Breaking down barriers
A global guide to foreign investment regimes
In recent years there has been a marked change in attitude towards foreign investment ("FDI") screening. A range of jurisdictions globally have taken steps to strengthen their ability to review and actively intervene in transactions. Most recently, the EU introduced an EU-wide regime (a significant move away from its historically more relaxed approach to foreign investment), while in the UK the National Security and Investment Act came into force in January 2022, granting the Government the power to intervene in a wide range of transactions.

In this comparative guide, we examine 16 key parameters of the current and proposed foreign investment regimes in China, the EU, jurisdictions across Europe, the UK and the US. While there are differences in scope and application across these regimes, it is clear that there are a number of striking commonalities that indicate an increasingly protectionist and restrictive environment for foreign investment, including:

- capturing a very broad range of transactions – it is not just traditional M&A which is caught but a range of minority and other investments
- no (or minimal) financial thresholds apply – foreign investment screening covers deals of all sizes
- not just an issue for the defence sector – a wide range of sectors are targeted
- governments are provided with substantial powers to block or amend transactions
- not just talk – governments are actively using their powers and are intervening in transactions of all sizes

This suggests that, looking ahead, foreign investment screening is not only set to remain a common feature of deal-making, but is likely to expand significantly to cover an ever-increasing range of transactions of all sizes and across a range of sectors. This guide provides companies and investors with an insight into:

- which types of transaction could be subject to foreign investment screening
- the impact that such processes can have and how long such reviews might take
- what powers governments have to intervene
- the sanctions which can be imposed for non-compliance
- what rights of appeal, if any, exist

We hope that you find the guide a useful tool when planning your deals. If you have any questions as to whether your future plans may be impacted by FDI regimes, please get in touch with your usual Eversheds Sutherland contact or a member of the FDI team.
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**Separate vetting process or part of merger control?**

Separate.
**Relevant authority and decision-maker?**

Austrian Federal Ministry of Labour and Economy
(Bundesministerium für Arbeit und Wirtschaft, the "BMAW")

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Mandatory or voluntary filing?

Filing is mandatory for investments into companies which are engaged in the areas defined in an attachment to the Austrian Investment Control Act (Investitionskontrollgesetz). These are as follows:

**Particularly Sensitive Areas**
- defence equipment and technologies
- operation of critical energy infrastructure
- operation of critical digital infrastructure, in particular 5G infrastructure
- water
- operation of systems that guarantee the data sovereignty of the Republic of Austria
- research and development in the fields of medicinal products, vaccines, medical devices and personal protective equipment

**Other areas in which there may be a threat to security or public order**

**Critical Infrastructure (facilities, systems, equipment, processes, networks or parts thereof); this includes in particular:**
- energy
- information technology
- traffic and transport
- health
- food
- telecommunications
- data processing or storage
- defence
- constitutional institutions
- finance
- research institutions
- social and distribution systems
- chemical industry
- investments in land and real estate that are crucial for the use of the critical infrastructure mentioned in the bullet points above

Critical Technologies and dual-use items within the meaning of Article 2(1) of Regulation (EC) No 428/2009, including:
- artificial intelligence
- robotics
- semiconductors
- cybersecurity
- defence technologies
- quantum and nuclear technologies
- nanotechnologies
- biotechnologies

The security of supply of Critical Resources, including:
- energy supply
- raw material supply
- food supply
- supply of medicines and vaccines, medical devices and personal protective equipment, including research and development in these areas

Access to sensitive information, including personal data, or the ability to control such information
- Freedom and plurality of the media

Infrastructure, Technologies and Resources are considered to be "critical" for these purposes if they are essential for the maintenance of important societal functions because their disruption, destruction, failure or loss would have a serious impact on the health, safety or economic and social well-being of the population or the effective functioning of government institutions.

Filing is voluntary for the investment in companies engaged in other activities.
**Need for prior approval before closing?**

For the investment in companies subject to mandatory filing (see above): Yes

For other investments: No
Is it targeted only at "foreign" investments and if yes, what is “foreign”?

Yes. The following investors are deemed to be "foreign":

- non-EU/EEA or non-Switzerland citizens, or
- legal entities with its registered office or head office outside the EU/EEA or Switzerland
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**Sectoral focuses**

Please refer to the chapter above on mandatory or voluntary filing.
Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)

Direct or indirect acquisition of:

- more than 25% of voting rights in the target entity (or more than 10% in Particularly Sensitive Areas, see response to Question 3 above)
- further voting rights in the target entity (e.g., if the acquirer buys further shares) so that a threshold of 25% or 50% of the voting rights is reached or exceeded
- controlling influence over the target entity (regardless of the number of shares), or
- significant assets of the target entity which enables control over the target entity

If more than one foreign person/entity invests in the target entity, their voting rights may have to be added together for the purposes of calculating the thresholds under certain circumstances.

Target entities are all companies and enterprises having their registered office or place of central administration in Austria.
### Austria

**Separate vetting process or part of merger control?**
- Relevant authority and decision-maker

**Mandatory or voluntary filing?**
- Need for prior approval before closing

**Is it targeted only at “foreign” investments and if yes, what is “foreign”?**
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- Potential sanctions for gun jumping/failure to file

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### Thresholds that apply

Please refer to the response to Question 7 above on types of transactions caught for the percentage thresholds.

No filing is required and the screening rules do not apply to small companies and start-ups with less than 10 employees and a yearly turnover or balance sheet total of less than EUR 2,000,000.
When can a transaction be called in by a regulator?

The BMAW may step in and open a procedure after it has been notified of a transaction or has become aware by other means of a planned or already completed transaction subject to mandatory prior approval. Transactions subject to mandatory prior approval are considered to be suspended until the required approval has been acquired. If the required approval is not granted, the transaction is considered null and void. If a transaction is completed without the required approval, the BMAW can order the unwinding of the transaction.
Relevant test for intervention

The BMAW will review whether the transaction is likely to negatively affect security or public order.

The BMAW shall take into account in particular:

- whether an acquiring person is directly or indirectly controlled by the government, including government agencies or the armed forces, of a third country, including by virtue of ownership structure or in the form of substantial financial resources;
- whether an acquiring person, or a natural person who holds a senior position in an acquiring legal person, is already or has been involved in activities that have or have had an impact on security or public policy in another EU Member State; and
- whether there is a significant risk that an acquiring person, or a natural person who holds a senior position in an acquiring legal person, is or has been involved in illegal or criminal activities.
### Timetable for review

The BMAW is required to make a decision within one month. This one-month period starts:

- on expiry of the deadline for other EU authorities to comment on the application, which is 35 days after receipt of the application forwarded from the BMAW, and if further information is required, this is extended for a further 20 days after the receipt of such further information; or
- in urgent matters, upon the BMAW’s receipt of the complete application.

The parties will be informed of the date on which this one month period begins.

The BMAW is entitled to extend this decision period by up to two months in particularly complicated cases. If the BMAW does not issue a decision within the above timeframe, the application is considered to be approved.
AUSTRIA

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**Ability to prohibit / unwind a transaction?**

The BMAW is entitled to block and prohibit transactions. Completed transactions can be unwound by the BMAW. Furthermore, transactions subject to mandatory prior approval are considered by law to be suspended until the required approval of the BMAW has been received. If approval is not obtained, the transaction is considered null and void.
Any acceptable remedies to address national security risks?

The BMAW may approve a transaction subject to conditions that it considers necessary for the elimination of the threat to security or public order.
### Potential sanctions for gun jumping / failure to file

Non-compliance: Criminal offence punishable by up to three years of imprisonment and/or a fine of up to EUR 550,000.

Minor violations of the law may be punished by an administrative fine up to EUR 40,000.
### Right of Appeal

The decisions of the BMAW are subject to judicial review by the Federal Administrative Court and superior courts in case of an appeal. The deadline for filing an appeal is four weeks.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

Following the COVID-19 pandemic, certain targets active in the health sector, particularly in the research, development and supply of medicinal products, vaccines, medical devices and personal protective equipment are now subject to the Austrian regimes on foreign investment.

### Austria

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Separate vetting process or part of merger control?

There are two relevant regimes in China:

1. Foreign Investment Review (FIR)
   Note: FIR is separate to merger control.
   On 1 January 2020, the Foreign Investment Law ("FIL") took effect. The FIL phases out concepts which form part of the previous foreign investment regime (such as Sino-foreign equity and contractual joint ventures and wholly foreign-owned enterprises). Subject to exceptions, foreign-invested enterprises (being enterprises registered and established in China which are wholly or partly invested by foreign investors (including foreign natural persons, enterprises and organisations)) are treated in the same manner as national enterprises going forward.

   In general, foreign investments only need to be reported post-closing. However, there are different rules for investments in a target enterprise that is in a listed sector. The listed sectors are those falling within the national or free trade zone Negative Lists of foreign investments which are prohibited in certain areas. Foreign investments in certain other areas are only subject to review by the relevant authority or department as to whether the specified conditions are satisfied.

2. National Security Review (NSR)
   Under the Anti-Monopoly Law, mergers that have national security implications are expressly subject to the NSR, which is separate to the merger control regime. The NSR is now codified under the new FIL. Investments in military-related domestic enterprises, as well as domestic enterprises in other sensitive sectors (such as key technologies, key energy and infrastructure, see further below), are more likely to trigger the NSR.

Separate vetting process or part of merger control?

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**Relevant authority and decision-maker**

**FIR**
The Negative List, which sets out sectors subject to FIR, is approved by the State Council and jointly issued by the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM"). As stated above, only the relevant transactions are subject to review, whilst other transactions are notified to the State Administration for Market Regulation ("SAMR") post-closing.

**NSR**
The Measures for the Security Review of Foreign Investment, which became effective in January 2021, sets out the key rules that apply to NSR. A working office (the "NSR Office") set up within the NDRC, that is jointly led by the NDRC and MOFCOM, has since been tasked with organising, coordinating and supervising NSR work.
### Mandatory or voluntary filing?

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<td>Where a target enterprise falls within the Negative List, parties are prohibited from completing a transaction pending review by the relevant authority. Other transactions only need to be notified to SAMR post-closing.</td>
<td>The NSR requires a mandatory filing if a transaction falls within its scope (see below). An interested party may assess whether a proposed transaction would trigger the need for an NSR filing and make a filing proactively. The NDRC may also on its own volition or upon a report being made, require a party to make an NSR filing.</td>
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### Need for prior approval before closing?

**FIR**
The need for prior approval before closing depends on the target enterprise. Where the target enterprise falls within the Negative List, parties are prohibited from completing the transaction pending approval. Industry-specific approvals may also be required for certain sectors. Other transactions only need to be notified to MOFCOM via an online system administered by SAMR post-closing.

**NSR**
Whether a transaction falls within the scope of NSR can be unclear and is largely fact-specific. Where the target enterprise is likely to fall within an identified sensitive sector, a consultation with the NSR Office prior to completion is recommended.

Upon the formal acceptance of an NSR application, NDRC will review the relevant material and within 15 working days determine whether a formal review is required. If a formal review is initiated, the NSR Office will conduct a general review (and possibly a further special review). During such period, the applicants cannot close the transaction.

Even after the close of the transaction, NDRC may initiate an NSR at its own discretion or upon receipt of third party complaints.
Is it targeted only at “foreign” investments and if yes, what is “foreign”?

FIR and NSR
Both the FIR and the NSR target foreign investments. A person or company will be regarded as a “foreign” investor if its nationality/place of incorporation is outside of Mainland China.

An investment will also be regarded as “foreign” where the capital comes from outside Mainland China. Investors from Hong Kong, Macau and Taiwan are therefore “foreign” for FIR purposes.
FIR
Enterprises on the Negative List may be subject to sectoral approval processes.

NSR
Enterprises in the following sectors, as set out in the Measures for the Security Review of Foreign Investment, are subject to the NSR:

A. Military: any investment in the military or military-industrial industries, a field related to national security, or which is situated near military facilities or military-industrial facilities; or

B. Other Sensitive investments: any investment affecting national security in:
   - key agricultural products
   - key energy and resources
   - key equipment manufacturing
   - key infrastructure
   - key transportation services
   - key cultural products and services
   - key information technology and internet products and services
   - key financial services
   - key technologies
   - other key areas

The NSR applies to any type of investment in an enterprise falling under the “Military” category above.
The NSR is applicable to “Other Sensitive Investments” only where the investment will result in a change of control.

