary or mandatory?	11 July 2024 **Mandatory** for any FDI prior to the investment being made. Additionally, if following a change in capital distribution a Foreign Investor crosses a threshold of 25 per cent of the voting rights in an Entity, a mandatory notification has to be made within 15 calendar days of such crossing. There is **no voluntary notification procedure**
Extra-territorial reach and workarounds?	11 July 2024 Where a Screening Procedure is initiated, the Minister for Foreign and European affairs shall notify the other Member States and the European Commission. If a FDI planned or carried out in another Member State is likely to be detrimental to the security or public order of Luxembourg, the Minister responsible for Foreign and European affairs may request information from the Member State in which the FDI is planned or has been carried out.
What is the FDI procedure?	11 July 2024 **First step – notification:** The FDI procedure has to be notified by the Foreign Investor to the Minister with the notification provided to the Minister containing the following information: ◦ the ownership structure of the Foreign Investor and Entity prior to the making of the FDI or following events which have changed the capital distribution including information on the beneficial owners (as defined in Article 1 paragraph 7 of the law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended) and on the capital holding;

- the approximate value of FDI;
- the products, services and business operations of the Foreign Investor and the Entity;
- the countries in which the Foreign Investor and Entity carry out commercial activities;
- the financing of FDI and its source; and
- the date on which the FDI is planned for or has been made.

If the Foreign Investor has not provided the information mentioned supra, it shall be requested to provide the missing information without undue delay. If the information obtained from the Foreign Investor does not allow a decision to be taken on whether a Screening Procedure is required, the Foreign Investor shall be requested to provide requested additional information.

Thereafter, the Minister shall decide whether or not the FDI shall be subject to a Screening Procedure within two months of the notification.

Second step - Screening Procedure:

During the Screening Procedure the Minister will determine whether the FDI is likely to harm national security or public order of Luxembourg. In determining whether such an investment is likely to have the above mentioned-impact, consideration shall be given to its potential effects on ("**Screening Factors**"):

- the integrity, security and continuity of supply of critical infrastructures, whether physical or virtual, related to the Critical Activities;
- the sustainability of activities related to critical technologies and dual-use items;
- the supply of essential inputs, including raw materials and food security;
- access to sensitive information, including personal data, or the ability to control such information; and
- the freedom and pluralism of the media.

In particular, the following may also be taken into account, each time in relation to the Foreign Investor:

- government of a third country, including public bodies or the armed forces;
- the fact that it has already been involved in activities detrimental to security or public order in a Member State; and
- the fact that there is a serious risk that it is engaged in illegal or criminal activities.

After taking the Screening Factors into consideration the Minister will take a decision within 60 calendar days after the Screening Procedure is initiated either to authorize, to attach conditions to the investment or to prohibit it. In the event of missing information, this period shall be suspended until the additional information that has been requested is obtained.

What are the penalties of the failure to file?

11 July 2024

If a FDI has been made without a notification or without an authorization having been obtained in the context of a Screening Procedure, the Minister may suspend the exercise of the voting rights relating to the Entity and conferring Control over the Entity until the situation has been regularized, and the Minister may order the Foreign Investor to modify the transaction or to have the previous situation restored at its own expense. If voting rights in an Entity have been exercised in the meantime, the Tribunal d'Arrondissement sitting in commercial matters may declare the nullity of all or part of the decisions made by the Foreign Investor at general meetings.

Where the conditions attached to authorisation of the FDI are not complied with, the Minister may:

- order the Foreign Investor to comply with the conditions set out in the authorization, within a deadline that it shall determine;
- order the Foreign Investor to comply with requirements in substitution for the obligation not fulfilled, including the restoration of the situation prior to the non-compliance or the transfer of all or part of the activities – all within a deadline that it will determine;

- suspend the exercise of the voting rights attached to the Entity and which confer Control over such Entity until the above-mentioned conditions have been met and implemented;
- withdraw the authorization.

If the Foreign Investor does not comply with the injunctions mentioned above within one month of the notification, the Minister may impose a fine of up to EUR 1,000,000 if the Foreign Investor is a natural person and up to EUR 5,000,000 if the Foreign Investor is a legal entity.

Is FDI clearance necessary to close the transaction?

11 July 2024

In order to close the acquisition, the Minister's authorization is in principle not needed unless in the event the Screening Procedure is triggered, in which case the FDI may not be made until a decision authorizing the FDI in question has been taken.

If the Foreign Investor closes the acquisition without notifying the Minister or without his or her authorization, the above-mentioned sanctions can be imposed

Is there a right to appeal?

11 July 2024

The Minister's decision may be appealed before the Luxembourg Administrative Court. The appeal must be lodged within one month of the date of notification of the decision, failing which it shall be barred.

How to manage the FDI procedure?

11 July 2024

When it comes to M&A deals, the FDI process can be crucial. The complexity and length of the process should not be underestimated by the parties. The parties should therefore make sure to address potential risks of delay or even failure of transactions from the outset, for example by:

- Identifying whether the Entity is active in one of the listed Critical Activities;
- Mapping the political landscape and preparing a strong storyline to explain the benefits of the transaction;
- Proactively considering solutions to mitigate potential concerns, for example by offering certain commitments or carving-out highly strategic business operations;

- Defining (deemed) clearance as a closing condition;
- Including a right of termination in the event that the deal is not cleared before a certain long stop date;
- Specifying how the parties will respond to a prohibition or instructions as to who will bear the costs; and
- Considering a break-up fee to be paid by the buyer in the event of a prohibition.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

The Law does not expressly provide any special measures to protect national assets in response to COVID-19.

What are the key trends in FDI enforcement?

11 July 2024

On the one hand, Luxembourg's goal in establishing a screening mechanism is to control FDI in critical infrastructure that have the potential to be a threat to national security or public order. On the other hand, Luxembourg also wants to maintain its attractiveness for Foreign Investors which is of high importance for the country. This is shown by the fact that the Minister, for example, tries to reach a decision as quickly as possible within 60 calendar days after the Screening Procedure has been initiated. This is contrast toneighbouring country Germany where the process can take up to 6 months or even longer. Luxembourg also goes less far in terms of possible sanctions in case of violations – noting thatin the United Kingdom, investors who are natural persons may face imprisonment for non-compliance. The explanatory memorandum of the Bill also shows the legislator's effort to ensure the greatest possible transparency of the entire process, including the possible sanctions but also the Foreign Investors' rights. Finally, Foreign Investors should not be deterred by ann overly strict regime and too costly bureaucracy.

What are the recent legal developments?

11 July 2024

As mentioned above, the Law entered into force on 1 September 2023. However, there are neither legal reports nor reports on the impact on the Luxembourg economy from an official site (e.g., the responsible ministry or the Luxembourg Parliament) publicly available.

What future legal developments are expected?

11 July 2024

With no reporting available, future legal developments are difficult to predict but future impacts on the Luxembourg economy are closely monitored.

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Key Features

Types of deals subject to the FDI regime

30 August 2024

Investment screening regimes implemented in Dutch law aim to protect the national security and continuity of certain vital processes in the Netherlands. Such screening regimes focus on proposed investments in, acquisitions or transfers of, target businesses (each a "**Transaction**") that are active in "vital processes", "sensitive technology", "management of high-tech business campuses" and the "telecoms-, electricity- and gassectors". Typically, Transactions only trigger investment screening if certain thresholds are met.

N.B.: This FDI Legal Guide focuses on investment screening regimes driven by legislation aimed at protecting the Dutch national security. When engaging in M&A in the Netherlands, additional considerations may need to be taken into account based on e.g. *tax structuring*, financial regulatory and anti-trust laws.

Principal authorities

30 August 2024

The Dutch Minister of Economic Affairs and Climate (*Minister van Economische Zaken en Klimaat*) and the Investment Assessment Agency (*Bureau Toetsing Investeringen*, the "**BTI**", which is part of the Dutch Ministry of Economic Affairs and Climate).

Lookback period

30 August 2024

Vifo Act

If the BTI is of the opinion that a Transaction falling under the scope of the Vifo Act (*Wet veiligheidstoets nvesteringen, fusies en overnames, the* "**Vifo Act**") is completed without filing it with the BTI, it may, up to three months after the Transaction became known to it, require the relevant parties to file the Transaction.

Telecoms Act

The BTI is entitled to investigate Transactions that have not been filed in accordance with the Telecoms Act (*Telecommunicatiewet*, "**Telecoms Act**"), but only within eight months after becoming aware of any facts or circumstances on the basis of which it believes the public interest may be threatened.

Electricity and Gas Acts

Dutch law does not stipulate a specific lookback period for the Electricity Act and/or Gas Act (*Elektriciteitswet and Gas wet,* **"Electricity and Gas Acts"**).

Mandatory / voluntary filing

30 August 2024

All filing obligations under Dutch investment screening regimes are mandatory. If parties are uncertain as to whether a filing is required in relation to a Transaction, it is possible to informally discuss such Transaction with the BTI (on a no-names basis).

Substantive test

30 August 2024

for intervention	All Dutch investment screening regimes within the scope of this FDI Legal Guide focus on the Dutch national security, whereas the Electricity and Gas Acts also focus on the security of supply. Such Transactions can be prohibited or conditions can be imposed if the BTI deems that the national security and/or security of supply (as applicable) is at risk. The screening procedures typically focus on the acquirer, whereby the BTI shall, amongst others, take into account (the transparency of) the acquirer's ownership structure, the geopolitical situation in its country of residence (including security situations), current sanctions against the acquirer, its track record in running businesses in the relevant sector and whether it has committed any criminal offences.
Extra-territorial reach	30 August 2024 The Dutch investment screening regimes apply irrespective of the nationality of the investor (so also to Dutch investors), to direct or indirect Transactions in relation to businesses that are located / operating in the Netherlands.
Timeline for review (approximately)	30 August 2024 **Vifo Act** ◦ After the filing of a Transaction, the BTI must decide within eight weeks whether a screening decision is required (phase 1). If a screening decision is required and the application for such decision has been submitted by the acquirer and the target, the BTI must in principle decide on the application within eight weeks (phase 2). ◦ The deadlines for each of these phases can be extended if further investigation is required, but such extension is in the aggregate limited to six months (and to nine months for Transactions involving a non-EU investor). **Telecoms Act** ◦ Eight weeks prior to the envisaged completion date, the acquirer must file a Transaction with the BTI. During these eight weeks, the BTI can investigate the Transaction. ◦ This period can be extended by six months.

Electricity and Gas Acts

- Four months prior to the envisaged completion date, the relevant parties must file the Transaction with the BTI. During this period, the BTI can investigate the Transaction.

- Any conditions that the BTI wishes to impose in respect of the Transaction must be approved by the European Commission. If the European Commission does not respond within two months, the relevant condition(s) may be imposed by the BTI without approval.

Potential penalties

30 August 2024

Vifo Act

If the filing and/or standstill obligation under the Vifo Act is not complied with, a penalty of up to EUR 1,030,000 (reviewed annually) or 10% of the turnover of the infringing undertaking (potentially the entire group's turnover) can be imposed.

Transactions that have been completed in breach of a decision of the BTI are void (*nietig*), unless the Transaction was completed by way of a merger or through a regulated market in which case the Transaction is voidable by a court order.

Telecoms Act

If the filing obligation under the Telecoms Act is not (timely) complied with, the BTI can impose a penalty amounting to the highest of EUR 900,000 or 1% of the revenue. Moreover, a Transaction that has not been filed can nevertheless be prohibited in which case the Transaction must either be reversed or the acquired interest must be decreased below the threshold of 'decisive control' (see 'What types of deals are subject to the FDI regime?').

Any Transaction that is completed in breach of a decision of the BTI is void (unless completed through a regulated market in which case the acquired interest must be decreased below the threshold of 'decisive control').

Electricity and Gas Acts

Any Transaction carried out in breach of the filing obligation set out in the Electricity and Gas Acts is voidable by a court order. The Electricity and Gas Acts do not provide for any monetary penalties if such obligation is not complied with.

FDI clearance necessary to close

30 August 2024

Vifo Act

A mandatory standstill period applies before the Transaction can be completed.

Telecoms Act

Although no explicit standstill obligation applies, a Transaction that has been completed prior to obtaining clearance can, nevertheless, be prohibited by the BTI in which case the Transaction must either be reversed or the acquired interest must be decreased below the threshold of 'decisive control'.

Electricity and Gas Acts

Although no formal approval from the BTI applies prior to completing the Transaction, the filing is not optional.

Right to appeal

30 August 2024

Parties to a Transaction have objection/appeal rights under each of the Vifo Act, Telecoms Act and Electricity and Gas Acts in accordance with Dutch administrative law, but the relevant procedures slightly differ under each of the relevant acts.

Special measures in response to COVID-19

11 July 2024

Not Applicable

Questions

Is FDI subject to restrictions, filing, or review?