Sectoral focuses

FIR
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The NSR is applicable to “Other Sensitive Investments” only where the investment will result in a change of control.
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

**FIR**
Any form of investments, direct or indirect, incorporation, formation of a joint venture, acquisitions of shareholdings or minority rights could be captured, irrespective of the shareholdings acquired.

**NSR**
All direct or indirect transactions involving the acquisition of domestic military-industrial or military-related enterprises, enterprises neighbouring military and military-related facilities and other sectors concerning national security by foreign investor(s) can be caught.

In addition, direct or indirect transactions resulting in the foreign investor(s) accumulatively acquiring control over domestic enterprises in any of the identified sensitive sectors (including key agricultural products, and key energy and resources, as set out above) are also likely to be within scope.

For the purposes of the NSR, a foreign enterprise acquires control if:
- the foreign shareholdings will be 50% or above in a target enterprise
- the foreign shareholdings will be below 50%, but the voting rights held by the foreign investor(s) will confer the ability to materially impact the decisions of a target enterprise in its board or shareholders’ meetings
- in other circumstances where the foreign investment(s) will be able to materially impact the target enterprise’s business strategy, human resources, finance or technology
### CHINA

#### Thresholds that apply

No financial thresholds applicable.

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When can a transaction be called in by a regulator?

**FIL**
Pre-transaction review is mandatory for foreign investment in sectors identified in the Negative List. For other types of investments, MOFCOM and/or any other relevant government authority may conduct a review subsequent to filing or reporting.

**NSR**
Transactions falling within the scope of the NSR can be called in by the NSR Office, which may request that the parties make an NSR filing.
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**Relevant test for intervention**

**FIL**
There is no express test for intervention. Relevant government authorities have the powers to review and investigate any foreign investments that are within scope.

**NSR**
There is no express test for intervention. The NSR Office has the power to review and investigate any foreign investments that are within scope.
**FIR**
There is no set timetable for FIR.

**NSR**
The NSR timetable generally involves two stages (general review and special review):

(i) Within 15 working days of making an NSR filing, the NSR Office will decide whether a formal review is required. If a formal review is not required, the transaction may proceed.

(ii) If a formal review is required, a general review will be conducted within 30 working days. A special review will be initiated for transactions that are considered to have an impact or potential impact on national security. The NSR Office is required to complete the special review within 60 working days. The duration of the review may be extended when necessary.
Ability to prohibit/unwind a transaction?

FIR
The authorities have the power to prohibit or unwind a transaction (although this power is rarely exercised).

NSR
The NSR Office may prohibit a transaction from proceeding or approve a transaction subject to satisfaction of condition(s) specified by the NSR Office. As decisions are typically not made public, there is limited visibility as to how frequently transactions are blocked or unwound.
### Any acceptable remedies to address national security risks?

**FIR**
The rules on FIR are silent on remedies.

**NSR**
Specifically for transactions subject to the NSR, the NSR Office may require parties to modify the transaction structure to address the likely impact on national security and re-file, or require the parties to adhere to conditions attached to its approval.
### Potential sanctions for gun jumping/failure to file

**FIR**
- if an enterprise fails to make a notification, it may be ordered to rectify this (failing which a fine of RMB100,000 to 500,000 may be imposed)
- if an enterprise fails to obtain proper approvals before investing in a field on the Negative List, the authorities may order the parties to terminate the investment activity, dispose of the investment or to unwind the transaction. Any illegal income may be confiscated

**NSR**
In addition to the NSR Office’s ability to suspend or prohibit a transaction and/or request the parties to unwind a transaction, it may also take all necessary measures to require the disposal of the investment and restore the pre-transaction status. A failure to file may also result in a bad credit record on the National Enterprise Credit Information Publicity System.
### Right of Appeal

**FIR**

Yes – in principle there is the right to appeal any negative decision which can be challenged by way of administrative review.

**NSR**

No – under the new FIL, decisions on NSR are final.
Foreign investment reforms came about due to the enactment of the FIL and its implementing regulations, which preceded COVID-19.

However, in response to COVID-19, MOFCOM and NDRC issued a revised Negative List on 27 December 2021, which came into effect on 1 January 2022. The revised Negative List removed restrictions on foreign investment in the manufacturing industry and brought down the number of restrictive measures from 33 to 31.

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**Introduction**

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- **Spain**
- **Switzerland**
- **UK**
- **USA**
- **China**
- **Austria**
- **Czech Republic**
- **EU**
- **France**
- **Germany**
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- **Hungary**

**Separate vetting process or part of merger control?**

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Mandatory or voluntary filing?

Both.

Mandatory filing and obtaining a permit (or conditional permit) based on an application for a foreign investment permit is required when making a foreign investment in the following sectors:

- production, research, development, and innovation of defence equipment;
- operation of critical infrastructure elements (e.g., energy distribution, large scale agricultural operation, healthcare industry, data centres, networks, etc.);
- administration of information or communication systems of critical information infrastructure, including their operation;
- development or production of dual-use goods.

Beyond the above sectors, the MoIT may initiate the screening procedure of its own accord for investments that could threaten the security of the Czech Republic or internal or public order, either following a mandatory consultation (see below), or within five years from the completion of the foreign investment if the foreign investor has not submitted a proposal for mandatory consultation.

Mandatory consultation applies to foreign investments in the following sectors:

- nationwide radio or television broadcasting,
- publication of a periodical press with an aggregate minimum average circulation of 100,000 copies a day in the last calendar year.

Beyond the mandatory consultation, the investor has the option to voluntarily consult the foreign investment with MoIT on whether the foreign investment may threaten the security of the Czech Republic or internal or public order, which may be a way to increase the legal certainty in relation to MoIT’s right to initiate the screening procedure of its own accord in the future.

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### Czech Republic

#### Need for prior approval before closing?

Obtaining a permit or a conditional permit is a pre-condition for completion of the investment. Mandatory consultation must be carried out prior to completion of the foreign investment. In addition, MoIT has the right to review completed transactions until five years after the completion of the foreign investment.

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Yes. Foreign investors are investors who/which are:

- non-EU citizens,
- legal entities with a seat outside the EU, or
- entities directly or indirectly controlled by either one;
- under certain conditions, trustees of a trust fund.
Please refer to the section above on mandatory or voluntary filing.
### CZECH REPUBLIC

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Effective control over an economic activity can be exercised as follows:

- ability to dispose of at least 10% of voting rights (or a corresponding influence) in the target entity. This percentage includes the shares of the entities which act in concert with the foreign investor or are subject to its joint management;
- membership of the foreign investor (or an entity close to it) in a corporate body of the target entity;
- ownership of an object used for the economic activity; or
- any other form of control which gives the foreign investor access to information, systems, or technologies which are important for protecting the security of the Czech Republic or internal or public order.
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**CZECH REPUBLIC**

**Separate vetting process or part of merger control?**

**Relevant authority and decision-maker**

**Mandatory or voluntary filing?**

**Need for prior approval before closing?**

**Is it targeted only at "foreign" investments and if yes, what is "foreign"?**

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**Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)**

**Thresholds that apply**

**When can a transaction be called in by a regulator?**

**Relevant test for intervention**

**Timetable for review**

**Ability to prohibit/unwind a transaction?**

**Any acceptable remedies to address national security risks?**

**Potential sanctions for gun jumping/failure to file**

**Right of Appeal**

**What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**
When can a transaction be called in by a regulator?

A transaction can be called in by the MoIT when:

- the foreign investor fails to submit the application for the foreign investment permit (mandatory filing), or
- the foreign investment could threaten the security of the Czech Republic or internal or public order, and either
  - based on the result of the mandatory consultation, or
  - within five years from the completion of the foreign investment, if the foreign investor has not submitted the proposal for mandatory consultation, or
- the foreign investor has acted to conceal facts for which the screening procedure could otherwise have been initiated and such facts become apparent after the expiration of five years from the completion of the foreign investment.
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<td>The test for intervention is whether the transaction threatens the security of the Czech Republic or internal or public order. When assessing the foreign investment, the Government shall take into account the possible impact of the foreign investment on the principles of the democratic rule of law, the protection of life and health of the population, the defence of the Czech Republic, its foreign political or security interests, economic security, and possibly other facts important in terms of the protection of the security of the Czech Republic or internal or public order.</td>
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Timetable for review

1. Foreign investment screening procedure based on a mandatory or voluntary consultation

MoIT provides information on the foreign investment to the Ministry of Interior, Defence and Foreign Affairs, as well as to the Police of the Czech Republic and intelligence services, and other authorities as appropriate. These authorities provide the MoIT with an opinion within 35 days of receipt of the request. If the authorities or the MoIT find grounds for initiating the screening procedure, they shall notify the foreign investor within 45 days from the date of receipt of the proposal for the consultation and shall also send the foreign investor a notice of initiation of the screening procedure.

If the authorities or the MoIT do not find grounds for initiating the screening procedure, they shall also notify the foreign investor within 45 days from the date of receipt of the proposal for the consultation, provided that the foreign investment does not pose a threat to the security of the Czech Republic or internal or public order. In such a case, the screening procedure may not be conducted in the future.

2. Foreign investment screening procedure based on the application for the foreign investment permit or initiated ex officio

If the foreign investment meets the screening criteria described above, the foreign investor must apply for a permit before the execution of the foreign investment; alternatively, the screening procedure is initiated of the MoIT's own accord - as described above.

Once the screening procedure has been initiated, the MoIT provides the information received from the foreign investor to other authorities such as the Ministry of Interior, Defence, Finance, Foreign Affairs, the Czech National Bank and the intelligence services and others and requests their opinion within 60 days of the request.

Approval

If the MoIT does not receive an opinion from the aforementioned authorities indicating that the foreign investment may threaten the security of the Czech Republic or internal or public order, and if the MoIT itself has no reason to believe that this is the case, it shall issue a decision on approval of the foreign investment. The MoIT shall issue its decision within 90 days from the date of the initiation of the screening procedure. This period may be extended by 30 days if the case is particularly complex.

Negotiation of the conditions

If, during the screening procedure, the MoIT receives an opinion from the aforementioned authorities indicating that the execution or continuation of the foreign investment should be conditional, the MoIT shall enter into negotiations with the foreign investor on the conditions.

Consideration by the Government

If the MoIT receives an opinion from the abovementioned authorities indicating that the foreign investment could pose a threat to the Czech Republic or to internal or public order, the MoIT shall submit the matter to the Government for consideration before issuing a decision within 90 days from the date of initiation of the screening procedure. This period may be extended by 30 days if the case is particularly complex.

The Government shall adopt a resolution within 45 days of the date on which the case was submitted to it on whether the foreign investment may pose a threat to the security of the Czech Republic or internal or public order.

Decisions in screening procedure initiated based on the application:

– approval of the foreign investment,
– conditional approval of the foreign investment, or
– not granting the foreign investment permit.

Decisions in screening procedure initiated ex officio:

– admissibility of the foreign investment without conditions,
– conditional admissibility of the foreign investment,
– prohibition of the foreign investment, or
– prohibition of the continuation of the foreign investment.
The MoIT may decide to prohibit further continuation of the foreign investment in the following cases:

- the foreign investor has violated the conditions set out in the decision on the conditional permit for the foreign investment;
- the foreign investor has violated the conditions set out in the decision on the conditional admissibility of the foreign investment;
- the foreign investment has been executed in violation of the decision not to grant the permit for the foreign investment;
- the foreign investment has been executed in violation of the decision on the prohibition of the foreign investment.

If, as a result, the security of the Czech Republic or internal or public order may be threatened.

In the context of such a decision, MoIT may:

- prohibit or restrict the exercise of ownership or voting rights of the foreign investor in the target entity;
- order the sale of the target entity or the object used for the economic activity or the participation in the target entity if this is necessary to ensure the security of the Czech Republic or internal or public order.
Any acceptable remedies to address national security risks?

In the event that the original intention of the foreign investor threatens the security of the Czech Republic or internal or public order, the MoIT may set specific conditions (in the conditional permit for the foreign investment) that modify the original intention so that the foreign investment can be executed.

These conditions may include the obligation of the foreign investor to propose consultation again when further increasing the voting rights or the corresponding increase of influence in the target entity or when changing or expanding the scope of activities of the foreign investor or the target entity.
Potential sanctions for gun jumping / failure to file

Breaching the investment prohibition or conditional investment permit carries a fine of up to 2% of the total net turnover of the foreign investor for the last completed accounting period. If the amount of turnover cannot be ascertained, the range is CZK 100,000 - 100,000,000 (approx. EUR 4,000 – 4,000,000).

Investing without applying for a permit / mandatory consultation carries a fine of up to 1% of the total net turnover of the foreign investor for the last completed accounting period. If the amount of turnover cannot be ascertained, the range is CZK 50,000 - 50,000,000 (approx. EUR 2,000 – 2,000,000).
Right of Appeal

The MoIT’s decision cannot be appealed or reviewed in the review procedure. However, it is possible to file a lawsuit or a request for a retrial against such a decision.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

No specific impact.
### EU

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Member States retain decision-making power over foreign investments via their own foreign direct investment screening regimes. However, Member States must also abide by the rules set out in Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (the “EU FDI Regulation”), which establishes a framework for cooperation and information-sharing in respect of foreign direct investment taking place within a Member State.
Mandatory or voluntary filing?

Parties are not required to make a separate FDI filing to the European Commission (the "Commission"), or any other EU institution, pursuant to the EU FDI Regulation. Instead, the EU regime makes it mandatory for a Member State to notify the Commission and the other Member States of any foreign investment in their territory that is undergoing screening. However, each Member State’s own rules apply when determining whether a foreign investor must make a filing in that Member State.
Need for prior approval before closing?

This is dependent on the national rules of the Member State undertaking the foreign investment screening.

Parties are not required to make a separate FDI filing to the Commission, or any other EU institution, pursuant to the EU FDI Regulation.

Under the EU FDI Regulation, the Commission may issue an opinion on a foreign investment where it considers that a foreign investment:

- which is being screened by a Member State is likely to affect security or public order in more than one Member State (or if the Commission has relevant information in relation to that foreign direct investment)
- is not undergoing screening in a Member State but is likely to affect security or public order in more than one Member State
- is likely to affect projects or programmes of Union interest on grounds of security or public order

A Member State can also provide comments on a foreign investment being undertaken in another Member State if it considers that the foreign investment is likely to affect its own security or public order (or if the Member State has information relevant for such screening).

The Member State undertaking screening must give due consideration to the comments of other Member States and to the opinion of the Commission.
Is it targeted only at “foreign” investments and if yes, what is “foreign”?

Yes. The EU FDI Regulation is targeted at investments made by “foreign investors”, with “foreign investor” being defined as a natural person or an undertaking of a third country, intending to make or having made a foreign direct investment.
Interventions under the EU FDI Regulation are limited to transactions which are likely to affect Member State security or public order. The types of transactions which are most likely to be caught are broad and cover:

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

- critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum aerospace, defence, energy storage, nuclear technologies, nanotechnologies and biotechnologies

- supply of critical inputs, including energy or raw materials, as well as food security

- access to sensitive information, including personal data, or the ability to control such information

- the freedom and pluralism of the media

While the EU FDI Regulation itself does not impose any threshold tests or sector exclusions, Member State domestic screening regimes can and do impose these.

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### Sectoral focuses

Interventions under the EU FDI Regulation are limited to transactions which are likely to affect Member State security or public order. The types of transactions which are most likely to be caught are broad and cover:

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- supply of critical inputs, including energy or raw materials, as well as food security

- access to sensitive information, including personal data, or the ability to control such information

- the freedom and pluralism of the media

While the EU FDI Regulation itself does not impose any threshold tests or sector exclusions, Member State domestic screening regimes can and do impose these.
The EU FDI Regulation applies to investments of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom, or the undertaking to which, the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.
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### EU:

**Thresholds that apply**

No thresholds.
**When can a transaction be called in by a regulator?**

The Commission does not have the power to call-in transactions for review. Each Member State’s own rules apply to determine whether or not a transaction can be called in by the relevant regulator in that Member State.

Where a Member State wishes to provide comments, or the Commission wishes to provide an opinion, on a foreign direct investment taking place in another Member State they must do so no later than 15 months after the foreign direct investment has been completed.
Relevant test for intervention

In determining whether a foreign investment is likely to affect security or public order, and therefore is an investment in respect of which they can issue a comment or opinion, Member States and the Commission may take into account its potential effects on the sectors outlined above (see Question 6).

Member States and the Commission are also able to take into account the context and circumstances of the foreign investment, in particular whether:

- the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces of a third country, including through ownership or significant funding
- the foreign investor has already been involved in activities affecting security or public order of a Member State
- whether there is a serious risk that the foreign investor engages in illegal or criminal activities
Timetable for review

Timetable in relation to foreign investments undergoing domestic screening in a Member State

Member States must notify the Commission and the other Member States of any foreign investment in their territory that is undergoing screening as soon as possible.

Other Member States and the Commission must notify the Member State undertaking screening of their intention to provide comments or issue an opinion within 15 calendar days following receipt of the notification from the Member State undertaking screening. Comments or opinions must be addressed to the Member State undertaking the screening within a reasonable period of time, and in any case no later than 35 calendar days following receipt of the notification from the Member State undertaking screening. The Commission may issue an opinion following comments from other Member States where possible within the deadline of 35 calendar days, and in any case no later than five calendar days after this deadline expires.

Where further information is requested from the Member State undertaking screening by other Member States or the Commission, comments or opinions must be issued no later than 20 calendar days following receipt of the additional information.

In the exceptional case where the Member State undertaking screening considers that its security or public order requires immediate action, it must notify other Member States and the Commission of its intention to issue a screening decision before expiry of the timeframes referred to above, and justify the need for immediate action. In such circumstances, the other Member States and the Commission must endeavour to provide comments or to issue an opinion expeditiously.

Timetable in relation to foreign investments not undergoing domestic screening in a Member State

Where the Commission or a Member State considers that a foreign investment which is not undergoing screening is likely to affect security or public order, it may request information regarding the investment from the Member State where the foreign investment is planned or has been completed. This information must be provided by the relevant Member State without undue delay.

Comments or opinions must be addressed to the Member State where the foreign investment is planned or has been completed within a reasonable period of time, and in any case no later than 35 calendar days following receipt of the requested information. In cases where the opinion of the Commission follows comments from other Member States, the Commission has an additional 15 calendar days for issuing that opinion.
### Ability to prohibit/unwind a transaction?

The final screening decision is taken by the Member State undertaking the screening, and its own rules with regards to its ability to prohibit or unwind a transaction will apply. The Commission itself does not have such powers.
Any acceptable remedies to address national security risks?

The final screening decision is taken by the Member State undertaking the screening, and its own rules with regards to acceptable remedies will apply. The Commission itself does not have such powers.
### Potential sanctions for gun jumping/failure to file

The EU FDI Regulation does not impose a filing requirement on the parties. There are also no sanctions for a Member State’s failure to notify the other Member States and the Commission of foreign investments undergoing screening.
Right of Appeal

Not relevant as comments received from Member States and opinions issued by the Commission are not legally binding.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

The COVID-19 crisis has led to a substantially greater focus on Member States’ screening of foreign investment with the Commission explicitly encouraging Member States to use existing domestic FDI regimes or, in the absence of these, “all other available options” to guard against opportunistic foreign takeovers in healthcare and other sectors.
## FRANCE

### Separate vetting process or part of merger control?

Separate.

### Relevant authority and decision-maker

#### Mandatory or voluntary filing?

Need for prior approval before closing?

#### Is it targeted only at “foreign” investments and if yes, what is “foreign”?

Sectoral focuses

#### Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

Thresholds that apply

#### When can a transaction be called in by a regulator?

Relevant test for intervention

#### Timetable for review

Ability to prohibit/unwind a transaction?

#### Any acceptable remedies to address national security risks?

Potential sanctions for gun jumping/failure to file

#### Right of Appeal

What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?
## France

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FRANCE

Need for prior approval before closing?

Yes.
**FRANCE**

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| Is it targeted only at “foreign” investments and if yes, what is “foreign”? | Yes. The following are to be considered “foreign investors”:  
  (i) any non-French legal entity or natural person;  
  (ii) any French natural person whose tax residence is outside France; or  
  (iii) any French legal entity controlled by any of the previous mentioned investors. |
There are two classes of sensitive activities under French FDI regulations namely:
- a public authority activity
- (i) activities that are likely to affect public order, public safety or national defence or (ii) activities of research, production or sale of weapons, ammunitions, gunpowder or explosive materials

These sensitive activities include various sectors. The list of sectors subject to foreign investment control is now the same for all foreign investors, regardless of whether they are located within or outside the European Union.

Below are some examples of sensitive activities which fall within the scope of the French FDI regulations:

1. Sensitive activities relating to national defence, national security and public policy (including military products, dual-use products or technologies, interception/detection of correspondence/conversations, capture of computer data, activities intended to prevent or remedy the illicit use of pathogenic or toxic agents, electronic systems used in public security missions, etc.);
2. Activities relating to “essential” facilities, infrastructure, goods or services (energy, water, transportation, space, electronic communications, public health, agriculture and food industry, publishing and media);
3. Research and development activities in the following sectors: cyber security, artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies, energy storage, biotechnology, dual-use products or technologies, provided that any of them relates to any of the activities referred to in paragraphs 1 or 2 above.

Any French company may ask the MoD whether its activity falls within the scope of the French FDI investment regulation.
### Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

The French foreign investment regulation covers:

1. For EU investors: the acquisition, directly or indirectly, of control of French targets (which may be less than 50% of the shares of a French target if, for instance, a minority shareholder holds a majority of the voting rights in a French target or the right to appoint and dismiss the majority of its Board members, on the basis of a shareholders’ agreement);

2. For non-EU investors: the acquisition, directly or indirectly, alone or jointly, of more than 25% of the French target’s voting rights, in addition to the acquisition referred to under paragraph 1 above. The threshold has been lowered to 10% until 31 December 2022, where the French target is a listed company;

3. The acquisition of all or part of a business (asset deals).

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### FRANCE

**Separate vetting process or part of merger control?**

**Mandatory or voluntary filing?**

**Is it targeted only at "foreign" investments and if yes, what is "foreign"?**

**Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)**

**When can a transaction be called in by a regulator?**

**Timetable for review**

**Any acceptable remedies to address national security risks?**

**Right of Appeal**

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<td>No thresholds (in terms of turnover) relating to the size of the French target company or its business apply.</td>
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When can a transaction be called in by a regulator?

Not applicable as the French foreign investment regime is mandatory.
### France

**Relevant test for intervention**

Given that an MOE authorisation is required as soon as the conditions set forth by the French FDI regulations are met, there is no specific test to consider. That said, depending on the sensitiveness of the business of the French target, the MOE authorisation may be subject to certain commitments to be made and complied with by the foreign investors. In this respect, the MOE will ensure, inter alia, that the proposed acquisition will not affect (i) the durability and security, on French territory, of the activities referred to under the French FDI regulations that are carried out by the French target, notably by making sure these activities are not subject to the laws of a foreign country that would be likely to hinder those activities, and (ii) the protection of the related information.

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The French MoE is required to take a position on any investment clearance request within 30 business days from the receipt of a complete clearance request, failing which such request is deemed to be rejected.

If the MoE wishes to consider the possibility of authorising the transaction subject to certain conditions, an additional 45 business day period will apply. Absent any decision at the expiry of this additional 45 business day period, the investment clearance request is deemed to be rejected.
FRANCE

Ability to prohibit/unwind a transaction?

No transaction falling within the scope of the French foreign investment regime can take place without the clearance (with or without conditions) of the French MoE. Failure to seek such clearance puts the parties to the transaction at risk of heavy penalties.

When such a transaction has been implemented without prior authorisation, the MoE may require the investor to:

- file for authorisation
- unwind the transaction at its own expense
- amend the transaction

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**FRANCE**

- **Separate vetting process or part of merger control?**
- **Relevant authority and decision-maker**
- **Mandatory or voluntary filing?**
- **Need for prior approval before closing?**
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Any acceptable remedies to address national security risks?