30 August 2024

Dutch investment screening regimes apply irrespective of the nationality/residency of the investor. The Dutch investment screening regimes focus on direct and indirect investments in, or acquisitions, of

businesses that are active in (i) vital processes, sensitive technology, management of high-tech business campuses and (ii) the telecoms sector and (iii) the electricity / gas sector.

Three Dutch law investment screening regimes are currently in force and effect: (i) a screening regime relating to Transactions with respect to businesses engaged in vital processes, sensitive technology or the management of high-tech business campuses (the Vifo Act); and two sector focused investment screening regimes relating to Transactions with respect to businesses in the (ii) electricity / gas sector (the Electricity and Gas Acts) and (iii) telecoms sector (the Telecoms Act).

If a Transaction is subject to the Vifo Act, Telecoms Act or the Electricity and Gas Acts, such Transaction must be filed with the BTI, which will investigate the Transaction and can prohibit such Transaction or impose conditions in relation to such Transaction. The filing obligation is typically only triggered if certain thresholds are met.

What types of deals are subject to the FDI regime?

30 August 2024

Vifo Act

The Vifo Act applies to both direct and indirect Transactions in relation to target businesses that are established in the Netherlands and active in vital processes, (highly) sensitive technology and the management of high-tech business campuses:

Vital processes comprise (i) the transport of heat, (ii) nuclear installations, (iii) certain air transport activities relating to Schiphol airport, (iv) Harbor Master's Division of the Port of Rotterdam, (v) significant banks, (vi) certain infrastructure for the financial markets, (vii) extractable energy (a holder of a permit for extraction of natural gas at the Groningen gas field, currently NAM, or GasTerra) and (viii) storage of natural gas and substances.

Sensitive technology comprises certain (i) dual use items the export of which requires an export permit and (ii) military goods. In addition, the Decree scope sensitive technology (*Besluit toepassingsbereik sensitieve technologie*) has been enacted which further determines that quantum technology, photonics technology, semiconductor technology and high assurance products, as well as a selection of dual-use and military goods, are considered "*highly sensitive*" technologies, for which lower thresholds apply. A target business is considered 'active' in (highly)

sensitive technology if it conducts research on or otherwise exploits (e.g. develops, processes or produces) such technology with a commercial objective in the Netherlands.

A manager of a high-tech business campus is a business that operates a site where (i) multiple businesses are located and (ii) public-private cooperation (*publiek-private samenwerking*) takes place in respect of technologies and applications that are of economic and strategic importance for the Netherlands.

The Vifo Act applies to share Transactions (including (de)mergers and creating joint ventures) as well as asset Transactions, which result in a person or company (i) obtaining control (through exercise of the majority of the votes in the general meeting, determining the majority of the management board, veto rights or otherwise) over a target business that (a) operates / supplies one or more vital processes, (b) is active in sensitive technology or (c) is a manager of a high-tech business campus and (ii) obtaining or increasing significant influence over a target business that is active in "*highly sensitive*" technology (thresholds are 10%, 20% and 25% of the voting rights, but such influence can also consist of the right to nominate one or more members of the management board).

As part of the screening, the BTI will assess whether the Transaction can pose a risk to the Dutch national security and will consider, amongst others, the acquirer's track record with respect to criminal offences, (the transparency of) its ownership structure, the geopolitical situation in its country of residence (including security situations), current sanctions against the acquirer, its financial stability and its reputation.

Greenfield investments in the Netherlands do not fall within the scope of the Vifo Act.

Telecoms Act

The Telecoms Act applies to both direct and indirect Transactions in relation to businesses that are active in the Dutch telecom sector (referred to as 'telecom parties'). A telecom party is a business established in the Netherlands, being (a holder of decisive control in) a provider of (i) internet and/or telephone access services to end-users in the Netherlands, (ii) access to an electronic communications network to end-users in the Netherlands, (iii) an internet exchange point, (iv) hosting services (domain names with an ".nl"-extension), (v) data centre services (other than for a business' own use), (vi) qualified trusted

services in accordance with Regulation (EU) No 910/2014 (eIDAS) and (vii) electronic communications services, an electronic communications network, data centre services or trusted services to the (a) Dutch General Intelligence and Security Service, (b) Dutch Ministry of Defense, (c) Dutch Military Intelligence and Security Service, (d) Dutch National Coordinator for Counterterrorism and Security or (e) Dutch National Police. The Decree regarding undesired control in the telecom sector (*Besluit ongewenste zeggenschap telecommunicatie*) stipulates certain thresholds for services (i)–(v), and a combined threshold applies when multiple telecoms services are provided.

The Telecoms Act applies to share Transactions (including (de)mergers and creating joint ventures) as well as asset Transactions which result in a person or company obtaining decisive control over a telecoms party (e.g. through exercise of 30% or more of the votes in the general meeting, determining the majority of the management board, veto rights or otherwise).

As part of the screening, the BTI will assess whether the Transaction can pose a risk to the Dutch public interest and consider, amongst others, (the transparency of) the acquirer's ownership structure, the geopolitical situation in its country of residence (including security situations), current sanctions against the acquirer, its track record with respect to infringements and disruptions of any relevant services (e.g. in terms of availability, confidentiality or reliability) and its reputation.

Electricity and Gas Acts

The Electricity and Gas Acts apply in the event of a change of control in respect of (a (manager of) an (i) electricity generating facility with a nominal electrical capacity exceeding 250 MW and (ii) LNG installation (i.e. an installation used for liquefaction of gas, or for importing, offloading, or regasification of liquefied gas, including ancillary services and temporary storage necessary for the process or regasification and subsequent delivery to the transmission system, excluding those portions of the installation used for storage).

Whether control is obtained, must be assessed on a case-by-case basis and on the basis of factual or legal circumstances (through exercise of the majority of the votes in the general meeting, determining the majority of the management board, veto rights or otherwise).

As part of the screening, the BTI will assess whether the Transaction can pose a risk to the Dutch national security and the security of supply and consider, amongst others, the acquirer's financial reliability, the management of the target business, the track record of the involved party/parties regarding ensuring safety and their technical expertise to reliably conduct the relevant activities.

Which are the principal authorities in charge of FDI?

30 August 2024

The Dutch Minister of Economic Affairs and Climate and the BTI (which is part of the Ministry of Economic Affairs and Climate).

Is there a lookback period?

30 August 2024

If the BTI is of the opinion that a Transaction falling under the scope of the Vifo Act or the Telecoms Act was completed in breach of the relevant filing obligation, the BTI may, up to three months (Vifo Act) or eight months (Telecoms Act) after the Transaction became known to it, require the relevant parties to provide information regarding the Transaction and investigate the Transaction. Dutch law does not apply a specific lookback period for the Electricity and Gas Acts.

Is the FDI filing voluntary or mandatory?

30 August 2024

All filing obligations under Dutch investment screening regimes are mandatory. If parties are uncertain as to whether a filing is required in relation to a Transaction, it is possible to informally discuss such a Transaction with the BTI (on a no-names basis).

Extra-territorial reach and workarounds?

30 August 2024

The Dutch investment screening regimes apply irrespective of the nationality of the investor (so also to Dutch investors), to Transactions in relation to businesses that are located / operating in the Netherlands.

Due to the fact that such screening regimes apply to both *direct* and *indirect* Transactions, the acquisition of (an interest in) a non-Dutch holding company, which group has business activities in the Netherlands, can trigger investment screening in the Netherlands.

What is the FDI procedure?

30 August 2024

Vifo Act

- Investment screening under the Vifo Act consists of two phases.

Phase 1 starts with the filing, which must be submitted to the BTI by the acquirer or the target business. A standard form listing all information that must be submitted as part of the filing is made publicly available. Although there is no deadline for the filing, (i) the screening only commences upon the BTI's receipt of the filing and (ii) a standstill period applies (see 'What are the penalties of the failure to file?').

- Phase 1: The BTI must in principle decide within eight weeks of the filing whether a screening decision is required (i.e. if the investment can potentially pose a risk to national security). This period can be extended with six months. At the end of phase 1, the BTI notifies the relevant parties that either (i) no screening decision is required or (ii) further screening is necessary.

- Phase 2: After receiving notification that further screening by the BTI is necessary, the acquirer or the target business must request the BTI to issue a screening decision. The BTI then has another eight weeks to assess whether the Transaction poses a risk to the Dutch national security.

- The BTI can extend either eight week period, provided that the entire screening period (i.e. phase 1 and phase 2) may not exceed sixteen weeks *plus* (i) six months or (ii) nine months for Transactions involving a non-EU investor. If the BTI requests additional information, the screening period is suspended until such information is provided.

- The BTI can decide to (i) grant clearance, (ii) impose conditions in relation to the Transaction if this is necessary to prevent or reduce the associated risks to an acceptable level if the Transaction can result in a threat to the Dutch national security (see 'Can remedies or conditions be required for approval?'), or (iii) prohibit the Transaction as a whole.

Telecoms Act

- The acquirer must file a Transaction with the BTI, at the latest eight weeks prior to the envisaged completion date. During these eight weeks, the BTI can investigate the Transaction. This period can be extended by six months.

- A standard form is made publicly available which lists all information that must be submitted as part of the filing.
- The BTI can decide to (i) grant clearance, (ii) prohibit the Transaction subject to certain suspensive conditions if the Transaction can result in a threat of the public interest (see 'Can remedies or conditions be required for approval?') or (iii) prohibit the Transaction as a whole. So far, no such conditions or prohibitions were made public.

Electricity and Gas Acts

- One of the parties involved must file the Transaction with the BTI, no later than four months prior to the envisaged completion date of the Transaction.
- The filing must contain information relating to the Transaction, such as (i) the power generating or LNG facilities and (ii) the parties that are involved in the Transaction and (iii) the acquirer's financial position, intentions, strategy and past performance in the power generation or LNG industry.
- Within the four months after the filing, the BTI can impose conditions in relation to the Transaction, provided that the BTI must request the European Commission to approve any such conditions. If the European Commission does not respond within two months, the condition(s) may be imposed by the BTI without such approval.

What are the penalties of the failure to file?

30 August 2024

Vifo Act

If the filing and/or standstill obligation under the Vifo Act is not complied with, a penalty up to EUR 1,030,000 (reviewed annually) or 10% of the turnover of the infringing undertaking (potentially the entire group's turnover) can be imposed.

Transactions that have been completed in violation of a decision of the BTI are void, unless the Transaction was completed by way of a merger or through a regulated market, in which case the Transaction is voidable

by a court order.

Telecoms Act

If the filing obligation under the Telecoms Act is not (timely) complied with, the BTI can impose a penalty amounting to the highest of EUR 900,000 or 1% of the revenue. Moreover, a Transaction that has not been filed, can nevertheless be prohibited in which case the Transaction must either be reversed or the acquired interest must be reduced below the threshold of 'decisive control'.

Any Transaction that is completed in violation of a decision of the BTI, is void (unless completed through a regulated market in which case the acquired interest must be decreased below the threshold of 'decisive control').

Electricity and Gas Acts

Any Transaction that is completed in violation of the filing obligation set out in the Electricity and Gas Acts is voidable by a court order. The Electricity and Gas Acts do not provide for any monetary penalties if such obligation is not complied with.

Is FDI clearance necessary to close the transaction?

30 August 2024

Vifo Act

Under the Vifo Act, a mandatory standstill period applies. Penalties can be imposed if such obligation is not complied with (see 'What are the penalties of the failure to file?').

Telecoms Act

Whilst no explicit standstill obligation applies, a Transaction that has been completed prior to obtaining clearance can nevertheless be prohibited by the BTI in which case the Transaction must either be reversed or the acquired interest must be decreased below the threshold of 'decisive control'. Deal certainty only then exists, once, after filing of the Transaction, the screening period has lapsed and the BTI has not prohibited the Transaction or imposed conditions.

Electricity and Gas Acts

Whilst no formal approval from the BTI is required prior to completing the Transaction, the filing is not optional. The parties to the Transaction will only have deal certainty once, after filing of the Transaction, the

screening period has lapsed and the BTI has not prohibited the Transaction or imposed conditions.

Transactions completed in breach of the mandatory filing obligation under the Electricity and Gas Acts (as applicable) are voidable by court order. Both the BTI and interested third parties can invoke this voidability in court.

Is there a right to appeal?

30 August 2024

Vifo Act

Interested parties can raise objections to a decision of the BTI with the BTI, appeal against the decision on such objection at the Administrative Court of Rotterdam and further appeal at the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*).

Telecoms Act

Interested parties can raise objections to a decision of the BTI with the BTI, appeal against the decision on such objection at the Administrative Court of Rotterdam (which has specialised telecoms judges) and further appeal at the Trade and Industry Appeals Tribunal.