Depending on the sensitivity of the business of the French target, the MoE might make its authorisation conditional on the acceptance of and compliance with commitments by the foreign investor. Such commitments may include, for example:

- ensuring the continuity and security in the French territory of the activities carried on by the French target entity, in particular by ensuring that these activities are not subject to the legislation of a foreign state likely to hinder them (for instance the US International Traffic in Arms Regulations ("ITAR") legislation in the military sector), as well as the protection of the confidential information relating to those activities

- ensuring the maintenance of the knowledge and know-how of the target entity and preventing their capture by the foreign investor in the most sensitive sectors

- adapting the internal organisation and governance of the target entity, as well as the procedures for exercising the rights acquired in the target entity

- determining the reporting methods to the public authority in charge of the foreign investment control

The authorisation may be denied if (i) commitments are not enough to remedy national security concerns; (ii) the investor has relationships or links with a foreign government or foreign public entities; or (iii) the investor committed violations of criminal or social law.
### Potential sanctions for gun jumping/failure to file

The MoE may take interim measures, including, for instance, the suspension of the voting and financial rights of the foreign investor in the French target company, or the appointment of a temporary representative. The MoE can also impose heavy monetary sanctions against the foreign investor.

In addition to the above, failure to comply with the French foreign investment regulation may constitute a criminal offence. Under the French Criminal Code, where the non-compliant investor is a legal entity such as a company, it may be held criminally liable for the offences committed on its behalf by its directors and the sanction can be a fine of up to five times the amount of the non-compliant investment.

In addition, the non-compliant investor acting as a natural person or the directors acting on the non-compliant investor's behalf may also be held criminally liable in their own name. A fine of an amount ranging from the amount of the non-compliant investment to double this sum can be imposed, and a penalty of imprisonment for a maximum of five years can be applied.

In addition, the following sanctions may also be imposed:

- the prohibition to exercise, directly or indirectly, one or more activities, either permanently or for a maximum period of five years
- the exclusion from public tenders, either permanently or for a maximum period of five years
- the prohibition, either permanently or for a maximum period of five years, to perform an IPO
- the prohibition to draw cheques, and to use payment cards, for a maximum period of five years
- the confiscation of the goods which were used or intended to be used for the completion of the offence
- the publication of a public notice of the decision in the written press or using any form of communication to the public by electronic means
- the prohibition, for a maximum period of five years, of receiving any public aid from the French State, local authorities, their establishments or groups and any financial assistance from a private person in charge of a public service mission

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### Right of Appeal

Decisions of the MoE may, like any administrative decision, be appealed to the administrative court.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

As a result of the COVID-19 pandemic, R&D activities related to biotechnologies have been included in the list of sensitive activities falling within the scope of the French foreign investment regime.

The French MoE has also lowered the threshold from which the acquisition of a stake by a non-European investor will be subject to foreign investment control to 10% of the capital of a listed strategic company (down from the current 25% threshold).
### GERMANY

**Separate vetting process or part of merger control?**

Separate.

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The German Federal Ministry of Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie) ("BMWi").
### Mandatory or voluntary filing?

Filing is mandatory for the acquisition of companies which manufacture, develop, modify or possess defence goods, as defined in an attachment to the Foreign Trade Ordinance ("Außenwirtschaftsverordnung"), defence goods covered by patents or utility models declared secret, which produce or used to produce, but still have skills for security-related IT, or which are "facilities essential for defence" in the meaning of the German Safety Screening Act ("sector-specific review").

Filing is also mandatory for the acquisition of companies engaged in specific "sensitive" activities ("cross-sector review"):
- operation of critical infrastructure in sectors such as energy, TMT, finance, insurance, health, and transport
- development or modification of industry-specific software for such critical infrastructure
- companies involved in publicly available telecommunications activities
- activities in telematics infrastructure
- providers of cloud-computing using infrastructures of a certain size
- publishing of up-to-date news to a large audience
- various activities in the health sector (personal protective equipment, certain drugs, medical products, and in-vitro diagnostics)
- operation of a sophisticated satellite system
- developing or producing items which are able, by use of artificial intelligence, to cause serious harm, for example to perform automated cyber-attacks, to imitate persons or to allow surveillance of persons
- developing or manufacturing vehicles for autonomous driving and unmanned aircraft, or essential components or software necessary for such functions
- developing or manufacturing robots for use in extreme situations, such as handling explosives or operating in heights above 30,000 meters or 200 meters or more below the water surface
- developing, manufacturing or refining nanotechnology, nano- or micro-electronic circuits and tools for producing or processing such circuits
- developing or producing IT security products or essential components, unless for captive use only
- operating an air carrier with an operating license, or developing or producing certain avionics items and components for aircraft, and items or technology for use in space flight and space flight infrastructure
- development, production, modification and use of nuclear materials, facilities, and equipment, and of certain chemicals as defined in Reg. 428/2009 on dual use goods.
- developing or manufacturing of items and essential components for quantum IT, quantum communication and quantum-based and quantum metrology
- developing or manufacturing items for additive production/3D printing using metal or ceramic materials, essential components of such items and powder for producing such items
- developing or manufacturing products specifically made for operation of data networks
- manufacturing smart-meter gateways or safety modules for smart-meter gateways
- employing individuals who work in ‘vital facilities’ in the meaning of the German Safety Screening Act (‘Sicherheitsüberprüfungs-gesetz’)
- excavation, processing or refining of raw materials or ores which have been declared ‘critical raw materials’ by a notice of the European Commission and which the BMWi has published in the Federal Gazette (Bundesanzeiger)
- development or production of goods which are covered by patents declared secret or utility models declared secret
- exploitation, direct or indirect, of agricultural land of more than 10,000 hectares

Filing is voluntary for the acquisition of companies engaged in other activities.
### Germany

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<td>For the acquisition of companies subject to sector-specific review: Yes</td>
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<tr>
<td></td>
<td>For the acquisition of companies subject to cross-sector review engaged in sensitive activities: Yes</td>
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<td>For other acquisitions: No</td>
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**Separate vetting process or part of merger control?**

**Relevant authority and decision-maker**

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**Sectoral focuses**

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**What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**
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**Is it targeted only at “foreign” investments and if yes, what is “foreign”?**

Sector-specific review: targeted at all non-German acquirers.

Acquisition of companies engaged in sensitive activities subject to cross-sector review: applicable to acquirers outside the EU or outside the EFTA member states.

Whether an acquirer is “foreign” to Germany/EU or EFTA is a matter of:

- domicile or habitual residence of an individual
- place of office or actual administration of a corporate entity

A corporate entity with its registered office in Germany/the EU will be considered as “foreign” if foreign shareholders hold more than 10% of the shares in transactions subject to sector-specific review or in sensitive industries. For other transactions, that threshold is 25%.

Even a domestic acquirer may be treated as “foreign” and the transaction be subject to review if there are indications of an abusive structuring or an effort to circumvent restrictions for foreign acquirers; at present, there is neither a definition of what is abusive or circumvention nor respective case law.
Please refer to the chapter above on mandatory or voluntary filing.
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

For (a) regular transactions, foreign investment control may be initiated by the BMWi in its discretion where a non-EU/EFTA investor acquires a direct or indirect interest of 25% or more of the voting rights in a German business.

For (b) transactions subject to cross-sector review, involving sensitive activities and (c) transactions subject to sector-specific review, where a “foreign” acquirer acquires a direct or indirect interest of 10% or more of the voting rights in a German business. For sector-specific transactions concerning the eighth and subsequent bullets in the chapter above on voluntary or mandatory filing, it is 20% of the voting rights.

Indirect shareholdings in a company are largely equated to direct ownership.

A transaction by which voting rights are increased, e.g. if the acquirer buys further shares, may be reviewed and must be notified when shares of 25, 40, 50 and 75% of the voting rights are reached or exceeded.

The BMWi may also review instances where a foreign/non-EU/non-EFTA party obtains effective participation in control of a company in Germany by other means, such as
- a right to appoint additional board, supervisory board or management members
- a right to veto strategic decisions on business or personnel
- a right “over” sensitive information on the business, exceeding the rights which the share in the company normally would confer. Such “transactions” are, however, not subject to prior notification

Asset deals are caught too.
GERMANY

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Thresholds that apply
No threshold.
When can a transaction be called in by a regulator?

The BMWi may step in and open a procedure after it has been notified of a transaction or has become aware of it by other means after the signing of a share or asset purchase agreement ("transaction agreement"). Transactions subject to sector-specific review or relating to sensitive activities will be suspended and may not be closed before clearance by the BMWi (express or by expiration of deadlines for review).

Any review is time-barred five years after signing of the transaction agreement.
### Relevant test for intervention

Substantive test for transactions subject to sector-specific review: transactions which are likely to negatively affect essential security interests of the Federal Republic of Germany.

Substantive test for the cross-sector review: transactions which are likely to negatively affect public order or security of the Federal Republic of Germany (“an actual and sufficient material threat to fundamental interests of society”), another Member State of the European Union, or projects of EU interest according to Reg. 2019/452.

The BMWi may take into account “in particular”:
- whether an acquirer is controlled by a foreign state or foreign armed forces
- or has already been involved in activities detrimental to the Federal Republic of Germany
- that there is a significant risk that the acquirer has been involved in acts which, if committed in Germany, would qualify as specific criminal offenses (cf. Art. 4 par. 2 Reg. 2019/452)
### Germany

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#### Phase 1
The BMWi has two months to open a procedure after it has become aware that a transaction agreement has been concluded or is in receipt of a notification by the acquirer.

#### Phase 2
The BMWi has four months from receipt of complete documents and information to decide whether the acquisition should be prohibited. This deadline may be extended by the BMWi:
- if a specific case is complex in terms of fact or law, by up to three months
- if the transaction concerns interests of national defence in a particular way and the Ministry of Defence refers to such circumstances, by another month
- upon consent of the immediate acquirer and the seller

If the BMWi requests that the parties submit additional information or documents, the deadlines will be postponed until receipt of such information. If the BMWi and parties to the transaction negotiate on an agreement for mitigating concerns, the deadlines will also be postponed until negotiations are discontinued.
### Germany

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<td>The BMWi is entitled to block a transaction. In this context, it may:</td>
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<td>– prohibit or restrict the exercise of voting rights in the acquired company</td>
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<td></td>
<td>– appoint a trustee for unwinding of an acquisition which has already been completed.</td>
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### GERMANY

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**Any acceptable remedies to address national security risks?**

The BMWi may impose obligations on the acquirer in order to ensure that public order or security/essential security interests of the Federal Republic of Germany/other Member States/projects of EU interest are safeguarded. The BMWi usually "offers"/requires acquirers to conclude agreements under public law ("öffentlich-rechtliche Verträge") in order to avoid a prohibition or imposing obligations and to mitigate concerns about the transaction.
### Germany

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“Completion” comprises exercise of voting rights, comparable acts, distribution of profits and disclosure of information on the target company related to the sensitive activities before approval by the BMWi or expiration of the deadlines.
The decisions of the BMWi are subject to judicial review by the Berlin administrative court and superior courts for appeal and appeals on questions of law. The deadline for appealing against a decision of the BMWi is one month.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

The COVID-19 pandemic has caused Federal Government to expand the German FDI regime to targets active in the health sector, including manufacturers of personal protective equipment, of certain drugs, of certain medical products and of certain in-vitro diagnostics. It has at least not deterred the Federal Government from tightening provisions on procedure and non-completion.
### HUNGARY

#### Separate vetting process or part of merger control?

*Yes, it is a separate process.*

Please note that Hungary operates (1) a general mechanism and (2) a temporary mechanism introduced due to the COVID-19 pandemic, and which is still in force at the time of publication.
### Relevant authority and decision-maker?

The Minister appointed by Government Decree.

General mechanism: Minister of Interior

Temporary mechanism: Minister for Innovation and Technology

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Mandatory or voluntary filing?

Filing is mandatory in all cases.

- **Mandatory or voluntary filing?**
- **Need for prior approval before closing?**
- **Is it targeted only at “foreign” investments and if yes, what is “foreign”?**
- **Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)**
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**Need for prior approval before closing?**

No - the notification must be made within 10 days following completion of the transaction.
Is it targeted only at “foreign” investments and if yes, what is “foreign”?

**General mechanism**

Foreign investor is defined as:
- national or legal entity outside of EU/EEA/Swiss Confederation
- a legal entity registered in an EU/EEA/Swiss Confederation, if the person with a controlling interest is a non-EU/EEA/Swiss Confederation national or legal entity who acquires ownership or interest in a Hungarian company

**Temporary mechanism**

Foreign investor is defined as:
- a legal person or other entity established domestically, in another Member State of the EU, in EEA and in the Swiss Confederation, if the citizen, legal person or entity described in point b) below has a majority influence in the legal person or entity
- a citizen of a state outside the European Union, the European Economic Area and the Swiss Confederation, or a legal person or other entity registered in such a state
- Although the COVID-Act does not classify it as a foreign investor, the obligation to notify also extends to a legal person or other entity registered in the EU, EEA and the Swiss Confederation if it acquires a majority stake in a strategic company
Sectors which are important to national security are defined in the FDI Act. It includes sectors as firearms and military equipment, dual-use products, financial services credit institutions, the supply of electricity, gas and water, electronic communication and information systems of government agencies.

Temporary mechanism

23 sectors are defined as strategic (see Government Decree 289/2020). The sectors include chemical sector, commercial establishments (trade and repair of motor vehicles and motorcycles, retail and wholesale trade), communications sector, critical industrial sector (electronics, mechanical engineering, etc.), defence industry, dams, energy sector, emergency services (defence, fire protection), financial sector, food sector and agriculture, government facilities, healthcare, information technology, nuclear sector, construction, water supply and wastewater services, waste management, building materials industry, transportation, medical device manufacturing, tourism, education, raw material of critical importance.
### Hungary

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HUNGARY

**General mechanism**
Screening is mandatory and is considered a foreign investment where a foreign investor seeks to establish an enterprise important to national security or acquire a stake in such an enterprise which: (i) exceeds 25% (10% in case of a public company); or (ii) leads to a controlling interest; or (iii) would result in the combined shares of foreign investors in such an enterprise (except for public limited companies) exceeding a total of 25%.

**Temporary mechanism**
The notification requirement is triggered by the (i) transfer of shares; (ii) increase of capital; (iii) transformation, merger or division; (iv) issuing of bonds; and (v) establishing a right of usufruct over a share.

If a foreign investor plans to acquire at least 10% of ownership ratio either directly or indirectly in a strategic company and the value of such investment reaches HUF 350,000,000, or if the joint ownership of foreign investors would thereby exceed 25% any such transaction is subject to notification.

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**Thresholds that apply**

**General mechanism**

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**Temporary mechanism**

- The notification requirement is triggered by the (i) transfer of shares; (ii) increase of capital; (iii) transformation, merger or division; (iv) issuing of bonds; and (v) establishing a right of usufruct over a share.
- If a foreign investor plans to acquire at least 10% of ownership ratio either directly or indirectly in a strategic company and the value of such investment reaches HUF 350,000,000, or if the joint ownership of foreign investors would thereby exceed 25% any such transaction is subject to notification.
When can a transaction be called in by a regulator?

The foreign investment regime is mandatory and so transactions are not called in.
Relevant test for intervention

There is no express test for intervention. Relevant ministers have the powers to review and investigate any foreign investments that are within scope.
Timetable for review

**General mechanism**
The notification must be made within 10 calendar days following completion of the relevant legal transaction. The competent Minister has to confirm the receipt of the notification within eight calendar days. The Minister has to make its decision within 60 calendar days, the review period can be extended by another 60 calendar days under certain circumstances.

**Temporary mechanism**
The notification must be made within 10 calendar days following completion of the relevant legal transaction. The competent Minister has to confirm receipt of the notification within eight calendar days. The Minister has to make its decision within 30 working days, and the review period can be extended by up to 15 days in particular cases.
In the case of a failure to file, the foreign investor may not be registered as a shareholder in the list of shareholders or the book of shares, and the foreign investor may not exercise its rights in the strategic company. The right to own, operate or use the infrastructure, equipment and facilities necessary for the company’s activities may be granted only after obtaining the approval. Without the filing, the underlying agreement on: (i) under the General mechanism the right to operate or use the sensitive infrastructure will be unenforceable; and (ii) under the Temporary mechanism acquisition of the respective interest or right to own, operate or use the strategic infrastructure will be null and void. The transactions and investments may be reviewed ex officio and retroactively.
Any acceptable remedies to address national security risks?

There are no acceptable remedies.
Potential sanctions for gun jumping / failure to file

**General mechanism**
Non-compliance with statutory obligations is subject to a fine of up to HUF 1,000,000 if the foreign investor is a natural person or up to HUF 10,000,000 if the foreign investor is a legal entity. In addition, if a threat to Hungarian security interests is deemed to exist, the Ministry will order the unwinding of the acquisition. A transaction which was not notified as required or was implemented despite a prohibition decision is null and void.

**Temporary mechanism**
Non-compliance with statutory obligations is subject to a fine of up to two times the value of the transaction, but at least exceeding HUF 100,000 where the foreign investor is a natural person, or 1% of the net turnover in the last business year of the strategic company targeted where the foreign investor is a legal person. A transaction which was not notified as required or was implemented despite a prohibition decision is null and void.
Prohibition decisions are subject to a limited judicial review. The foreign investor has only a limited right to appeal against the decision of the Minister to the Municipal Court of Budapest (Fővárosi Törvényszék). An appeal may be made on the basis of the transaction’s qualification as “harming the national interest of Hungary” and/or the violation of essential procedural rules.
**HUNGARY**

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**What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**

Due to COVID-19 pandemic, a new, temporary FDI regime (referred to throughout as the temporary mechanism) was introduced in addition to the general regime.
## Separate vetting process or part of merger control?

A separate vetting process is provided to the merger control regime conferred upon the Italian Competition Authority ("ICA"). For instance, it is possible that a concentration does not meet the merger control thresholds, but at the same time it must be notified as it falls within the scope of application of the "golden power" regime, which allows the Italian government to prohibit or impose restrictions/conditions to an investment in certain industries deemed strategic for the Republic of Italy.

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**Italian Competition Authority (ICA)**

The ICA is the relevant authority for merger control in Italy. It is responsible for evaluating concentrations that may affect competition. The ICA has the power to prohibit or impose restrictions/conditions to an investment if it deems it to be in the public interest. This includes industries deemed strategic for the Republic of Italy.

**Golden Power Regime**

The golden power regime allows the Italian government to prohibit or impose restrictions/conditions to an investment in certain industries deemed strategic for the Republic of Italy. This regime is independent of the merger control thresholds and can be applied to concentrations that do not meet the merger control thresholds.
ITALY

Relevant authority and decision-maker

The Presidency of the Council of Ministers ("Presidency").
Mandatory or voluntary filing?

Mandatory.
Need for prior approval before closing?

In the defence and national security, transport, communications, energy sectors and those listed in Art. 4 of the EU Reg. 452/2019, a 45 calendar day standstill period is mandated before closing can take place.

In the 5G sector, a 30 calendar day standstill period is mandated before the contracts concerning the acquisition of goods or services relating to 5G technologies can be performed by the parties.

In both cases, the parties can receive express authorisation from the Presidency during that period, or tacit authorisation once the period lapses.

On 22 March 2022, the Decree-Law No.21/2022 (the Decree-Law) entered into force, which amended the Decree-Law No. 21/2012. The Decree-Law, which confirmed the effectiveness of the provisions introduced by the Italian legislator during the COVID-19 outbreak, has recently been converted into a final law (Law No.51 of 20 May 2022).

The new Decree-Law has introduced, where possible, the joint notification of a transaction by the acquiring company and the target.

In this regard, it is also established that in cases where the notification is not made jointly by the parties, the notifying acquiring company must send the target, at the same time as the notification, an informative report containing details of the essential elements of the transaction and the notification itself, and must provide proof of receipt of this by the target company. Within 15 days of notification, the target company may submit memoranda and documents to the Prime Minister’s Office.

Furthermore, in cases where the Presidency requires more information on the transaction from the parties, the 45 day period for the adoption of the clearance or ban decision is stopped until the requested information is provided by the parties (within 10 days of the request).
Is it targeted only at “foreign” investments and if yes, what is “foreign”?

No. In the transport, communication and energy sectors and in the sectors listed in Art. 4, EU Reg. 452/2019, a notification is required in the following circumstances: (i) where there is a change of control over the company (“SPA”) which owns strategic assets or over the assets itself (“APA”), as identified by the decrees no. 179 and 180/2020; and (ii) where the ultimate beneficial owner (“UBO”) of the transaction is a company based in a non-EU country.

However, it must be noted that the requirements in relation to the fields of national defence and public security are stricter, and a filing in these sectors will be required even if the transaction is between Italian companies.

Additionally, a transaction in which the UBO is an EU-based company must also be notified when there is a change in control and if the target holds strategic assets:

i) as identified by the implementing decree no. 180/2020;

When the UBO is instead a non-EU company, the buyer must also notify if the target holds strategic assets mentioned in the above pts. i) and ii) and it will acquire a minority stake up to 10%, with a minimum investment of €1 million, and every time a minority stake of 15%, 20%, 25% and 50% is acquired.

Lastly, in case of asset purchase agreement, the notification must be made in the case of a sale between Italian companies to the extent that the assets merely refer to the sectors listed in Art. 4, EU Reg. 452/2019 and/or those identified by decree no. 179/2020.
Sectoral focuses

Defence and national security, electronic broadband telecommunication networks with 5G technology, energy, transport and telecommunications, financial, credit and insurance, critical infrastructures and technologies, including energy, transport, water and health, food safety, access to sensitive information, including personal data, artificial intelligence, robotics, semiconductors, cybersecurity, as well as nanotechnology and biotechnology, dual use products.
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

In the case of asset purchase agreements, the seller must notify any resolution, act or transaction that has the effect of changing the ownership, control or availability of the strategic assets or changing their destination.

In the case of sale and purchase agreements, the buyer must notify the purchase of shares in companies that hold strategic assets in the transport, telecommunication, and energy sectors and in those mentioned in Art. 4, EU Reg. 452/2019 as identified by the implementing decrees, which involves taking control of the target company.

In the case of transactions relating to defence and national security, acquisitions of minority stakes must be notified: 3% if the target is a listed company or 5% if the target is a non-listed company.

From a different standpoint, in the case of acquisitions of companies in the defence and national security sectors, a filing will be required in connection with any extraordinary resolution or corporate transaction, or any acquisition by a person other than the Italian State or any Italian public or publicly controlled entity, of an equity interest exceeding the thresholds of 3, 5, 10, 15, 20, 25 and 50% ownership in the share capital of the target company by both EU/EEA and non-EU/EEA entities.

A filing is also required in all sectors covered by the regime for transactions carried out by any non-EU/EEA entity of any interest representing at least 10% of the corporate capital or otherwise the ability to exercise at least 10% of the voting rights of the target company, provided the value of the transaction is equal to or in excess of €1 million (and any subsequent acquisition exceeding, 15, 20, 25 and 50% of the target company's capital).
Thresholds that apply

In principle, no financial thresholds are applicable.

The implementing decree no. 179/2020 provides that in the energy, water, health and financial sectors the economic activities carried out by the target company are considered strategic if it has a net annual turnover of up to €300 million and an average annual number of employees of up to 250 people.

The same decree considers strategic economic activities as those that have as their object dual use goods to the extent that the target company has an annual net turnover of €300 million.
When can a transaction be called in by a regulator?

In recent years, the scope of FDI screening rules has been progressively broadened by the Italian legislature to take into account the adoption of EU Regulation 452/2019 which establishes an EU-wide FDI screening framework, and most recently, the effects of the COVID-19 outbreak.

Both the sectors and relevant transactions falling within the scope of the FDI rules are extremely broad, and in many cases, it is not easy to establish whether a transaction must be notified. In practice, this has led to the Government encouraging an extensive and prudent approach in interpreting the scope of the FDI sectors. Therefore, in case of uncertainty and considering the severe sanctions for failing to notify, a practice is developing of filing to receive negative clearance (i.e., formal confirmation of non-application of the rules). This has led to an exponential growth in filings. By way of illustration, between 2014 and 2019, 199 filings were made, and in 2020 this number increased to 341.

If parties fail to notify, the authority can start an FDI review of its own accord. As a result of such a review, the authority can impose conditions with retroactive effect, or they can unwind the transaction. In asset deals, the authority can also order the parties to restore the pre-transaction situation at their own expense.
### Relevant test for intervention

The test for intervention in the defence sector is whether the transaction threatens to impair the essential interests of defence and national security.

The test for intervention in the energy, communication and transport sectors is whether the transaction threatens to impair the public interests relating to the safety and functioning of networks and plants as well as the continuity of supplies of critical inputs.
### Timetable for review

In the defence and national security, transport, communications, and energy sectors, and in those listed in Art. 4 of the EU Reg. 452/2019, when the transaction entails the transfer of strategic assets, the company (seller) must notify any resolution or any act that has the effect of changing the ownership, control or availability of the strategic assets or changing their destination within 10 calendar days of their adoption, and those acts cannot be executed prior to clearance. The Presidency must make a decision on the investment clearance request within 45 calendar days. If the Presidency has not handed down a decision at the expiry of the 45-day period then the transaction will be considered authorised.