In addition, the Telecoms Act requires the BTI to request the relevant telecoms party's views in relation to a Transaction in writing prior to prohibiting or imposing conditions on a Transaction.

Electricity and Gas Acts

Interested parties can raise objections to a decision of the BTI with the BTI, appeal against the decision on such objection at the relevant administrative court and further appeal at the Administrative Jurisdiction Division of the Council of State (*afdeling bestuursrechtspraak van de Raad van State*).

How to manage the FDI procedure?

30 August 2024

Given the potentially significant consequences of investment screening, it is advisable to timely consider the applicability of the Dutch investment screening regime when engaging in M&A / restructuring activity.

It is important to consider such potential consequences at an early stage, particularly if (i) the Transaction falls under any of the Dutch investment screening regimes (directly or indirectly, because the target company has operations in the Netherlands), and (ii) there may be national security concerns due to the nature of the target business or assets and/or the identity or nationality of the acquirer.

If the Transaction falls under any of the Dutch investment screening regimes, the parties should consider, inter alia solutions to mitigate potential concerns, and deal conditionality (resulting in a bifurcated signing and closing of the transaction) and how any risk of the Transaction being prohibited, conditions being imposed etc. will be proportioned between the parties (i.e. risk allocation of remedies).

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

Not Applicable

What are the key trends in FDI enforcement?

30 August 2024

As the Vifo Act results in a considerably broader scope of investment screening regimes in the Netherlands, FDI screening and enforcement has gained importance following its enactment on 1 June 2023 and investment screening filings with BTI have exponentially increased.

What are the recent legal developments?

30 August 2024

In December 2023, the BTI has published guidance on its website (i) whether internal restructurings and the acquisition of one or more assets fall within the scope of the Vifo Act and (ii) when a business is deemed to be 'active' in the field of sensitive technology, further clarifying the scope of the Vifo Act.

Based on experience, in ongoing filings the BTI may (and often does) ask for information in addition to the information contained in the filing to better understand the business and the sensitivity of the Transaction. Although the BTI typically thoroughly reviews submitted filings (also if the investor and its ultimate beneficial owner(s) are established in states that do not seem to pose any specific risks), so far, the BTI has used its powers to prohibit or impose conditions in relation to Transactions in a

very restrained manner. They are furthermore willing to enter into (informal) discussions to address questions (whether from the filing party/ies or from the BTI) and/or potential issues.

The annual report regarding investment screening that will be published by the BTI starting from 2024 is expected to provide further insight into how the regime has been operating in practice, the number of filings and the areas of focus of the BTI.

What future legal developments are expected?

30 August 2024

There are currently three legislative proposals in development. The European Commission is preparing a proposal for the revision of the EU FDI Screening Regulation which is expected to further harmonize investment screening in the EU. For the Netherlands, the harmonization as foreseen in the proposed revisions, will result in the expansion of the scope of the current investment screening regimes (to, amongst others, artificial intelligence, biotechnologies, 6G, internet of things, cyber security technologies, space-focused technologies, hydrogen and new fuels, batteries, certain critical medicines and additional financial services).

The Dutch government is working on a draft legislative proposal relating to the electricity and gas sectors (*Energiewet*), which is expected to replace the Electricity and Gas Acts. This draft legislation is in line with the filing obligations currently provided for in the Electricity and Gas Acts.

Finally, the Ministries for Defense and Economic Affairs and Climate are in the process of drafting new legislation for which provides for investment screening of transactions relating to the defense industry, in particular certain essential suppliers of the armed forces, military goods and transportation capacity.

Associated Contacts

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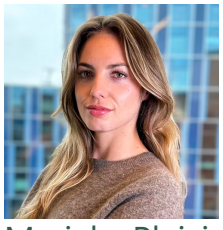

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Poland

Key Features

Types of deals subject to the FDI regime

11 July 2024

In general, under Polish law, the foreign investment control extends to acquisition of:

- shares or stocks,
- all the rights and obligations of a partner with the right to conduct the affairs of the company or the right to represent the partnership,
- an enterprise or its organized part

- resulting in the acquisition (direct or indirect) or attainment of "**significant participation**" in, or the acquisition of "**dominance**" over, a company that is a protected entity.

A two-tier investment control system has been put in place in Poland.

The first model, introduced in 2015, applies to a selected group of entities (mainly companies controlling essential infrastructure and resources) over which the Polish legislator decided to extend special protection (Model 1).

The second model, introduced during the Covid-19 pandemic, includes protection for entities meeting certain criteria regarding the legal (corporate) nature of the protected entity or industry its active in (Model 2).

	In the Model 2, protection of domestic companies applies only to acquisitions by entities or natural persons from outside the EU, EEA or OECD (this includes organizations and entities that, for at least two years before the day preceding the notification, have their registered office on the territory of an EU, EEA or OECD member state). Please note that the FDI proceeding does not waive the obligation to notify a proposed qualifying concentration under relevant competition law provisions (ie merger control laws).
Principal authorities	11 July 2024 In the Model 1, depending on the protected entity: ◦ the minister responsible for state assets; ◦ the Minister of Defense; ◦ the minister responsible for maritime economy. In the Model 2: the President of the Office for Competition and Consumers' Protection (UOKiK).
Lookback period	11 July 2024 Up to 5 years.
Mandatory / voluntary filing	11 July 2024 Mandatory notification.
Substantive test for intervention	11 July 2024 Model 1: protection of public order or public security. Model 2: public order, public security, or public health.
Extra-territorial reach	11 July 2024 The FDI regime captures foreign-to-foreign transactions as long as they lead to the indirect acquisition of Polish businesses.
Timeline for review (approximately)	11 July 2024 Usually up to 30 days. In more complex cases, up to 4 months.
Potential penalties	11 July 2024

	Fines up to PLN 100 million; and potential imprisonment. Apart from the penalties, the sanction envisaged in the Law on control of certain investments 2015 (LCCI), as amended significantly in 2020, is the invalidity of the transaction closed without approval.
FDI clearance necessary to close	11 July 2024 Yes.
Right to appeal	11 July 2024 Yes.
Special measures in response to COVID-19	11 July 2024 Yes. Model 2 was adopted initially for the period of 2 years, now extended to 5 years until 27 July 2025.

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 The LCCI requires foreign investors to notify the relevant authority of proposed foreign investments that meet certain criteria. The notification will be examined by the relevant competent authority (depending whether Model 1 or Model 2 is applied). The overwhelming majority of the notified transactions are approved (however, there are not many notifications).
What types of deals are subject to the FDI regime?	11 July 2024 **Model 1** The control applies only to the entities listed in the Decree of the Council of Ministers of 27 December 2023 on the list of entities subject to protection and the control bodies competent for them. The current list includes 17 entities. In the case of 16 of them, the controlling authority is the Minister of State Assets. For the remaining entity, it is the Minister of Defense. **Model 2** In accordance with the LCCI, protected entities are entrepreneurs with registered offices in Poland whose revenue from sales or services in Poland in at least one of the two financial years preceding the

notification exceeded EUR 10 million and who meet one of the following conditions:

- they are a public company; or
- own property which is disclosed in the list of facilities, installations, equipment services constituting critical infrastructure; or
- develop or modify software in areas designated by the LCCI; or
- carry out an economic activity in one of the industries specified by the LCCI (in particular this applies to energy companies, fuel companies, chemicals, armaments, telecommunications, companies providing certain services in the IT sector, medical or processing of meat, milk cereals and fruit and vegetables).

The FDI provisions will apply to acquisitions of rights resulting (directly or indirectly) in: (a) the acquisition of dominance; (b) the acquisition of significant participation in a protected entity. These terms are identified in the LCCI (please note that the definitions vary slightly depending on each of the control models, for example entities protected under Model 1 are not partnerships).

There is no definition of "dominance" in the LCCI but, instead, the "dominant entity" is described as the entity:

- which holds, directly or indirectly, through other entities a majority of the total number of votes in the bodies of another entity, including through agreements with other persons; or
- which has the power to appoint or remove a majority of the members of the management or supervisory bodies of another entity; or
- for which more than half of the members of the board of directors of another entity are also members of the board of directors, proxies or persons performing managerial functions of the first entity or another entity with a relationship of dependence with the first entity; or
- which holds an equity interest in a partnership with a value of at least 50% of the value of all contributions made to that partnership; or

- which has the ability to otherwise decide on the directions of another entity, in particular under an agreement providing for the management of that entity or the transfer of profits by that entity.

Significant participation is a situation that makes it possible to influence the activities of the entity through:

- ownership of shares giving at least 20% of the total number of votes, calculated as a weighted average during the last 2 years, in the entity's governing body (in particular at the general meeting or shareholders' meeting) while changes in the ownership of shares, including the disposal of all shares during the period and their acquisition, do not affect the determination of significant participation or
- holding an equity interest in a partnership with a value of at least 20% of the value of all contributions made to the partnership.

Cases of indirect acquisition of dominance/significant participation in a protected entity are also subject to control. Indirect acquisition is defined in the LCCI and means acquisition or achievement of significant participation. Acquisition of dominance shall also be understood as cases of acquisition or attainment of significant participation in a protected entity or the acquisition of dominance over protected entity:

- made by a subsidiary, including on the basis of agreements entered into with a parent entity or a subsidiary of such an entity;
- made by an entity whose statute or other act regulating its functioning contains provisions regarding the right to its assets in the event of dissolution of the entity or other form of its termination, including the right to dispose of such assets without acquisition;
- carried out on one's own behalf, but on behalf of another entity, including in the performance of a portfolio management contract within the meaning of the provisions of the Act of 29 July, 2005 on Trading in Financial Instruments;
- made by an entity with which another entity has entered into an

agreement the object of which is the transfer of the power to exercise voting rights, or other rights to shares or rights over shares of a company that is a protected entity;

- carried out by a group of two or more persons where at least one of those persons is an entity with which another entity has entered into an agreement to acquire shares in a company that is a protected entity, or at least to acquire shares in companies based in Poland if the object of the agreement is to transfer the power to exercise voting rights, or other rights to shares or rights from shares in a company that is a protected entity;
- made by an entity acting on the basis of a written or oral agreement concerning the acquisition by the parties to such an agreement of shares in a company that is a protected entity, or the acquisition of shares in companies based in Poland.

The LCCI separately defines the subsequent acquisition or achievement of significant participation or acquisition of dominance. These will be situations where an entity acquires or achieves significant participation or acquires dominance over a covered entity or reaches or exceeds 20% or 40%, respectively (in Model 1 there are two additional thresholds of 25% and 33%), of the total number of votes in the governing body of a covered entity, participation in the profits of a covered entity of the covered entity or an equity interest in a partnership that is a covered entity with respect to the value of all contributions made to that company. This effect could be a result of, for example, the redemption of shares of the covered entity or the acquisition of shares or own shares of that entity, division of the covered entity or its merger with another entity, amendment of the contract or statute of the covered entity with respect to preference of shares, participation in profits, establishment or modification or cancellation rights vested in individual partners, shareholders or participants of the entity.

Polish FDI regulations also include an exterritorial clause. As an indirect acquisition, the LCCI also recognizes cases where, as a result of a transaction or event not listed above, an entity acquires the status of a parent entity to an entity that has a significant participation in a covered entity or a parent entity to a covered entity or to an entity having legal title to an enterprise or organized part of an enterprise of the covered entity. If such indirect acquisition has occurred as a result of an act, made under the laws of a country other than Poland, in

particular as a result of a merger of companies whose registered offices are located outside the territory of Poland, or the acquisition or taking up of shares of an entity with its seat outside the territory of Poland, being an entity having a significant participation in the covered entity or a dominant entity with respect to a covered entity, the provisions of the LCCI apply to the extent necessary

Which are the principal authorities in charge of FDI?	11 July 2024 **In Model 1:** ◦ the minister responsible for state assets; ◦ the Minister of Defense; ◦ the minister responsible for maritime economy. (present list of control authorities includes only the Minister of Defense and the Minister of State Assets). **In the Model 2:** the President of the Office for Competition and Consumers' Protection (UOKiK). In the case of a coincidence of Models (a situation in which an entity subject to control is subject to both the control performed by the President of the UOKiK and one of the ministers), Model 1 will be applicable
Is there a lookback period?	The control authority may initiate preliminary examination proceedings ex officio in the case of an intention to acquire or achieve or to acquire or achieve a significant participation or an intention to acquire dominance if there are indications of abuse or circumvention of the law. Ex officio proceedings shall not be initiated where 5 years have passed since the acquisition or achievement of significant participation or acquisition of dominance.
Is the FDI filing voluntary or mandatory?	11 July 2024 The FDI filing is mandatory.
Extra-territorial reach and workarounds?	11 July 2024 The LCCI includes extra-territorial clause and, if an investment falls within the framework as a "notifiable transaction", the FDI restrictions cannot be avoided.

What is the FDI procedure?

11 July 2024

In Model 1:

The FDI procedure is initiated as a result of the filing of a notice (or, in some cases, ex officio). The control authority may call on the entity submitting the notice to supplement any formal deficiencies of the notification within a specified period of not less than 7 days.

The control authority may refuse to initiate proceedings on the grounds that the activity covered by the notice is not subject to the LCCI.

A decision in a case initiated by notification has to be issued no later than 90 days from the date of receipt of the notice or initiation of proceedings ex officio, and should be delivered no later than 2 working days from the date of its issuance (the date of posting of the decision will be relevant). Stopping the clock rule applies: the time limits specified above will be suspended during the period from the date on which the summons for supplementing formal deficiencies is made.

Before issuing the decision, the control authority conducts consultations with the body named Consultative Committee (its members comprise of representatives of different agencies across Polish government) and may request the entity submitting the notification to provide additional written explanations regarding the information or documents (the clock stopping rule applies here as well).

In its decision, the control authority may object to the acquisition of shares or rights from shares or the acquisition of a protected entity if:

- the entity submitting the notification did not, within the prescribed period, correct formal deficiencies in the notification or in the documents or information attached to the notification, or the summoned entity did not submit the information or documents at the request of the inspection authorities or the notifying entity failed to provide additional written explanations within the time limit set by the inspection authority; or
- it is justified by the purpose of public order or safety (also taking into account the assumptions of state policy in areas of social or economic life of significant importance).

In Model 2:

The investment control proceedings are based on a two-phase model. The first phase serves to conduct a preliminary screening procedure, the

purpose of which is aimed at collecting information and documents on the basis of which the UOKiK will decide either to terminate the proceedings already at this stage, or to continue these proceedings in order to further clarify the case.

The first phase of the control proceedings can take up to 30 working days (the clock stopping rule applies).

Further procedure takes place in the course of the control proceedings in the second phase. In this case, a decision will be issued no later than 120 days from the date of initiation of the control proceedings and should be delivered, in principle, no later than 7 working days from the date of its issuance (the date of posting of the decision will be relevant).

The UOKiK has the right to call on the entity submitting the notice to supplement any formal deficiencies and may request the entity submitting the notification to provide additional written explanations regarding the information or documents (the clock stopping rule applies here as well).

In its decision the UOKiK may object to the acquisition of shares or rights from shares or the acquisition of a protected entity if, among other things:

- the entity submitting the notification did not, within the prescribed period, correct formal deficiencies in the notification or in the documents or information attached to the notification, or the summoned entity did not submit the information or documents at the request of the inspection authorities or the notifying entity failed to provide additional written explanations within the time limit set by the inspection authority; or
- it is justified by the purpose of public order or safety (also taking into account the assumptions of state policy in areas of social or economic life of significant importance;
- it is not possible to determine whether the purchaser has the nationality of an EU, EEA or OECD member state (in the case of natural persons), or has or has had for at least two years from the day preceding the notification an establishment in the territory of an EU, EEA or OECD member state (in the case of entities other than natural persons); or

- the acquisition or achievement of significant participation or acquisition of dominance may have a negative impact on projects and programs of interest to the European Union

What are the penalties of the failure to file?

11 July 2024

A failure to comply with the LCCI may result in significant criminal and civil penalties. This includes failing to make a mandatory notification and proceeding with a transaction prior to receiving control authority approval.

Whoever, without filing a notice, acquires or achieves substantial participation or acquires dominance may be subject to a fine of up to PLN 100,000,000 or imprisonment for a term of 6 months to 5 years, or both.

An individual who, being obliged by law or contract to deal with the affairs of a subsidiary, knowing of an indirect acquisition subject to FDI control fails to file a notification shall be liable to a fine of up to PLN 10,000,000 or to imprisonment for a term of 6 months to 5 years, or to both these penalties jointly

Is FDI clearance necessary to close the transaction?

11 July 2024

In principle, acquisition or attainment of significant participation or acquisition of dominance made without filing the notification referred or despite the issuance of an objection decision is null and void.

If there is a notification obligation, the transaction cannot be closed prior to seeking and obtaining approval. When a filing is made a transaction must not be closed prior to authorities approval being obtained. If the parties implement the transaction prior to approval being granted, penalties may apply.

Is there a right to appeal?

11 July 2024

Yes. The decision of the control authority may be appealed to the administrative court.

How to manage the FDI procedure?

11 July 2024

Early review and understanding of the LCCI regime is highly recommended. This can allow:

- review of the structure of the transaction to see if it can be

amended to properly structure around the LCCI framework;

- review of the key transaction document(s) to ensure the requirements of the LCCI regime are fully addressed – e.g. inserting applicable condition(s) precedent in the sale and purchase agreement to accommodate the LCCI approval requirements;
- consideration of whether to make a voluntary application;

ensure early engagement with the LCCI and that appropriate timing is built into the transaction timetable (where it is determined that an application will be made

Are there special measures to protect national assets in response to COVID-19?	11 July 2024 In 2020, the LCCI was amended and Model 2 was introduced (initially for the period of 2 years).
What are the key trends in FDI enforcement?	11 July 2024 So far no significant trends have been identified. Most of the notifications are evaluated and cleared in the first stage of the proceedings.
What are the recent legal developments?	11 July 2024 There were no recent legal developments.
What future legal developments are expected?	11 July 2024 Unless the LCCI is amended, Model regulations will cease to apply on 27 July 2025. For more information contact Piotr Skurzynski, counsel, Warsaw

Spain

Key Features

Types of deals subject to the FDI regime	11 July 2024 ***Direct investments*** made by ***foreign investors*** (both concepts as defined below) in **Spanish companies/subsidiaries/assets** under a) certain strategic/key sectors; **or** b) when the foreign investor meets certain subjective conditions (in this last case, regardless of the potential strategic nature of the activities of the target).
Principal authorities	11 July 2024 In view of the applicable FDI regime in Spain -as explained in detail below-, the proceedings are administered by the Directorate General for Foreign Investments of the **Ministry for Industry, Trade and Tourism** (for the General Screening Mechanism) and the Directorate General for Armaments and Equipment of the **Ministry of Defence** (for the Defence Screening Mechanism). These bodies are in charge of reviewing the filings and making a proposal to the Council of Ministers. The **Council of Ministers** is the final decision maker on the transaction in these cases, except in certain cases where the Directorate General will be competent, in particular: (i) for the General Screening Mechanism, those filings on transactions for amounts equal to or less than €5 million, which shall be notified to, and authorised by, the **Directorate General for International Trade and Investment**; and (ii) for the Defence Screening Mechanism, those filings on transactions that by its nature, characteristics or amount of the transaction, do not affect essential defence interests, which shall be notified to, and authorised by, the **Directorate General for Armaments and Equipment**. Regarding the Weapons Screening Mechanism and the Diplomatic Real Estate Screening Mechanism, filings shall be addressed to the Directorate General for International Trade and Investment of the **Ministry for Industry Trade and Tourism** and to the **Ministry of Foreign Affairs, European Union and Cooperation**, respectively. In both cases, it is the **Council of Ministers** who ultimately decides on transactions.
Lookback period	11 July 2024 **No** lookback period is provided for in the regulation in force.
Mandatory / voluntary filing	11 July 2024

	When the relevant **thresholds** are met, notification is **mandatory** for all FDIs.
Substantive test for intervention	11 July 2024 Depending on the characteristics of the investment, especially the nationality of the investor or the sectors involved (key sectors), but likely to give rise to risks on national security, public order or public health in Spain or in another Member State of the European Union or in relation to projects or programmes of Union interest.
Extra-territorial reach	11 July 2024 **No**. The control regime only covers the acquisition of Spanish target companies as well as Spanish subsidiaries and assets.
Timeline for review (approximately)	11 July 2024 There is no timetable scheduled for the process of reviewing a notifiable transaction except that the FDI competent authority shall issue a formal decision within **three months** from the notification (time starts running once the notification is formally lodged). However, authorities may issue a request for additional information, which suspends the relevant time period for deciding and notifying. There is no simplified procedure foreseen in the FDI regime. The lack of an express FDI decision implies the rejection of the request (negative administrative silence). However, this does not mean that the authorisation cannot be granted after this period, so that a rejection by silence only has the effect of enabling the investor to appeal. The authority will continue to be obliged to issue an express decision in the FDI proceedings, and may grant the authorisation. This is likely to be the scenario in complex procedures or procedures requiring the adoption of commitments.
Potential penalties	11 July 2024 Failure to notify or suspend the completion of a transaction caught by the regime would represent a **very serious infringement.** FDI carried out without prior authorisation is **invalid** and **without legal effect** until it is duly validated by obtaining the corresponding authorisation, without the foreign investor being able to exercise its

economic and political rights in the Spanish investee company until the necessary authorisation -if so- has been obtained.

In addition, a fine may be imposed, the amount of which may be up to the total value of the transaction, but certainly **not less than €30,000**, and a public or private warning can be imposed.

FDI clearance necessary to close

11 July 2024

Yes, if the acquisition is subject to a mandatory FDI filing.

Right to appeal

11 July 2024

Yes. The FDI regime provides for the possibility of lodging an administrative appeal to reposition (*recurso de reposición*) or a direct judicial contentious-administrative appeal (*recurso contencioso-administrativo*) against refusals of authorisation and authorizations subject to conditions or commitments contained in the agreements, resolutions or decisions issued by the FDI relevant authority

Special measures in response to COVID-19

11 July 2024

The Covid-19 pandemic and its economic consequences on Spanish companies have been important factors in the regulation of FDI in Spain.

This situation has left some Spanish companies in a situation of unprecedented vulnerability, causing their value to decline rapidly, which has shown to the legislator the need to protect the strategic sectors of Spain's economy and to safeguard national security and public order. This has entailed the adoption of the General Screening Mechanism in Spain.

To this end, Royal Decree-Law 8/2020, of 17 March 2020, on extraordinary urgent measures to deal with the economic and social impact of Covid-19 (RDL 8/2020), introduced Article 7 bis suspending the liberalisation regime. In this way, the ex-ante authorisation mechanism was introduced.

The persistence of the health and economic crisis over time has resulted in new transitional measures and extensions such as, in particular, a temporary framework by which the Spanish FDI screening mechanism shall also cover investments in strategic sectors made by investors within the EU and EFTA, either **(i)** in publicly listed companies in Spanish stock exchanges or **(ii)** where the value of the investment is above €500 million.

Finally, the receipt of European funds for the economic recovery after the pandemic (*NextGenerationEU*) has maintained and boosted the need to protect those companies that have benefited from them.

Questions

Is FDI subject to restrictions, filing, or review?

11 July 2024

Until March 2020, the Spanish FDI regime was liberalised, that is, it was governed by the principle of freedom of capital movements and external economic transactions (with the main exception of the defence sector).

However, following the EU Screening Framework Regulation (EU) 2019/452, the regime for FDIs in Spain was amended and extended to cover certain strategic sectors and investors, as part of the measures implemented to mitigate the social and economic effects caused by the Covid-19 health crisis.

The **regulation on FDI** control in Spain is mainly governed by:

- Spanish Act 19/2003, of 4 July 2003, on the legal regime of capital movements and economic transactions abroad (Spanish Act 19/2003); and
- Royal Decree 571/2023, of 4 July 2023, on foreign investments (the RD 571/2023), which updates the Spanish FDI regulatory regime and is in force since 1 September 2023.

This regulation foresees the Spanish FDI screening regime which entails:

- The **General Screening Mechanism**, introduced in March 2020, which foresees mandatory filings for certain FDIs that are either (i) taking place in strategic sectors and affecting national security, public order and public health; **or** (ii) being carried out by investors that meet certain subjective requirements;
- the **Defence Screening Mechanism**, which was adopted by RD 664/1999 (no longer in force with the entry into force of RD 571/2023) and is maintained by RD 571/2023, which foresees mandatory filings for FDIs directly concerning national defence;
- the **Weapons Screening Mechanism**, introduced by RD 571/2023, which foresees mandatory filings for FDIs conducted

in activities related with the manufacture, trade or distribution of arms, cartridges, pyrotechnic articles and explosives for civilian use; and

- the **Diplomatic Real Estate Screening Mechanism**, introduced by RD 571/2023, which provides for the need of acquisitions of real estate intended for diplomatic or consular representations to be previously authorised.

What types of deals are subject to the FDI regime?

11 July 2024

1. **General Screening Mechanism**

Under Spanish FDI regulation, prior authorisation may be required for certain investments in Spanish companies (whether listed or unlisted) carried out either ***directly*** or ***indirectly*** by a foreign investor, provided that both the investment and the investor fulfil certain initial conditions, as explained below. When these initial conditions are met, it will be necessary to notify the investment if either a) the target carries out activities in certain "strategic sectors"; **or** b) the investor itself meets certain subjective characteristics (in this last case, regardless of the potential strategic nature of the activities of the target).