In the case of share purchase agreements, the buyer, after the SPA has been signed, must notify the transaction within 10 calendar days. As in the case of notification by the seller, the Presidency must make a decision on the investment clearance request within 45 calendar days. If the Presidency has not handed down a decision at the expiry of the 45-day period then the transaction will be considered authorised.

In the 5G sector, the company that has acquired goods or services relating to 5G technologies shall notify the transaction within 10 calendar days from signing and the contract cannot be performed prior to clearance. The Presidency must make a decision within 30 calendar days. If the Presidency has not handed down a decision at the expiry of the 30-day period then the transaction will be considered authorised.
### Ability to prohibit/unwind a transaction?

The Presidency has the power to prohibit or authorise the transaction.

The Presidency also has the power to unwind a completed transaction.

In the 5G sector, in situations where the notifying company has started to perform the notified contract before the end of the investigation and in the event that the Presidency decides to exercise its vetting powers, it may order the company to restore the situation prior to the performance of the aforementioned contract at its own expense.

In the national security, defence, transport, energy, and communication sectors, and in those listed in Art. 4 of EU Reg. 452/2019, if the transaction has been completed before the end of the investigation and the Presidency decides to exercise its vetting powers, the buyer cannot exercise voting rights and must sell its shares within one year. In the event of a failure to comply with such an order, the civil court, upon request of the Presidency of the Council of Ministers, will order the sale of the aforementioned shares.
Any acceptable remedies to address national security risks?

The Presidency has the power to impose remedies in order for the transaction to be cleared. The Italian FDI benchmarking provisions do not expressly anticipate what kind of remedies can be imposed on companies.

According to the latest annual report of the Italian Presidency, the power to impose remedies has been exercised in a total of 40 cases, which is equates to 11.7% of the total number of notified transactions. Where conditions are imposed on the parties to a transactions, these are monitored by a specific inter-ministerial committee.

Such conditions and requirements are generally aimed at ensuring the protection of:

(i) Italian national interests in the defence and national security sectors;
(ii) the development of the 5G communication networks;
(iii) public interests relating to the security and operation of networks and installations, and the continuity of supply.

In the past, the following measures have been imposed by the Presidency:

i) in the defence sector, a company has been required to adopt organisational and technical solutions to ensure the maintenance of control in Italy of strategic research and development activities subject to monitoring by a specific inter-ministerial committee as well as the need to appoint a manager with Italian citizenship to ensure compliance with the Italian legislation on the production, export, transit, use, traceability, and registration of military goods;

ii) in the telecommunications sector, specific conditions have been imposed upon the Italian incumbent operator for the adoption of an adequate investment and maintenance plans on the networks and systems necessary to ensure the continuity of the supply of the universal service. The provision also provided for a series of monitoring measures to ensure the compliance with the conditions imposed in the clearance decision through the establishment of a specific inter-ministerial committee.
## Potential sanctions for gun jumping/failure to file

The Italian legal framework provides for an administrative fine of up to double the value of the transaction and, in any case, not less than 1% of the aggregated turnover achieved in the last financial year by the companies involved. In addition, in the case of a failure to notify and also following the notification and until the clearance of the transaction, all the voting rights connected to the shares representing the majority stake are suspended. Furthermore, any resolutions adopted with the decisive vote of such a stake would be deemed null and void.

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### Italy

#### Right of Appeal

Yes.

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What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

Following the COVID-19 outbreak, in April 2020 the Italian legislator significantly extended the scope of application of the “golden power” regime.

In particular, a notification is due where the seller owns assets and relationships in the “sectors” reported in Art. 4 of the EU Reg. 452/2019, as well as in the case of a transfer of assets identified by the new implementing decree no. 179/2020 adopts a resolution or an act and to the extent it entails change in the ownership, control or availability of these assets in favour of another company (even Italian or based in the EU).

An EU investor that acquires control over a target owning strategic assets in the transport, communication, or energy sectors and those identified by the decree no. 179/2020, which is implemented in Italy via Art. 4 of the EU Reg. 452/2019, must notify the transaction.

In addition, in 2020, two new implementing decrees have were adopted. Firstly, the decree 180/2020 was published, which updated the prior decree of 2014 concerning strategic assets in the energy, transport and communications sectors. Secondly, the decree 179/2020 was also adopted which identified the strategic assets in the sectors mentioned in Art. 4 of the EU Reg. 452/2019.

The Decree-Law No.21 of March 2022 confirmed the effectiveness of the provisions introduced by the Italian legislator during the COVID-19 outbreak.
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In order to implement the Regulation, the bill ‘Foreign Direct Investments Screening Regulation (Implementation) Act’ (Uitvoeringswet screeningsverordening buitenlandse directe investeringen) (the ‘Act’) was adopted and entered into force on 4 December 2020.

The Act:

(i) assigns the Minister of Economic Affairs and Climate (the ‘Minister’) as the point of contact to facilitate and support exchange of confidential information between Member States and with the European Commission;

(ii) establishes an authority responsible for the collection of the information; and

(iii) regulates the enforcement.
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If an obligation to notify is established, the intent to acquire control/significant influence must be notified to the Minister. The relevant department is the Bureau of Investment Screening.
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## Is it targeted only at "foreign" investments and if yes, what is "foreign"?

No, the Act targets all in-scope investments.
Dutch law provides for sectoral screening with regard to the electricity and gas markets. Since 1 October 2020 the telecommunications sector has also been subject to a sector specific screening regime very similar to the regimes for electricity and gas.

A bill regarding general FDI for national security called the Investment Screening Act ("ISA") was adopted on 17 May 2022, and is expected to enter into force in early 2023. The ISA does not cover a specific industry but focuses on the screening of transactions regarding (i) sensitive technologies; and (ii) vital processes which are relevant for national security in the Netherlands.

On the basis of the current version of the ISA, "vital processes" include: heating network operators, nuclear power plant operators, national airline operators (KLM), airports, air traffic control, port authorities, banks, financial market infrastructure, and companies active in natural gas exploration, transport and storage. The scope of the definition of "vital processes" can be broadened, but this can only be achieved by adopting a formal law. "Sensitive technologies" includes goods for military and dual-use purposes.

The current draft legislation has retroactive effect with regard to investments made after 8 September 2020, meaning acquisitions and investments which have taken place as of 8 September 2020 could be reviewed post-completion by the Minister and as a result could be subject to conditions or blocked.
### Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

1) **Electricity and gas**
   - Screening is triggered by a change in control in (i) an electricity production installation with a capacity in excess of 250MW or an undertaking managing such a production installation; or (ii) a liquefied natural gas ("LNG") plant or an undertaking managing such LNG plant irrespective of capacity or size. The Dutch Minister of Economic Affairs and Climate Policy is the competent authority to assess the aforementioned transactions. An FDI regime also applies to nuclear installations. Control in this respect has the same meaning as under Dutch/EU competition law.

2) **Telecommunications**
   - Screening is triggered if an investor acquires a controlling interest in a telecommunications company. An investor is deemed to have a controlling interest in a telecommunications company if it:
     - either directly or indirectly, individually or jointly with other persons, holds at least 30% of the votes in a general meeting
     - has the right to appoint or dismiss more than half of the members of the company’s management or supervisory boards, even if all persons entitled to vote cast their votes
     - holds one or more shares granting special rights or statutory control
     - is liable as a partner for debts of the company acting under its own name

3) **General national security screening**
   - A change in control of a target undertaking incorporated in the Netherlands which is:
     - involved in an activity that is essential for the continuity and resilience of vital processes; or
     - the change in control or acquisition of significant influence in a target undertaking that:
       - is active in the field of sensitive technology.

The definition of "control" is the same as under Dutch/EU competition law, which means that "control" is defined as the ability to exercise decisive influence over the activities of an undertaking on the basis of factual or legal circumstances. "Significant influence" is only relevant for target undertakings active in the field of sensitive technology and, based on the current draft of the bill, will include acquisitions of 10%, 20%, or 25% of the shares, and the power to appoint or dismiss one or more board members.
No turnover or market share based thresholds apply.
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**When can a transaction be called in by a regulator?**

If the transaction is within the scope of the screening regimes described above, and is not notified by the parties involved, the Minister may commence its own investigation.
The Minister can intervene when there is a risk to the national security of the Netherlands. National security entails:
- continuity of critical processes in the Netherlands
- maintaining the integrity and exclusivity of knowledge and information of critical or strategic importance for the Netherlands
- preventing unwanted strategic dependence of the Netherlands on other states
Netherlands

**Timetable for review**

This depends on which regime applies, but in general the review takes eight weeks and can be extended to six months in total. If this first phase review leads to the conclusion that a second phase review is needed, another eight week period applies which can be extended to six months in total. In addition, if the transaction must be notified to the European Commission, an extra three month term applies.

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### Ability to prohibit/unwind a transaction?

Prohibition or unwinding is possible under extreme circumstances, but is likely to be a last resort.
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<td>Yes - this will depend on the situation, but remedies are possible.</td>
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**Potential sanctions for gun jumping/failure to file**

Administrative and criminal fines can apply. Prohibition/unwinding of the transaction or remedies imposed after completion are also a possible consequence. Administrative or criminal fines can be 10% of the annual turnover of the group to which the perpetrator belongs.
**NETHERLANDS**

### Right of Appeal

Yes, a decision can be challenged in court.

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### Questions

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- **Right of Appeal**
- **What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**
### Q16

What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

No specific impact.
### Poland

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**Relevant authority and decision-maker?**

The President of the Office of Competition and Consumers Protection, which is the Polish Competition Authority ("PCA").
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Need for prior approval before closing?

As a general rule, the PCA’s approval is required before closing, however for some transactions an ex-post filing is allowed/required.
Is it targeted only at "foreign" investments and if yes, what is "foreign"?

For the most part, the regime is targeted only at "foreign" investors, which broadly speaking includes the following:

- natural persons, that are not citizens of states belonging to the EU, EEA, or OECD; and
- entities other than natural persons, without a registered office within the territory of the EU, EEA, or OECD for at least two years from the date preceding the notification.

In the case of strategic "named" companies covered by the FDI law, FDI screening concerns all investors.
### Sectoral focuses

- publicly traded listed companies
- companies that own “critical infrastructure”
- companies active in:
  - IT software
  - cloud-based data collection or processing services computing
- companies from the following sectors:
  - electricity
  - motor gasoline or diesel fuel
  - pipeline transport
  - transhipment warehousing or underground and storage
  - chemicals, fertilizers and chemical products
  - explosives, weapons and ammunition, and products and technology for military or police purposes
  - regasification or liquefaction
  - distribution of natural gas or electricity
  - telecommunications
  - transmission of gaseous fuels
  - rhenium
  - mining and processing of metal ores used for the production of explosives, weapons and ammunition as well as products and technologies for military or police purposes
  - medical appliances, instruments and devices
  - drugs and other pharmaceutical products
  - trade in gaseous fuels and gas with foreign countries
  - heat generation, transmission or distribution
  - transhipment in inland ports
  - processing of meat, milk, cereals as well as fruit and vegetables
- companies indicated directly by state.
Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)

As a rule, the acquisition of significant participation and the acquisition of dominance (as specifically defined in the FDI law) is covered.

Different rules apply to strategic "named" companies that are also covered by the FDI law.
No thresholds, other than a de minimis exemption from the FDI regime which applies if the target entity has not achieved EUR 10 million turnover (i.e., income from sales and services generated by the target in Poland) in either of the two years preceding the transaction.
When can a transaction be called in by a regulator?

The PCA can call in any transactions which have failed to be notified, and they may do so during the period of five years following the acquisition or achievement of significant participation or the acquisition of dominance.
**Relevant test for intervention**

The relevant test for intervention is the threat to public order, public safety, or public health.
### Timetable for review

Following notification, the PCA has 30 business days to either approve the transaction or initiate control proceedings. The control proceedings may last for an additional 120 calendar days.
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### Poland

- **Separate vetting process or part of merger control?**
- **Mandatory or voluntary filing?**
- **Is it targeted only at "foreign" investments and if yes, what is "foreign"?**
- **Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)?**
- **When can a transaction be called in by a regulator?**
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- **Any acceptable remedies to address national security risks?**
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- **Relevant test for intervention**
- **Ability to prohibit/ unwind a transaction?**
- **Potential sanctions for gun jumping/failure to file**
- **What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**
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## Poland

### Separate vetting process or part of merger control?

- Relevant authority and decision-maker

### Mandatory or voluntary filing?

- Need for prior approval before closing?