Conditions regarding the investment and the investor which are necessary in order to consider the operation a "foreign investment" within the General Screening Mechanism will be that:

- ***Regarding the investment: As a result of such investment:***

  a. the investor will hold an interest equal to or greater than **10% of the share capital** of the Spanish company; **or**
  b. the **control** of the Spanish company is acquired in accordance with the criteria set out in Article 7.2 of Spanish Act 15/2007, of 3 July 2007, on the defence of competition (the Spanish Competition Act), which refers to the possibility of exercising decisive influence over a company.

- ***Regarding the investor: The investor is a not a European Union (EU) or European Free Trade Association (EFTA) resident, meaning:***

  a. The investor resides in any country other than EU or EFTA Member States; **or**

b. The investor resides in an EU or EFTA Member State but is ultimately owned by residents outside the EU or the EFTA, which is deemed to occur in the case of any EU or EFTA resident company in which non-residents (a) directly or indirectly hold **25% or more** of the shares or the voting rights, or (b) otherwise (i.e. by any other means) exercise direct or indirect **control**.

In relation to the investor, the subjective scope of the General Screening Mechanism is **temporarily extended** (until 31 December 2024) to FDIs made in strategic sectors by residents of countries in the EU and EFTA where:

a. The target of the FDI is a company listed in Spain (for this purpose, companies listed in Spain will be considered as those whose total shares, or part of them, are admitted to trading on an official Spanish secondary market and have their registered office in Spain); or

b. In the case of unlisted companies, the value of the investment exceeds €500 million. Please note that, to this extent, the "value of the investment" should include, according to the information provided by the Spanish FDI authority via informal/non-official conversations, not only the value of the acquisition in Spain, but also of any additional investments in the target that may be necessary.

However, it **shall not** be considered a direct investment when: (i) the increase in business holdings by a shareholder who already has a holding of 10% is not accompanied by a "*change of control*"; and (ii) when it is an internal restructuring within a group of undertakings.

Provided that the investment falls within the FDI definition set out above, it will be subject to the Spanish General Screening Mechanism if, additionally, either a) the Target carries out activities in certain "strategic sectors"; **or** b) the investor itself meets certain subjective characteristics (in this last case, regardless of the potential strategic nature of the activities of the target), as described below:

A. **Investments subject to review based on the activities of the Target:** ***Investments in Strategic Sectors***

Any FDI in a Spanish company will be subject to prior authorisation if the target is active in any of the following sectors, which have been declared to be **strategic**:

a. ***Critical infrastructures***: whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial

infrastructure, sensitive facilities, and land and real estate crucial for the use of such infrastructures.

b. ***Critical technologies, and dual-use items, key technologies for industrial leadership and capacity building, and technologies developed under programmes and projects of particular interest to Spain***, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies, biotechnologies, advanced materials and advanced manufacturing systems.

c. ***Supply of key inputs***: those which are indispensable and non-substitutable for the provision of essential services relating to the maintenance of basic social functions–, in particular inputs provided by enterprises that develop and customize software used in the operation of critical infrastructures in: energy, strategic connectivity services or raw materials, food and/or water security, finance and insurance, transport and health.

d. ***Sectors with access to or control of sensitive information, in particular personal data***, or with the capacity to control such information. Undertakings shall be deemed to have access to sensitive information when they:

    - Access to official databases that are not publicly accessible;
    - Access to databases related with essential services (energy, health, connectivity or transport, food and/or water security);
    - Access to data about strategic infrastructures;
    - Carry out activities subject to mandatory personal data impact assessment in accordance with Article 35(3) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of their personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

e. ***Media***.

The Spanish Government reserves the right to add to this list other sectors that may affect public order, public security and public health.

Please note that when the Target is active in any of these strategic sectors, the General Screening Mechanism also applies to investments carried out by residents in EU or EFTA Member States, as stated above. That is, provided that the Target is either a) a company listed in Spain; or b) the value of the investment exceeds €500 million.

Exemptions: A new system of exemptions is established for this category of *Investments in Strategic Sectors* under the General Screening Mechanism, which also refers on the strategic sector of the company in which the investment is made.

- In the **energy sector**, when:
  - the company is not engaged in "*regulated activities*".
  - as result of the transaction, the company does not acquire the status of dominant player on the market.
  - in the case of the acquisition of energy production assets, the share of installed capacity per resulting technology held by the investor be less than 5%.
  - in the case of electricity trading companies, their number of customers is below 20,000.
- The acquisition of **real estate** which is not assigned to any critical infrastructure or which is not indispensable and not substitutable for the provision of essential services.
- In the **rest of the strategic sectors**, when the total turnover of the company in which the investment is made is less than €5 million. However, there are a few exemptions to this exemption that must be acknowledged:
  - Undertakings with technologies developed under programmes and projects of particular interest to Spain;
  - Certain electronic communications operators; and
  - Activities for research and exploitation of mineral deposits of strategic raw materials.
- **Transitory investments**, i.e. investments which are of short duration and where the investor does not have the capacity to

influence the management of the acquired company.

B. **Investments subject to review based on <u>subjective characteristics of the foreign investor:</u>**

FDIs in a Spanish company will be subject to prior authorisation, irrespective of the activities of the target (and although the target is not active in any strategic sector), if the **investor** meets certain **subjective characteristics**, in any of the following situations:

a. Investments by foreign entities, which are directly or indirectly controlled by **the government** (including public bodies or the army) **of a third country**. In order to verify whether or not an investor is controlled by the government of a third country, it may be investigated if such control is articulated through **significant funding** (including subsidies).

   In addition, it should be noted that investments made by vehicles through which funds of a public nature, or pension funds of public employees, are invested may be deemed not to be under public control and therefore exempted from the FDI authorisation regime.

b. Investments by entities who have made **investments** or participated in activities in **sectors affecting security, public order and public health** in another EFTA or Member State. In order to determine whether the investments made or the activities in which the foreign investor has participated may have affected security, order or public health in another Member State, the information received in the framework of the cooperation mechanisms in relation to foreign direct investments provided for in Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 may be used.

   It should be noted that, based on informal/non-official conversations with the Spanish FDI authority, this category should be assessed in detail in order to adopt an approach as regards a potential filing, particularly in those cases where no other condition/s foreseen in the Spanish FDI regime apply.

c. All investors, when there is a serious risk that the foreign investor carries out **criminal or illegal activities** affecting public security, public order or public health in Spain. The severity of the risk shall be weighted taking into account any administrative or judicial sanctions imposed on the investor in the last 3 years.

There are <u>no exemptions</u> applicable in principle in these cases where the FDI is triggered based on the subjective conditions of the foreign

investor.

2. ***Defence Screening Mechanism***

All foreign investments conducted in "*activities directly related to national defence*" fall under this Screening Mechanism.

First of all, it should be noted that for these purposes **foreign investors** are considered to be natural or legal persons not resident in Spain (including EU residents outside Spain) and is extended to foreign natural persons resident in Spain.

Authorisation will be required in these two scenarios:

a. when the foreign investor (non-resident or foreign natural person resident) acquires more than 5% of the share capital of the Spanish company; or
b. when the investment allows the foreign investor to form part, directly or indirectly, of the management of the Spanish company.

Exemptions: The following **exemptions** to an FDI filing based on the Defence Screening Mechanism are applicable:

- When the investment in the Spanish company is **less than 5%** of the company's capital and the investor is **does not form part, directly or indirectly, of the company's management body.**

Conditionally, investments between 5% and 10% will be exempted from an FDI filing if they are notified to the General Directorate of Armaments and Equipment and to the General Directorate of International Trade and Investment together with a document in which the investor undertakes in a public deed **not to use**, exercise or transfer to third parties its voting rights or to be part of any management bodies. The wording of the RD 571/2023 includes a final reference that the commitment should refer to "*the listed company*", so it should be clarified whether this reference is an error or whether this exception is really intended to be limited to listed companies.

3. **Weapons Screening Mechanism**

Applicable to all foreign investments conducted in activities related with the manufacture, trade or distribution of arms, cartridges, pyrotechnic articles and explosives for civilian use. There are no quantitative thresholds exempting from the obligation to notify, and the subjective

scope is the identical to the Defence Screening mechanism (non-resident natural or legal persons or foreign natural person that are resident, independently of their nationality).

4. **Diplomatic Real Estate Screening Mechanism**

Prior authorisation shall be required for direct or indirect investments made by non-EU members related to the acquisition of real estate intended for their diplomatic or consular representations, unless there is an agreement to liberalise them on a reciprocal basis.

Which are the principal authorities in charge of FDI?

11 July 2024

The relevant authority to review reportable transactions under the General Screening Mechanism is the **Directorate General for International Trade and Investment**, which is part of the **Ministry of Industry, Trade and Tourism.**

Scrutiny is carried out by such Directorate, together with the Foreign Investment Board at a later stage of the process. However, the final decision rests with the **Council of Ministers**, which approves – conditionally or unconditionally- or blocks the transaction.

Filings on transactions for amounts equal to or less than €5 million shall be notified to, and authorised by, **the Directorate General for International Trade and Investment.**

In case of FDIs affecting the national defence sector, the **Directorate General for Armaments and Equipment,** which is part of the **Ministry of Defence** is in charge of reviewing filings and making proposals to the Council of Ministers, which ultimately decides on transactions.

Filings on transactions that by its nature, characteristics or amount of the transaction, do not affect essential defence interests shall be notified to, and authorised by, the **Directorate General for Armaments and Equipment.**

Regarding the Weapons Screening Mechanism and the Diplomatic Real Estate Screening Mechanism, filings shall be addressed to the Directorate General for International Trade and Investment of the **Ministry for Industry Trade and Tourism** and to the **Ministry of Foreign Affairs, European Union and Cooperation**, respectively. In both cases, it is the **Council of Ministers** who ultimately decides on transactions.

Is there a lookback period?	**No** lookback period is provided for in the regulation in force.
Is the FDI filing voluntary or mandatory?	11 July 2024 When the relevant **thresholds** set out above are met, notification is **mandatory** for all FDIs that are carried out in any strategic/key sector that may concern national security, public order or public health in Spain, or made by the 'under-all-cases' foreign investors (i.e. who meet certain subjective conditions as explained above) regardless of the business of the company in which it invests (see question 2). Nonetheless, there is a **voluntary consultation procedure** (if there are reasonable doubts as to whether the relevant transaction may be subject to FDI screening) before the Directorate General of Foreign Investments of the Ministry for Industry, Trade and Tourism or the Directorate General of Armaments and Material of the Ministry of Defence (depending on the activities of the target), by which investors can receive, within a maximum of 30 working days, a confidential and binding reply as to whether or not a particular transactions should be subject to authorisation. Please note that this consultation procedure may also be subject to suspensions of the deadline due to requests for further information issued by the relevant FDI authority. Voluntary consultations are in practice submitted through the filing forms available.
Extra-territorial reach and workarounds?	11 July 2024 **No**. The control regime only covers the acquisition of Spanish target companies as well as Spanish subsidiaries and assets
What is the FDI procedure?	11 July 2024 Where a notification is required or deemed necessary, standard forms need to be completed and submitted by the direct acquirer electronically to the relevant FDI authority. With regard to the General Screening Mechanism, there is a **specific form** for filing is now available on the website of the Ministry for Economy, Trade and Enterprise: –Ministerio de Economía, Comercio y Empresa – Control de inversiones.

As for the Defence Screening Mechanism, the Ministry of Defence provides on its website a guide and filing forms on how to request an authorisation that specifies the information and documentation that the foreign investor should provide when notifying a transaction: Inversiones Exteriores - Portal de Servicios del Ministerio de Defensa de España.

It should be noted that this specific forms for filing could change, as it happened in the last quarter of 2023. However, even if there could be modifications in the future, they are not expected to be substantial.

It should also be noted that during the handling of the proceedings, the FDI authority may ask for any data, reports or information it deems appropriate, which has an impact -through suspensions- on the maximum three months deadline from notification to issue a decision in the proceedings. No filing fees apply in either case.

What are the penalties of the failure to file?

11 July 2024

An investment carried out in Spain without the required prior approval:

- renders the transaction **invalid** and without any legal effect in Spain until it has become compliant, without the foreign investor being able to exercise its economic and political rights in the Spanish investee company until the necessary authorisation -if so- has been obtained; and

- may carry a **fine** of between **€30,000** and the **transaction's financial value**, plus public or private admonition (i.e., in practice, reputational damage and further scrutiny in future transactions).

Is FDI clearance necessary to close the transaction?

11 July 2024

Yes. A transaction subject to a mandatory FDI filing is subject to a standstill obligation and the parties must await clearance before closing.