### Is it targeted only at "foreign" investments and if yes, what is "foreign"?

- Sectoral focuses

### Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

- Thresholds that apply

### When can a transaction be called in by a regulator?

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### Timetable for review

- Ability to prohibit/unwind a transaction?

### Any acceptable remedies to address national security risks?

- Potential sanctions for gun jumping/failure to file

### Right of Appeal

- What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

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**Potential sanctions for gun jumping / failure to file**

Fines of up to PLN 50,000,000 and/or imprisonment from six months to five years. Fines may also be imposed on persons acting on behalf of or in the interests of the entity acquiring significant participation or dominance contrary to the FDI law.

Acquisitions of significant participation or acquisitions of dominance made without notification or despite an objection by the PCA are null and void. In some situations the acquirer may not exercise rights attached to shares (e.g., voting rights) except the right to sell the shares. Different fines apply to actions contrary to the FDI law concerning strategic "named" companies.
Right of Appeal

Yes.
**POLAND**

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</table>
Separate vetting process or part of merger control?

Separate, irrespective of whether the transaction is also qualified as notifiable under the Romanian merger control regime. In this latter scenario, the acquirer of control will notify both the Romanian Competition Council, with respect to the notifiable transaction, and the Commission of the Examination of Foreign Direct Investments ("CEFDI").
## Romania

**Separate vetting process or part of merger control?** Relevant authority and decision-maker

**Mandatory or voluntary filing?** Need for prior approval before closing?

**Is it targeted only at "foreign" investments and if yes, what is "foreign"?** Sectoral focuses

**Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)** Thresholds that apply

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**Any acceptable remedies to address national security risks?** Potential sanctions for gun jumping/failure to file

**Right of Appeal** What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

### Relevant authority and decision-maker

The relevant authority for examining the foreign direct investments is the CEFDI, which is a newly incorporated body, subordinated to the Romanian Competition Council.

The CEFDI will issue an opinion (the Romanian aviz) which will be sent either to the Romanian Competition Council or to the Romanian Government.

The final decision will be issued either by the Competition Council (when the opinion of the CEFDI is to approve the transaction) or the Romanian Government (when the decision is a conditional approval or a prohibition decision).
Mandatory or voluntary filing?

Mandatory, subject to the following conditions cumulatively being met:

- if the investments concern one (or more) of the activities specified in the Decision of the National Supreme Council of State Defence no. 73/2012 as being of interest from a national security perspective, but subject to the criteria specified in Article 4 of Regulation no. 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the "FDI Regulation"); and
- the value of the investment exceeds a threshold of EUR 2 million in RON equivalent at the RON/EUR exchange rate published by the National Bank of Romania for the last day of the financial year preceding the year in which the investment is carried out.

Even where the value of the investment threshold is not met, the foreign investment may still be subject to the mandatory filing requirement if it could impact public security and order, or may pose such a risk.

The position set out above is the approach currently regulated through Government Emergency Ordinance no. 46/2022 ("GEO 46/2022"), which provides for the implementation of the FDI Regulation. The law through which this GEO will be approved proposes, however, extending the scope of applicability of the GEO 46/2022 to include EU investors. While this law is not yet in force (it is the subject of a review on procedural grounds), it should be reasonably anticipated that the amendment will be passed and will be applied. The approach suggested through this law reflects the legislative position that was applicable prior to the issuance of GEO 46/2022, when any investment in one of the industries qualified as of interest for national security would have been notifiable from a FDI perspective, irrespective if the transaction would have also qualified as a notifiable merger/economic concentration.

### Mandatory or voluntary filing?

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### Romania

Breaking down barriers A global guide to foreign investment regimes

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### Romania

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Question 4:

Need for prior approval before closing?

Yes.
Is it targeted only at “foreign” investments and if yes, what is “foreign”?

Currently, yes, but please see the response to Question 3 above.

From our market knowledge, we note that non-foreign investments which, under the previously applicable legislation relevant to investments in areas of relevance for national security required prior authorisation (regardless of these being domestic or international deals), have continued to be notified according to the previous procedure. This approach is due to the fact that the process and scope of applicability of the new procedure are not yet clear and certain investors prefer to take a more cautious approach.

“Foreign direct investment” means an investment of any kind made by a foreign investor with the purpose of establishing or maintaining durable and direct connections between the foreign investor and the targeted company or a separate unit of it, to whom such funds are or will be made available for carrying out activity in Romania and which allow the foreign investor to exercise control over the management of the enterprise.

A foreign direct investment shall also be deemed to have been made when there is a change in the ownership structure of a foreign investor incorporated as a legal entity, if such change makes it possible to exercise control, directly or indirectly, by a:

- natural person who is not a national of an EU Member State
- a legal person whose registered office is not located in an EU Member State; or
- another legal entity, without legal personality, organised under the laws of a state which is not a member of the EU

A “new investment” is defined as an initial investment in tangible and intangible assets within the same perimeter, related to the start-up of a new business, capacity expansion of an existing company, and diversification of production by products which were not previously manufactured or a fundamental change of the general production process of an existing undertaking.

“Foreign investor” means:

- a natural person who is not a citizen of an EU Member State, which has made or is about to make a direct foreign investment in Romania;
- an undertaking, the headquarters of which is outside of the EU, and which has made or is about to make a foreign direct investment in Romania;
- an undertaking, the headquarters of which is situated in the EU, which has made or is about to make a foreign direct investment in Romania, where direct or indirect control is realised by a natural person which is not an EU citizen, an undertaking which is not headquartered in the EU or any other legal entity, without legal personality, organized according to the laws of a non-EU state; or
- the fiduciary administrator of an entity without legal capacity which has made or is about to make a foreign direct investment in Romania, and an individual in a similar position, if they are not an EU citizen in the case of a natural person, or if it is not headquartered in an EU Member State in the case of a legal entity, or if the latter entity was incorporated under a law other than an EU Member State law.

The law approving the GEO 46/2022 (which is currently under the legislative procedure and not yet published) defines an “EU investor” as being:

- a natural person who is a citizen of an EU Member State, which has made or is about to make an investment in Romania;
- an undertaking, the headquarters of which is in the EU, and which has made or is about to make an investment in Romania;
- an undertaking, the headquarters of which is situated in the EU, which makes or is about to make an investment in Romania, where the direct or indirect control is realised by a natural person which is an EU citizen, an undertaking which is headquartered in the EU, or any other legal entity, without legal personality, organized according to the laws of an EU Member State;
- the fiduciary administrator of an entity without legal capacity which has made or is about to make a foreign direct investment in Romania, the fiduciary administrator of a legal entity, or a natural person, or if it is not headquartered in an EU Member State in the case of a legal entity, or if the latter entity was incorporated under a law other than an EU Member State law.

As mentioned above, on the basis of this draft approval law, the screening procedure will also be applied to the investments of EU investors, as defined above.
Transactions implemented in one of the following sectors qualified by the National Supreme Council for State Defence as being of interest for national security are caught under the screening carried out by the CEFDI:

- the security of citizens and communities;
- border security;
- energy security;
- transport security;
- security of vital resource supply systems;
- security of critical infrastructure;
- security of information and communication systems;
- security of financial, fiscal, banking and insurance activity;
- security of the production and trade of arms, ammunition, explosives and toxic substances;
- industrial security;
- protection against disasters;
- agriculture and the environment protection;
- protection of the privatization operations of state-owned companies or their management.
Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)

- acquisition of direct or indirect control arising from a change in the ownership structure of a foreign (legal entity) investor;
- acquisition of significant influence, investing in any nature in the way detailed in response to Question 5
**ROMANIA**

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### Thresholds that apply

EUR 2 million in RON equivalent at the RON/ EUR exchange rate published by the National Bank of Romania for the last day of the financial year preceding the year in which the investment is carried out.

Investments falling below this threshold may still be caught under the screening procedure, if, through their nature or potential effects, they may impact public security and order or may pose such a risk.
The CEFDI may automatically initiate an investigation regarding a transaction which may qualify for screening under the FDI procedure and with respect to which the investor did not submit an authorisation request. There is no criterial in the law with respect to when the CEFDI may trigger such an investigation.

In addition, the CEFDI may initiate a review procedure following a notification received from any Romanian authority which considers that an investment should, for objective reasons, be subject to screening.
There is no relevant rest for intervention.

As the legislation is also very new (noting that the CFEDI has been in existence only since June 2022) there is no practical guidance regarding what would trigger the CFEDI to look into a completed/implemented investment.

Relevant test for intervention

There is no relevant rest for intervention.

As the legislation is also very new (noting that the CFEDI has been in existence only since June 2022) there is no practical guidance regarding what would trigger the CFEDI to look into a completed/implemented investment.
For the purposes of FDI screening, the CEFDI will issue an opinion, pronouncing on one of the following:

1. the possibility for the investment to be authorised in Romania – opinion which will be issued to the Romanian Competition Council, which in a 30 days term will issue a decision by which the investment will be authorised in accordance with the opinion issued; this decision will then be communicated to the investor within a term of 45 days;
2. the possibility for the investment to be authorized only subject to certain conditions to be met;
3. dismissal of the authorisation request.

In all cases, the opinion issued by CEFDI will be issued in a 60 days term as of the date the authorisation notice was considered complete.

The opinions mentioned in points 2 and 3 above will be sent to the Romanian Government, who will analyse the opinion of the CFEDI and issue the relevant conditional authorisation or prohibition decision.

If the CFEDI considers that the opinion of the Supreme Council for State Defence ("SCSD") is necessary, an in-depth review process may be initiated. The opinion of the SCSD will be issued within 90 days from when it is requested by the CFEDI.
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<td><strong>Yes.</strong></td>
<td>In the scenario where the CEFDI issues the opinion that the investment may be authorised subject to certain condition being met, the CEFDI will also send to the Romanian Government the remedies proposed in order for the investment to be authorised. The criteria, requirements, terms and procedure for the remedies to be approved will be detailed in a Government Decision.</td>
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**Notes:**
- **QM13**
- **Breaking down barriers**
- **A global guide to foreign investment regimes**

**Countries:**
- Slovakia
- Spain
- Switzerland
- UK
- USA

**Topics Covered:**
- Introduction
- Slovakia
- Spain
- Switzerland
- UK
- USA

**Questions and Keywords:**
- **Separate vetting process or part of merger control?**
- **Mandatory or voluntary filing?**
- **Is it targeted only at “foreign” investments and if yes, what is “foreign”?**
- **Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)**
- **When can a transaction be called in by a regulator?**
- **Timetable for review**
- **Any acceptable remedies to address national security risks?**
- **Right of Appeal**

**Additional Notes:**
- **Potential sanctions for gun jumping/failure to file**
- **Thresholds that apply**
- **Sectoral focuses**
- **Need for prior approval before closing?**

**Context:**
- **Introduction to the foreign investment regime in Romania**
- **Overview of the legal and regulatory framework**
- **Impact of the COVID-19 pandemic**
- **Overview of the investment environment and climate**

**Additional Resources:**
- **Government Decisions**
- **Regulatory Authority**
- **Decision-Maker**

**Further Information:**
- **Detailed criteria and requirements for remedies**
- **Timeline and procedures**
- **Impact on specific industries and sectors**

**Note:** This summary provides an overview and does not replace the need for detailed legal advice.
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**Potential sanctions for gun jumping / failure to file**

Fines of up to 10% of the worldwide turnover generated in the previous financial year by the investor.
The decisions of the Romanian Competition Council may be appealed within a 30 days term as of their communication.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

No impact.

As mentioned above, Romanian legislation already included provisions and procedures applicable to investments in certain fields. When such investments were carried out during the COVID-19 pandemic, there was no exemption applicable purely on the basis of the pandemic situation.

On the contrary, the Romanian Competition Council (who, under the previous legislation, was authorised to coordinate such reviews) has implemented a wide array of measures to streamline notification procedures and investigations carried out by the authority during the pandemic.
Separate vetting process or part of merger control?