In addition, please note that the authorised investments must be carried out within the period specifically indicated in the authorisation or, failing this, within six months. Once this period has elapsed without the investment having been made, the authorisation shall be deemed to have lapsed, unless an extension is obtained.

Is there a right to appeal?

11 July 2024

Yes, but limited to the judicial review standard. Decisions of the Council of Ministers may be appealed to the Supreme Court.

How to manage the FDI procedure?

11 July 2024

The FDI procedure can be a **key factor** in M&A transactions. It must be noted that investors from **Russia, China,** and **Iran** appear to be considered the most problematic, but this is nowhere to be found in writing.

The parties should not underestimate the time required to complete the procedure which may take up to three months (please also note that additional suspensions of the time could take place in case of requests for additional information).

The parties should therefore make sure to address potential risks of delay or even failure of transactions from the outset, for example by:

- identifying whether the Spanish target company is active in one of the listed strategic sectors,
- mapping the political landscape including whether the activities of the target are subject to heightened political interest and the nationality of the investor is considered "problematic",
- defining (deemed) clearance as a **closing condition**,
- Including a **right of termination** in the event that the deal is not cleared before a certain long stop date,
- specifying how the parties will respond to a prohibition or instructions and who bears the costs, and

considering a **break-up fee** to be paid by the buyer in the event of a prohibition.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

The Covid-19 pandemic and its economic consequences on Spanish companies have been important factors in the regulation of FDI in Spain.

This situation has left some Spanish companies in a situation of unprecedented vulnerability, causing their value to decline rapidly, which has shown to the legislator the need to protect the strategic

sectors of Spain's economy and to safeguard national security and public order. This has entailed the adoption of the General Screening Mechanism in Spain.

To this end, RDL 8/2020 introduced Article 7 bis suspending the liberalisation regime. In this way, the *ex-ante* authorisation mechanism was introduced (beyond the existing one affecting the defence sector).

The persistence of the health and economic crisis over time, together with the further war in Ukraine, has resulted in transitional measures and extensions such as, in particular, a temporary framework (originally in force until 30 June 2021, then extended to 31 December 2021 and currently, once again, extended to 31 December 2024) by which the Spanish FDI screening mechanism shall also cover investments in strategic sectors made by investors within the EU and EFTA, either (i) in publicly listed companies in Spanish stock exchanges or (ii) where the value of the investment is above €500 million.

Finally, the receipt of European funds for the economic recovery after the pandemic (*NextGenerationEU*) has maintained and boosted the need to protect those companies that have benefited from them.

What are the key trends in FDI enforcement?

11 July 2024

We are spotting some emerging trends in the practice of the Spanish FDI authorities:

- The Spanish FDI regime provides that a key element for the assessment of FDIs derives from the conformity of the actions of the State in which the ultimate investor resides with the international commitments entered into by Spain in matters affecting public safety, public health or public order. This should be taken into account when assessing the investor's risk.

- For transactions that could raise serious doubts as to whether they are covered by the Spanish FDI regime, the FDI authorities expect parties to use the consultation procedure referred to above.

- According to the FDI Markets database of the Financial Times, in 2023 Spain was the largest global recipient of greenfield projects in the renewable energy sector. It was also the 3rd country to receive the most projects involving R&D activities, the 5th

country with the most projects received related to artificial intelligence and the 10th largest recipient of greenfields in the ICT and internet infrastructure sector. Although the 2023 Annual Report on Investment Screening in Spain is not yet published, this data would suggest that many of the foreign investments made in 2023 could, at least potentially, have had to be analysed for affecting strategic sectors.

What are the recent legal developments?

11 July 2024

There was an extension of the temporary framework applicable to the General Screening Mechanism (originally in force until 30 June 2021, then extended to 31 December 2021 and currently, once again, extended to 31 December 2024) by which the Spanish FDI screening mechanism shall also cover investments in strategic sectors made by investors within the EU and EFTA, either (i) in publicly listed companies in Spanish stock exchanges; or (ii) where the value of the investment is above €500 million.

The Spanish Government **also adopted and published the RD 571/2023, which entered into force on 1 September 2023.**

RD 571/2023 updates the General Screening Mechanism and the Defence Screening Mechanism with a view to clarifying, inter alia, (i) the categories of transactions; (ii) the thresholds of those transactions for exemption; and (iv) the definition of strategic sectors or relevant activities covered.

Moreover, RD 571/2023 introduced the Weapons Screening Mechanism and the Diplomatic Real Estate Mechanism.

Now entered into force, RD 571/2023 represents a solid legal framework for FDI control in Spain, giving it is necessary assurance in order to confirm/discard the transactions that could be under the FDI regime in Spain and thus subject to mandatory notification.

What future legal developments are expected?

11 July 2024

The practical implementation of RD 571/2023 remains to be seen. However, given the confidentiality of the proceedings and the limits on the rights of access to public information, there is only a limited amount of information available about specific FDI reviews and authorizations other than sporadic brief press releases.

The Annual Report on Investment Screening in Spain, covering the year 2023, is expected to be published in the coming months. Given that these reports have become more detailed each year, it seems reasonable to assume that they will provide more information on how RD 571/2023 has impacted in practice. However, given that the RD 571/2023 came into force in September 2023, it will be during the course of 2024 when its effects will be seen with more perspective.

Additionally, clarifications of RD 571/2023 by means of government regulations are likely to be made as the casuistry and application of the decree progresses.

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Key Features

Types of deals subject to the FDI regime	11 July 2024

	Any acquisition of (or investment in) an entity or asset that may give rise to a national security risk, including acquisitions made by UK companies and internal reorganisations.
Principal authorities	11 July 2024 The Investment Security Unit ("**ISU**"), which sits within the Cabinet Office (A UK Government department). The Secretary of State for the Cabinet Office is the final decision maker.
Lookback period	11 July 2024 Up to 5 years after the relevant 'trigger event' (e.g. closing).
Mandatory / voluntary filing	11 July 2024 A mandatory notification is required for acquisitions of shares or voting interests of 25% or more (or lower if they enable the ability to pass or block a class of resolutions governing the affairs of the entity) where the target entity is active in at least one of 17 sectors. A broader range of transactions, including lower minority investments, the acquisition of material influence and asset acquisitions, can be notified on a voluntary basis.
Substantive test for intervention	11 July 2024 To 'call in' a transaction for an in-depth national security review, the Secretary of State must reasonably suspect that a transaction has, or may give rise to, a risk to national security. The term "national security" is not defined, and can therefore be interpreted flexibly. To impose a final order blocking or unwinding a transaction, or imposing conditions, the Secretary of State must be satisfied that, on the balance of probabilities, there is a risk to national security.
Extra-territorial reach	11 July 2024 Yes, if a foreign entity carries on relevant activities in the UK.
Timeline for review (approximately)	11 July 2024 Where a mandatory or voluntary notification is submitted, the ISU has 30 working days to determine whether to call in or clear the transaction. If the transaction is called in for an in-depth national security

	assessment, the ISU has 30 working days (extendable by a further 45 working days) to conduct the additional review (although that can be further extended by consent).
Potential penalties	11 July 2024 Substantial fines and up to 5 years imprisonment for failing to make a mandatory notification or failing to comply with an order.
FDI clearance necessary to close	11 July 2024 Yes, if subject to a mandatory filing requirement. A failure to make a mandatory notification or closing prior to clearance will lead to the transaction being legally void.
Right to appeal	11 July 2024 Yes, but limited to the judicial review standard.
Special measures in response to COVID-19	11 July 2024 None. However, as there is no definition of what is meant by 'national security', it could be interpreted to include matters relating to public health emergencies. Note that there is also a provision under the merger control rules enabling the Secretary of State to intervene in transactions which may impact the UK's ability to respond to public health emergencies

Questions

Is FDI subject to restrictions, filing, or review?	11 July 2024 The UK's National Security and Investment Act ("**NSIA**") came into force on 4 January 2022. The legislation introduced a stand-alone regime, significantly enhancing the UK Government's powers to scrutinise a wide variety of transactions that may have national security implications. The NSIA is underpinned by an overarching "call in" power, exercisable by the Secretary of State ("SoS"), for transactions, acquisitions and investments which she or he reasonably suspects have created, or could result in, a risk to national security. A key aspect of the regime is that a subset of transactions involving entities active in certain sectors require mandatory notification and cannot close until the review is complete. Other transactions can be

notified on a voluntary basis. For further explanation of the criteria for a mandatory or voluntary notification, see question 5.

The focus of the regime is national security, and other public interest considerations are not explicitly in scope – concerns around financial stability, plurality of the media and the UK's ability to combat a public health emergency are dealt with under existing powers in the merger control regime. However, the concept of national security is not defined, and so in practice may be construed broadly.

The NSIA is also strictly speaking not a 'foreign' investment regime, as domestic acquirers are also within the ambit of the rules. Furthermore, there are no lists of pre-approved acquirers and investors so everyone is potentially subject to scrutiny.

What types of deals are subject to the FDI regime?

11 July 2024

Transaction structures

As a starting point, the NSIA provides the SoS with the power to 'call in' a wide range of anticipated or completed transactions even where a notification has not been made and/or is not required:

- **share deals** which result in a 'trigger event', which can be as low as 10% (or lower) of voting rights/share capital if that also confers the right to exercise 'material influence' over the target (which is a concept taken from the UK merger control regime).
- **asset deals** including a very broad range of asset types including land, tangible moveable property, ideas, information or techniques which can include things such as trade secrets, algorithms and software. The test requires only being able to use (or use to a greater extent than previously) or direct or control how an asset is used (or to a greater extent than previously) to be in scope. Transactions including licence agreements or assignments of intellectual property are in scope.

Only share deals can be subject to **mandatory notification** requirement. See question 5 for whether a mandatory notification needs to be made.

Which deals will be 'called in' and subject to an in-depth national security assessment?

As noted above, irrespective of whether a transaction is notified (either on a mandatory or voluntary basis) the SoS has the ability to call in a broad range of transactions for an in-depth review. How this power is used in practice is set out in guidance called the "Statement for the purposes of section 3" (the "Section 3 Statement"). This was issued in November 2021 and has to be reviewed at least every 5 years (the first update to the Section 3 Statement is expected in May 2024).

The Section 3 Statement sets out that, when deciding whether to exercise the call-in power, an assessment will be undertaken to evaluate the likelihood that the acquisition will give rise to a risk to national security. This assessment is therefore also relevant to assess whether to consider making a voluntary filing.

Each transaction will be assessed on a case-by-case basis but the SoS will primarily consider the following three risk factors, which are assessed in the round:

- **Target risk** – broadly whether the target of the acquisition (entity or asset) is used, or could be used, in a way that may raise a national security risk.
- **Acquirer risk** – broadly whether the acquirer has characteristics which might indicate that it may be a national security risk for that acquirer to have control of the target. Guidance indicates that state-owned enterprises are not inherently more likely to raise national security concerns.
- **Control risk** – broadly whether the actual level of control being acquired through the transaction. If the transaction grants the acquiring party a lower level of control over the target, that would imply less of a national security risk.

Which are the principal authorities in charge of FDI?

11 July 2024

The UK's NSI regime is administered by the Investment Security Unit ("**ISU**"), which sits within the **Cabinet Office** (a UK Government department). The Secretary of State for the Cabinet Office is the final decision maker.

Is there a lookback period?

The call-in power lasts for 5 years from the relevant trigger event (i.e. closing of a transaction), but this is shortened if the SoS becomes "aware" of the transaction (to six months) or a notification is made (upon clearance).

The NSI regime also applies retrospectively: the Government has the power to call in for review transactions which closed on or after 12 November 2020 even though the regime only came into full force on 4 January 2022.

Is the FDI filing voluntary or mandatory?

11 July 2024

Whether a transaction is subject to a mandatory filing or not depends on the satisfaction of a two-limb test.

Mandatory Notification

Mandatory notifications to the ISU are required for certain 'notifiable acquisitions', which must satisfy a two-limb test: (i) there must be a 'trigger event', which involves the acquisition of shares in an entity; and (ii) the target entity must carry on an activity in the UK falling within 17 sensitive sector definitions.

<u>(i) Trigger Event</u>

For a mandatory notification to be required, a trigger event is the acquisition of:

- more than 25%, 50% or 75% of the shares or voting rights in the entity (i.e. including moving from a lower level of interest to a higher level); and/or
- sufficient voting rights to pass or block all resolutions of a certain class governing the affairs of the target entity.

An internal re-organisation can also be a trigger event. Where there is an intra-group change of control, because the entity holding the shares (either directly or indirectly) changes, this may require a mandatory filing even where the ultimate controlling entity remains the same.

There are no revenue or deal-size thresholds that allows smaller transactions to escape scrutiny.

The acquisition of control over assets is not in scope of the mandatory regime.

(ii) Sensitive Sectors

There are specific definitions for 17 sectors set out in The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 (the "Regulations"). If an entity's UK activities are caught by at least one of these definitions, and there is a trigger event, a mandatory notification must be made.

The 17 sensitive sectors identified under the regime are: *Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Military and Dual-Use, Quantum Technologies,*

Satellite and Space Technologies, Suppliers to the Emergency Services, Synthetic Biology and Transport.

Voluntary Notification

Where the SoS has the power to call in a transaction for review, it can also be notified to the ISU on a voluntary basis. A much wider set of transactions can be notified on a voluntary basis compared to those which must be notified on a mandatory basis.

The concept of a trigger event is broader than above – in addition to the above trigger events, the following are also sufficient to allow the SoS to call in a transaction:

- the acquisition of 'material influence' over an entity, which is a concept taken from the UK merger control regime and can be established with a relatively low shareholding (from around 10%) where other additional rights exist; or
- control of an asset, meaning either to use or otherwise control or direct how an asset is used, where previously there was no control or otherwise where control 'to a greater extent' is acquired.

These are relatively low thresholds for triggering jurisdiction, but this does not mean that the call in power will necessarily be used. The Government has indicated that a transaction is more likely to be called in

if the target entity or asset has UK activities which are 'closely linked' to the 17 sensitive sectors (listed above), but do not meet the specific definitions set out in the Regulations.

Extra-territorial reach and workarounds?

11 July 2024

Foreign entities are in scope where they perform activities in the UK (even absent a UK subsidiary or UK assets), in particular because the definition of production and development are extremely broad under the Regulations.

It is possible to close a broader transaction around an entity carrying on activities in the UK which requires a mandatory notification (provided there is no change in ownership of the relevant shares) but care needs to be exercised as the SoS will nevertheless likely have the power to call in a transaction if there are substantive concerns.

What is the FDI procedure?

11 July 2024

Where a notification is required or deemed necessary, standard forms need to be completed and submitted to the ISU's online portal. It typically takes a few days for a notification to be accepted as complete, at which point:

- The ISU has 30 working days (called the "**review period**") to decide whether to call in the transaction for an in-depth national security assessment. Absent such a step, the transaction is cleared unconditionally.
- If the SoS determines that she or he wants to conduct an in-depth national security assessment a "**call-in notice**" is issued. This can occur whether or not a notification (mandatory or voluntary) has been made. There is a 30 working day period, unilaterally extendable by the SoS for a further 45 working days (and possibly longer with agreement of the parties). During this period the review clock is stopped if the ISU asks questions (by way of an "information notice").

At the end of in-depth assessment the ISU will either clear the transaction or impose a Final Order, which will either block the transaction (or require a completed transaction to be unwound) or clear the transaction subject to the imposition of conditions.

The types of condition that might be imposed to remedy/mitigate any national security risk identified are wide-ranging. Remedies imposed to date have included the appointment of a Government approved observer to the board, a requirement to continue providing strategic capabilities to the Government post-closing, notification and consent obligations from the Government before taking certain actions and restricting rights of access to information.

There is generally little publicly available information about NSIA reviews (including when a transaction is called in), but all Final Orders issued are published on the Government's website.

What are the penalties of the failure to file?

11 July 2024

There are significant consequences for failing to comply with the NSI regime, both for individuals and for the legal status of the proposed transaction.

For a failure to make a mandatory notification or closing prior to clearance in cases where mandatory notification is required, the transaction will be void and the acquirer liable for a fine of up to £10m or 5% of worldwide turnover (whichever is higher), imprisonment for individuals (of up to 5 years), or both.

Furthermore, there are also significant civil and criminal sanctions for breaching the terms of a Final Order, or any interim orders, in addition to the associated reputational risks.

Is FDI clearance necessary to close the transaction?

11 July 2024

Transactions that are subject to mandatory notification must not close until cleared.

Is there a right to appeal?

11 July 2024

If a party disagrees with a decision of the SoS, the party can apply for **judicial review**. An application for permission to appeal must be made within 28 days of any decision (though this is extendable in exceptional circumstances), and must be made to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland.

Judicial review is not primarily concerned with the merits of a decision, but rather with whether it was lawfully made. Such appeals are therefore limited in scope – an application for judicial review can only be brought

on the grounds of illegality, procedural unfairness, unreasonableness/irrationality, or for a breach of the Human Rights Act 1998.

How to manage the FDI procedure?

11 July 2024

Given the expansive nature of the UK's regime, and significant consequences of not making a mandatory filing, the UK's NSI regime should be factored in at an early stage of M&A activity and investment planning.

It is important to consider at an early stage a number of issues, particularly if there are potentially going to be conceivable national security concerns due to the nature of the target entity or assets and/or the identity or nationality of the acquirer involved. These include:

- whether a 'trigger event' is likely to occur, particularly where the acquisition of shares may need to be notified on a mandatory basis;
- whether the target company is active in one of the 17 sensitive sectors, or could be considered closely linked to activities carried out in these sectors, such that there is a heightened risk of the transaction being called in for a detailed national security review;
- the political landscape, including whether the activities of the target are subject to heightened political interest (e.g. related to energy security);
- solutions to mitigate potential concerns and being ready to communicate or implement changes if required; and
- deal conditionality and how any risk of the transaction being blocked, remedies being imposed etc. will be apportioned between the parties.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

No. However, as there is no definition of what is meant by 'national security', it could be interpreted to include matters relating to public health emergencies.

Note that there is also a provision under the merger control rules

enabling the SoS to intervene in transactions which may impact the UK's ability to respond to public health emergencies if they meet the UK merger control jurisdictional thresholds.

What are the key trends in FDI enforcement?

11 July 2024

The regime has been live since January 2022 and is very active. The second Annual Report on the regime, published in July 2023, gave significant insight into how the regime has been operating in practice, and indicated that, in total, 866 notifications were made to the ISU between 1 April 2022 and 31 March 2023. See our article analysing the statistics and implications of the second Annual Report here: UK National Security and Investment Act – second Annual Report published - Hogan Lovells Engage.

As of 29 April 2024 there have been 20 Final Orders imposed:

- Five were prohibitions, two of which saw the Government make use of the NSIA's retrospective powers to require the purchasers to divest shares already acquired prior to the NSIA coming into force.
- 15 involved the imposition of conditions.

In the 2023 Annual Report, the Government confirmed that, between 1 April 2022 and 31 March 2023, the most common sector triggering a mandatory notification was Defence (47%), followed by Critical Suppliers to Government, Data Infrastructure, Military and Dual Use and Artificial Intelligence. The most common sectors for Final Orders related to the Military and Dual Use and Communications sectors (both receiving 4 Final Orders), and Energy, Defence, Computing Hardware and Advanced Materials (each receiving 3 Final Orders). Notably, two prohibitions involved semiconductors (which also involved Chinese acquirers).

As with many FDI regimes, a lot of the enforcement activity has focussed on Chinese acquirers. Of the 20 Final Orders imposed by April 2024, four of the five prohibitions and around half of all Final Orders involved Chinese or China-backed acquirers. This is despite the fact that, according to information published in the second Annual Report, China was cited as the 'origin of investment' for fewer than 5% of notifications made.

But limiting Chinese investment is not the whole story. Chinese investment is still being unconditionally cleared, as evidenced by the acquisition in 2022 of a company active in semiconductor technology by a Chinese acquirer (which came to light following political pressure in January 2023). Further, the majority of transactions notified as mandatory in the past year have involved a UK-based acquirer, and indeed deals have had conditions imposed involving UK acquirers, emphasising that the regime does not only relate to 'foreign' investment.

Interestingly, the proportion of deals called in is higher for voluntary filings (12%) compared to mandatory filings (6%) which indicates that the types of deals and sector definitions for mandatory notifications could be too broadly construed and that the regime may need to be recalibrated at some point to focus on catching deals most likely to cause a national security concern.

What are the recent legal developments?

11 July 2024

As the regime is relatively new, there have been no major amendments or developments to the legislation since coming into force in January 2022.

In February 2023, as part of a wider Government departmental shake up, the ISU moved from the Business department to sit closer to the centre of Government within the Cabinet Office, where the Government's central intelligence machinery already resides.

This was followed by a Memorandum of Understanding between the ISU and the Business, Energy and Industrial Strategy Committee in Parliament, giving Parliament greater oversight of the regime and improving its transparency.

In November 2023, the Government issued a Call for Evidence. The outcome of this was published on 18 April 2024. Based on the responses received, the Government has announced its intention to implement changes to the NSI regime over the course of 2024. The underlying objective is that the regime remains "proportionate and well-targeted". The changes will cover 5 broad areas (see response to question below).

What future legal developments are expected?

11 July 2024

The next annual report will be published during the course of 2024.

On 18 April 2024, the Government published its response to the NSI Call for Evidence announcing that it plans to:

- publish an updated statement in May 2024, on how the SoS expects to exercise the "call-in power" ("the Section 3 Statement"). The Government intends to ensure stakeholders have a better understanding of this aspect of the regime. As such, the updated statement will include specific factors that the SoS will take into account when exercising this power.
- publish updated market guidance in May 2024. This will include guidance on the NSI's application to transactions in the academia and research areas, the calculation of statutory time limits and the regime's application to outward direct investment.
- launch a public consultation on updating the mandatory notification sector definitions by Summer 2024. This will include proposals for a standalone semiconductor and critical minerals sector. It will also consider the addition of water to the list of sectors.
- lay technical exemptions to the mandatory notification requirement by Autumn 2024. Notably, the government confirmed that it will bring forward secondary legislation to exempt the appointment of liquidators, official receivers and special administrators.
- make further improvements to the functionality of the NSI system, including the online submission portal, the 'NSI Notification Service'.

The Government will continue to review the regime and will consider the implementation of further changes to ensure the NSIA keeps pace with "evolving threats".

There are currently two appeals of Final Orders in train, including an appeal has been brought by Nexperia by way of judicial review against a Final Order regarding its acquisition of Newport Wafer Fab. These

appeals will be the first challenges to the SoS' use of the powers under the NSIA and may give further guidance and insight into the decision-making process.

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Key Features

Types of deals subject to the FDI regime	11 July 2024

	Depending on the acquirer, target and transaction value, thresholds for mandatory notification start as low as five percent of voting rights. Voluntary notification may be relevant for other “significant actions”.
Principal authorities	11 July 2024 Australian Treasurer.
Lookback period	11 July 2024 Up to 10 years.
Mandatory / voluntary filing	11 July 2024 Mandatory and voluntary notification, depending on the transaction/sector.
Substantive test for intervention	11 July 2024 National interest or national security.
Extra-territorial reach	11 July 2024 The FDI regime captures the indirect acquisition of Australian businesses and land.
Timeline for review (approximately)	11 July 2024 Usually one to three months.
Potential penalties	11 July 2024 Fines up to AU$555 million; and potential imprisonment.
FDI clearance necessary to close	11 July 2024
Right to appeal	11 July 2024 Limited rights to appeal.
Special measures in response to COVID-19	11 July 2024 The temporary measures in response to COVID-19 have been reversed (including the temporary reduction of monetary thresholds to AU$0).

Questions

Is FDI subject to restrictions, filing, or review?

11 July 2024

The foreign investment review framework is set by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Foreign Acquisitions and Takeovers Fees Impositions Act 2015 (Cth), and administered by the Foreign Investment Review Board (FIRB). The Act requires foreign investors to notify the Australian Treasurer (Treasurer) of proposed foreign investments that meet certain criteria. Foreign investors will be required to pay an application fee when notifying the Treasurer of a proposed investment.

The Treasurer has the power to prohibit investments, or apply conditions to the way they are implemented, to ensure they will not be contrary to the national interest or national security. When making foreign investment decisions, the Treasurer is advised by the FIRB, which examines FDI proposals and advises on the national interest implications. The great majority of proposed investments are approved.

What types of deals are subject to the FDI regime?

11 July 2024

FATA contains complex provisions regulating the acquisition by a foreign person of, among other things, Australian business and land. Whether an acquisition by a foreign person will be subject to Australian FDI approval is highly fact-sensitive and will be dependent on numerous factors, including:

- Whether the investor is a foreign government or non-government investor.
- The type of acquisition.
- whether the investment is likely to raise national security concerns.
- The monetary thresholds relevant to the investment.
- Any free trade agreement commitments.

A “foreign person” includes an individual (not ordinarily resident in Australia), a foreign corporation and a foreign government (including a foreign government entity).

General thresholds

The monetary thresholds for acquisitions vary depending on the types of the deals and the investors. For example, from 1 January 2022, the general screening threshold for acquisitions of business is AU$289 million for investors from most countries. Certain countries which have free trade arrangements with Australia have a higher screening threshold of AU$1,250 billion (e.g. Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea and the U.S.). In general, lower monetary thresholds will apply for land investments and investments into certain industries, such as media, for national security related investments and where the investor is considered to be a foreign government investor.

The percentage interest threshold to trigger FIRB review is usually a 20 percent or more interest (a "significant interest") however this can be lower where the relevant test is taking a "direct interest". The concept of a "direct interest" is a 10 per cent interest, but this percentage is lowered to 5 per cent if the investor is a party to a shareholders agreement in relation to the target or any per cent interest if the investor is in a position to influence control of the Target.

However, different thresholds and special considerations may apply to acquisitions of interest in national security businesses, agriculture businesses, media businesses or when the target is Australian land. There are also additional actions for foreign government investors.

National security businesses

From 1 January 2021, a foreign person proposing to take a "notifiable national security action" must give notice of the action to the Treasurer and seek approval from FIBR. A "notifiable national security action" includes, among other things, an action to:

- Start a "national security business".
- Acquire a direct interest in a "national security business".
- Acquire an interest in Australian land that, at the time of acquisition, is "national security land".

This means that foreign investors will need to consider the nature of the target of their investment and whether it could be a "national security business" or "national security land".

A "national security business" refers to an endeavor that if disrupted or carried out in a particular way may create national security risks. For example, provision of critical services to defense and intelligence personnel in Australia may be considered a "national security business" under FATA regardless of whether such business is in anticipation of profit or gain. From this year, a "national security business" also includes business dealings with "critical infrastructure assets" (within the meaning of the Security of Critical Infrastructure Act 2018), examples of which are Port of Christmas Island or a gas processing facility with large capacity.

Under FATA, a business would only be a national security business if it is publicly known, or could be known by making reasonable inquiries, that the business fulfils the criteria for being a national security business. Likewise, the definition of "national security land" includes land of which an interest holder is an agency in the National Intelligence Community that is publicly known, or could be known by making reasonable inquiries.

Agriculture

Foreign persons must get approval before acquiring a "direct interest" in an agribusiness where the value of their holdings in that business are more than the relevant monetary threshold.

Media

All foreign persons must get approval before acquiring a "direct interest" in an Australian media business, regardless of the value of the investment.

Land

Foreign persons will need to obtain approval before acquiring an interest in "Australian land" (this includes agricultural land, commercial land, mining and production tenements, and residential land) where the value of their land holdings is more than the relevant monetary threshold or regardless of the value of land, depending on the type of land.

Foreign government investor

A foreign government or foreign government investor (FGI) is subject to the same requirements for approval as other foreign persons but additional requirements apply – the key one being that FGIs require

approval before acquiring any "direct interest" in an Australian entity or business, regardless of the value.

The definition of an FGI is broad and can capture investors that act independent of state governments – for example a private equity fund with a material portion of sovereign wealth funds/state pension funds can itself be deemed to be an FGI.

Which are the principal authorities in charge of FDI?

11 July 2024

The Treasurer, the FIRB and the Australian Taxation Office (ATO) are responsible for screening foreign investment proposals in line with Australia's foreign investment review framework.

The Treasurer reviews foreign investment proposals against the national security interest on a case by case basis.

The FIRB is a non-statutory body which advises the Treasurer on foreign investment policy and administration. They are responsible for examining foreign investment proposals that fall within the foreign investment framework. The FIRB application process involves mandatory engagement with the relevant government departments and agencies. Normally, this will include certain "consult parties" such as the Australian Competition and Consumer Commission, the ATO, national security agencies and government agencies relevant to the issues raised by an application.

The ATO has responsibility for administering residential real estate screening and for administering investments into non-sensitive commercial land and commercial reorganizations. The ATO assesses applications, collects fees, and is responsible for compliance and enforcement for residential real estate. They also, as a practical matter, take the lead in internal restructuring applications.

The Australian Prudential Regulation Authority (APRA) monitors FDI into the banking and financial sectors.

Is there a lookback period?

The Treasurer is able to "call in" for review transactions that have not been notified to the Treasurer for a period of up to 10 years. This is for the Treasurer to determine if such transactions raise national security concerns. For transactions "called in", the Treasurer may issue a no objection notification, including with conditions, or prohibit the action, or require divestment (see the answer to question 5 for more details).

Is the FDI filing voluntary or mandatory?

11 July 2024

There are broadly four main categories of actions that may be subject to notification to or review by the Treasurer:

- Actions classed as "notifiable action": it is necessary to obtain foreign investment approval, and the transaction cannot proceed without the Treasurer's approval. It includes a proposed action by a foreign person to acquire a "direct interest" in an agribusiness, a "substantial interest" in an Australian entity or an interest in Australian land.

- Actions classed as a "significant action": while the Treasurer's approval is not required before the transaction occurs, if the Treasurer subsequently decides the action was against the "national interest" they have the power to amend to order the unwinding of the transaction in the following 10 year period. Thus, foreign persons may choose to notify the Treasurer of a proposed significant action (not a notifiable action nor a notifiable national security action) by submitting an application to benefit from the certainty offered by a no objection notification.

  The conditions of a "significant action" vary depending on the types of action. And if it relates to an acquisition of an Australian business, generally will require certain monetary thresholds to be met and a change of control.

- Actions classed as "notifiable security action" (see at question 2 above).

- National security "call in": the Treasurer has the power to "call in" and review any transaction that has occurred in the last 10 years, which has not been notified to the Treasurer. If the Treasurer deems the transaction to be against Australia's "national security interests", it has the power to prohibit the action or require divestment. FIRB has provided guidance for transactions that do not require mandatory notifications as "national security businesses" but could give rise to national security concerns in the future, so FIRB recommends a voluntary application to remove the risk of the transaction

subsequently being “called in”.

If an investor decides to make a voluntary application to FIRB for a transaction, then the transaction becomes “notifiable” and the transaction cannot complete without the Treasurer’s approval.

Finally the 2021 amendments to the FIRB regulations introduced a new “last resort” power for the Treasurer. This gives the Treasurer an opportunity to review actions notified after 1 January 2021 for which a no objections notification, an exemption certificate, deemed approval or a notice imposing conditions has been given, if exceptional circumstances arise. It is contemplated that this last resort power would only be used in rare and exceptional circumstances.

Extra-territorial reach and workarounds?

11 July 2024

If an investment falls within the framework as a “notifiable transaction” the FDI restrictions cannot be avoided. However, it may be possible to restructure a transaction so that an investment doesn’t fall within the FDI framework, for example by delaying the transfer of certain Australian assets. However, any such restructure must be done carefully and on the basis that the restructuring can be clearly explained to FIRB if they ever enquired about it.

What is the FDI procedure?

11 July 2024

Foreign investment notifications are filed with the Treasurer through the online FIRB applications portal. The role of FIRB is to review and advise the Treasurer as to the national interest implications of the notified proposed foreign investment.

Once an application has been made, FIRB generally reviews the application and provides the applicant with requests for further information where required. However, the final decision to grant or refuse FIRB approval rests with the Treasurer.

The Treasurer has 30 days from the date that the application fee is paid to review and make a decision and a further 10 days to notify the applicant on whether FIRB will grant approval, giving an effective 40 day period, which is often extended as discussed below. The FATA does not provide grounds for expediating the assessment process, however, FIRB is open to hearing submissions as to why an application is urgent and should be expedited and will usually seek to be helpful where a strong case for urgent attention can be made.

The formal procedures allow FIRB to require more time by the issue of an interim order, which prevents the foreign person from carrying out the proposed transaction and allows FIRB a further 90 days to consider the application. The issue of an interim order is a public matter, however it is very rarely made, as discussed below.

FIRB often makes iterative requests for further information throughout the application process and, especially during busy periods, it is common for FIRB to request that the applicant gives them more time by way of a voluntary extension of the 40 day period. Although the request is "voluntary" the alternative is that FIRB will issue a public interim order, and so the "voluntary" request for extension is invariably consented to by applicants. The result is that applications frequently have "voluntary" extensions and a six - eight week time period is commonly needed to get final FIRB approval.

FIRB approval will generally be granted unless the foreign investment is considered a threat to Australia's national interests or contrary to Australia's national security. Upon review, the Treasurer will permit a foreign investment with or without additional conditions, or prohibit the foreign investment or, as the case may be, have the investment unwound.

Generally, we are seeing more conditions being imposed on FIRB approvals, particularly around tax compliance and data protection. This is consistent with the tightening of the foreign investment review framework enacted by the national security amendments and the increased concerns for tax and data privacy.

What are the penalties of the failure to file?

11 July 2024

A failure to comply with the FATA may result in significant criminal and civil penalties. This includes failing to make a mandatory notification and proceeding with a transaction prior to receiving FIRB approval.

With a breach of FIRB conditions, an individual can be fined up to AU$3.33 million and face 10 years' imprisonment, whilst a corporation can be fined up to AU$33.3 million. Under the civil penalty provisions, individuals can be fined between AU$1.11 million and AU$555 million and corporations liable to be fined between AU$11.1m and AU$555 million.

The Treasurer has a range of enforcement powers, including:

- imposing administrative payments under an infringement notice;
- having the power to unwind the investment;
- ordering divestment of the relevant asset; and
- accessing premises with consent or by warrant to gather information in order to monitor compliance with the FATA.

Is FDI clearance necessary to close the transaction?

11 July 2024

If there is a mandatory notification obligation, the transaction cannot be closed prior to seeking and obtaining approval. If a filing is actually made, either on a voluntary or mandatory basis, a transaction must not be closed prior to FIRB approval being obtained. If the parties implement the transaction prior to approval being obtained, penalties may apply.

Transaction documents can only be signed prior to approval if they contain an appropriate condition precedent relating to obtaining FIRB approval.

Is there a right to appeal?

11 July 2024

If a deal is blocked by authorities, there are limited rights to appeal. The review rights relate to procedural fairness and only extend to the merits of a decision when the Treasurer's last resort powers have been used.

How to manage the FDI procedure?

11 July 2024

Early review and understanding of the FIRB regime is highly recommended. This can allow:

- Review of the structure of the transaction to see if it can be amended to properly structure around the FIRB framework.
- Review of the key transaction document(s) to ensure the requirements of the FIRB regime are fully addressed, e.g. inserting applicable condition(s) precedent in the sale and purchase agreement to accommodate the FIRB approval requirements.
- Consideration of whether to make a voluntary application.

- If an application is to proceed, ensure early engagement with FIRB and appropriate timing is built into the transaction timetable.

Are there special measures to protect national assets in response to COVID-19?

11 July 2024

On 29 March 2020, the Australian Government temporarily reduced the monetary screening thresholds for all foreign investment subject to the FATA to $0 due to the impacts of COVID-19. This was thought to safeguard national interests as COVID-19 put pressure on Australia's economy and businesses. However, this has now been reversed and the temporary COVID-19 provisions lifted.

What are the key trends in FDI enforcement?

11 July 2024

Due to the 1 January 2021 changes to Australia's FDI regime (see the answer to question 14), there is an increasing focus on national security, critical infrastructure, FGI and on the geo-political environment. This has arisen due to the increased risks due to a confluence of developments, including rapid technological advancements and changes in the international security environment.

Penalties for non-compliance have been increasing as well as resources for compliance monitoring.

The limited review rights has meant that there is a lack of cases noted publicly.

What are the recent legal developments?

11 July 2024

The centerpiece of the legislative amendments in relation to the Australia's FDI regime is an enhanced review of acquisitions of property or businesses which are sensitive to Australia's national security. Significant amendments were made to Australia's FDI regime on 1 January 2021 with the introduction of the Foreign Investment Reform (Protecting Australia's National Security) Act 2020 and the Foreign Investment Reform (Protecting Australias National Security) Regulations 2020, which introduced a new definition of "national security business". The Australian Government further expanded the scope of what constitutes a national security business through amendments in 2022 to the Security of Critical Infrastructure Act 2018 (Cth), including deeming all "critical infrastructure" to be national security businesses.

Some of the most noteworthy developments from the amendments include:

- A new national security test was introduced alongside the concepts of "national security business" and "national security land".
- The Treasurer was given call in and last resort powers.
- The severity of criminal and civil penalties for non-compliance have increased in magnitude, including for failure to give FIRB notice of a "notifiable action" or of a "notifiable national security action".

What future legal developments are expected?

11 July 2024

It is too early to determine whether the newly implemented reforms in 2021 will have an impact on the FDI in Australia. As it stands, the reforms have achieved the Australian Government's intentions to enable scrutiny of investments that are determined to pose national security risks.

Since the 2021 reforms, the Australian Government have considered the following findings:

- The Treasury will increase transparency of its operations, through the development of additional public performance reporting.
- Clarification to be given to investors in regards to the application of the national security test.
- Refinements of the compliance and enforcement measures to ensure proportionate and scalable responses are available for any contraventions of the framework.

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