No separate vetting process, and not a part of merger control.

There is not yet a separate FDI screening procedure pursuant to the EU FDI Regulation (EU) 2019/452. However, there is a similar screening procedure for transactions involving operators of elements of critical infrastructure, similar to FDI vetting. This procedure is based on the Act on Critical Infrastructure which concerns critical infrastructure in the energy and industry sectors. This critical infrastructure screening applies both to domestic and foreign investments and is focused on compliance with public order or national security, security of another EU Member State or interest of the EU.

A draft law on the screening of foreign investments has not been passed by the parliament yet. The legislative procedure shall be re-started later this year.

The critical infrastructure screening controls certain parts of critical infrastructure in the energy and industry sectors (further "parts of critical infrastructure"), namely:

- distribution, transport, and storage of fuel
- production, storage, and processing of chemicals
- production of pharmaceuticals
- mining and metallurgy
### Relevant authority and decision-maker?

The Ministry of Economy of the Slovak Republic ("MoE") and the Government of the Slovak Republic.

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Mandatory or voluntary filing?

Filing is mandatory after the acquisition or merger ("notification filing") of (i) a part of critical infrastructure as an asset, including the acquisition of an enterprise or part of an enterprise, (ii) the acquisition of direct or indirect control of more than 10% of the share capital or voting rights of companies which hold and operate a part of critical infrastructure in its enterprise ("operator") or (iii) the acquisition of companies who can control an operator.

Following a notification filing, the MoE can screen the acquisition for compliance with public order or national security, security of another EU Member State or interests of the EU. The execution of any rights or obligations coming out of the acquisition must be suspended until the screening is completed.

Filing is mandatory in the case of the opening of insolvency proceedings ("filing for approval") of the operator, who operates a part of critical infrastructure, declares liquidation, bankruptcy, restructuring or any other similar proceeding, the beginning of security exercise or any other similar right towards the operator or its assets.

After this filing for approval the MoE can screen the structure of insolvency for compliance with public order or national security, security of another EU Member State or interest of the EU. The execution of any rights or obligations coming out of the insolvency proceedings must be suspended until the screening is completed.
Need for prior approval before closing?

Yes, in the case of an acquisition connected with insolvency proceedings of an operator (see details of the procedure "filing for approval" in Question 3 above).
Is it targeted only at "foreign" investments and if yes, what is "foreign"?

No, any investments (both foreign and domestic) are caught, provided that they target certain parts of critical infrastructure. The Act on Critical Infrastructure does not distinguish between foreign and domestic investments.
Sectoral focuses

Screening is a partial procedure within control of certain parts of critical infrastructure (energy and industry sectors), such as:
- production and distribution of electricity and gas
- distribution, transport, and storage of fuel
- production, storage, and processing of chemicals
- production of pharmaceuticals
- mining and metallurgy
### Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)

See Question 3 above.
### SLOVAKIA

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#### Thresholds that apply

See Question 3 above.
When can a transaction be called in by a regulator?

If the MoE considers that the acquisition could endanger public order or national security, security of another EU Member State or interests of the EU, it proposes to the Government of the Slovak Republic to refuse the approval of the acquisition or to grant conditional approval. If the Government of the Slovak Republic refuses to grant approval of the acquisition, the execution of rights and obligations arising from the acquisition shall be prohibited.
Relevant test for intervention

There is no specific test for intervention, but when evaluating a transaction, the MoE considers if the acquisition could endanger public order or national security, security of another Member State or interests of the EU.
The MoE shall come to a decision within a period of 60 days from filing the notification/application for approval. If the MoE determines that the acquisition may jeopardise public order or national security, security of another EU Member State or interests of the EU, it proposes to the Government of the Slovak Republic to deny the approval. The Government must then decide within the timetable set for ordinary sessions of the Government for each year (approximately 1 to 2 months, although there is no specific time period).
Ability to prohibit / unwind a transaction?

The MoE is entitled to block a transaction. The Government can decide to prohibit a transaction or grant conditional approval.
Any acceptable remedies to address national security risks?

The Government may decide to impose obligations on the acquirer in order to ensure that public order or national security, security of another EU Member State or interests of the EU are safeguarded.
Potential sanctions for gun jumping/failure to file

Suspension or invalidity of the transaction.
Right of Appeal

The decisions of the Government of the Slovak Republic can be appealed based on an action for review of the Government’s decision. The Highest Court of the Slovak Republic has jurisdiction. The deadline for appealing against the Government’s decision is 30 days.
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Separate vetting process or part of merger control?

Separate.

The Foreign Direct Investment ("FDI") control regime in Spain is mainly governed by the Spanish Act 19/2003 of 4 July, on the legal regime of capital movements and economic transactions abroad (the "FDI Act") and Royal Decree 664/1999, of 23 April 1999, on foreign investments (the "RD 664/1999").

In November 2021, the Ministry of Industry, Trade and Tourism (the "Ministry") published a draft implementing Royal Decree on foreign investments framework regulation (the "FDI Draft RD") but there is no precise date or entry into force of this new rule. Such FDI Draft RD (which shall replace RD 664/1999) is a regulation developing the new FDI Act with a view to clarifying its legal provisions, such as (i) the categories of transactions, (ii) the thresholds of those transaction for exemption from the FDI Act, or (iii) the definition of strategic sectors.

The current legal situation in Spain regarding FDI is complex in the sense that the Ministry has started to take into consideration the proposed new framework which is not yet in force. Therefore, both systems (i.e., the existing and the proposed) should be considered at the same time when assessing the need to notify a foreign investment in Spain.

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In general, Spain takes a liberal approach to foreign investment. In most cases only a post-completion declaration to the Registry of Foreign Investments is required.

Certain specific types of investments, however, require prior authorisation as described below pursuant to an ordinary procedure or a simplified procedure.

In relation to the ordinary procedure for prior authorisation, the application shall be addressed to the General Directorate for International Trade and Investment. The Spanish Council of Ministers would adopt the final decision further to a joint proposal from the Ministry and, where appropriate, the head of the Department concerned, subject to a previous report from the Foreign Investments Board.

For a transitional period and until the measures implementing Royal Decree-law 8/2020, on extraordinary measures to tackle the economic and social impact of COVID-19 (the "RDL 8/2020") and Royal Decree-law 11/2020, of 31 March 2020, adopting additional urgent measures in the areas of employed and economics to deal with COVID-19 (the "RDL 11/2020") are adopted, there is a simplified procedure for prior authorisation concerning (i) investments launched before 18 March 2020 but which have not been completed yet; and (ii) investments for an amount of less than €5 million, but higher than €1 million. In this procedure, the application for permission shall be addressed again to the General Directorate for International Trade and Investment, but in this case the Directorate is the decision-maker, subject to a previous report from the Foreign Investments Board.

In addition, there is an informal consultation procedure in order to determine whether a transaction is subject to mandatory prior authorisation pursuant to the FDI regime in Spain. Such applications should be addressed to the General Directorate for International Trade and Investment which is the relevant authority to determine whether a notification is required or not under the FDI regime. This consultation procedure is not set out in the law in force but has been a consolidated administrative practice up until now (in 2021 more than 400 consultations were filed in Spain). The consultation procedure has been specifically included in Article 9 of the FDI Draft RD.
Mandatory or voluntary filing?

As noted above, Spain takes a liberal approach to foreign investment. In most cases only a post-completion declaration to the Registry of Foreign Investments is required.

The following exceptions are subject to mandatory prior authorisation:

- foreign direct investments higher than €1 million in "critical" sectors (see section 6 below) covered by COVID-19 RDL 8/2020 and 11/2020

- EFTA/EU investors acquiring in Spain companies traded on the stock market or worth more than EUR 500 million (transitory up to 31 December 2022), covered by Royal Decree-law 27/2021, of 23 November, extending certain economic measures to support the recovery (the "RDL 27/2021")

- investments in national defence-related activities

- acquisition of real estate located in Spain for diplomatic use by non-EU Member States

In addition, there is a pre-completion declaration regime for investments originating from a "tax haven" if these result in the acquisition of 50% of the share capital of a Spanish company. "Tax havens" are defined in the Spanish Royal Decree 1080/1991, of 5 July, determining the countries or territories referred to in articles 1, section 3, number 4, of Act 17/1991, of 27 May 1991, on Urgent Tax Measures, and 62 of Act 31/1990 of 27 December 1990, on the General State Budget for 1991. This list includes as tax havens the following countries: Anguilla, Antigua and Barbuda, Bermuda, Bahrain, Fiji, Gibraltar, Grenada, Isle of Man, Cayman Islands, Cook Islands, Channel Islands, Falkland Islands, Solomon Islands, Turks and Caicos Islands, British Virgin Islands, United States Virgin Islands, Macau, Republic of Mauritius, Montserrat, Principality of Liechtenstein, Principality of Monaco, Hashemite Kingdom of Jordan, Dominica, Republic of Liberia, Republic of Nauru, Republic of Seychelles, Republic of Vanuatu, Lebanese Republic, Saint Vincent and the Grenadines, Saint Lucia, Nation of Brunei, Panama, Mariana Islands, Guam, Republic of Palau, Republic of Vanuatu, Samoa, American Samoa and Republic of Trinidad and Tobago.

Such pre-completion declaration regime as described above is for statistical purposes only.

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**Q4**

**Need for prior approval before closing?**

*See above.*
Yes, the FDI regime defines foreign investments as those where an investor acquires control over a Spanish target carried out by residents outside the EU or even a resident in the EU if ultimately controlled by residents outside the EU. Article 2(b) of the FDI Act provides that "non-resident" investors include "legal persons domiciled abroad". In general (critical sectors and other noted in reply 3 above) the regime applies to direct foreign investments in Spain, defined as: (i) investments as a result of which a foreign investor comes to hold a shareholding interest equal to or greater than 10% in a Spanish company; or (ii) corporate transactions, legal acts or businesses related to the investment, as a result of which the foreign investor would take part in the management or control of a Spanish company, provided that any of the two following elements are present:

a) the investment is conducted by investors which are not resident in EU countries or EFTA countries; or
b) the investment is conducted by residents in a EU or EFTA country whose actual ownership belongs to non-EU/EFTA residents. Such actual ownership shall be assumed when the latter hold a share higher than 25% in the share capital or voting rights of the investor, or when by any other means they exercise direct or indirect control over the investor.

Additionally, until 31 December 2022, in the instance of direct foreign investments in (i) a listed company in Spain, considering as a company domiciled in Spain and whose shares are wholly or partly admitted to trading in a Spanish official secondary market, or in (ii) a non-listed company in Spain if the value of the investment exceeds €500 million, a foreign investor is defined as:

a) Residents in an EU/EFTA country, or
b) Spanish residents whose actual ownership belongs to EU/EFTA residents. Such actual ownership shall be assumed when the latter hold a share higher than 25% in the share capital or voting rights of the investor, or when by any other means they exercise direct or indirect control over the investor.

In the particular case of the manufacture and trade of weapons or national defence-related activities, a foreign investor is defined as (i) non-resident individuals (that is, Spanish or foreign nationals domiciled abroad), (ii) legal entities domiciled abroad and (iii) public entities of foreign States.
### Sectoral focuses

Foreign investments in national defence activities are covered by a separate regime. This regime states all national defence-related activities, such as the manufacture or trade of weapons, munitions and war material are subject to prior authorisation by the Spanish Defence Ministry.

Investments in the following critical sectors require mandatory prior notification and clearance:

1. **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) and land and real estate crucial for the use of that infrastructure;
2. **Critical technologies and dual use items**, key technologies for industrial leadership and training, technologies developed under the programs or projects considered as of particular interest for Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace technologies, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies;
3. **Supply of critical inputs**, including energy or strategic connectivity services or raw materials, as well as food security;
4. Any sector which may have access to sensitive information, including personal data, or the ability to control such information; and
5. The media, without prejudice to the fact the audio-visual communication services under the terms defined in the Act 7/2020, of March, of General Audio-visual Communication, shall be governed by the provisions of that Act.

The Spanish Government may delimit, by regulation, such concerned sectors. Regardless of the concerned sector beyond those listed above, the Council of Ministers reserves the right to intervene in any given acquisition if it affects or may affect public order or public security of Spain.
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

Mandatory prior filing
A foreign direct investment in a strategic sector if (i) as a result of which a foreign investor reaches at least a shareholding interest of at least 10% in a Spanish company or (ii) which involves corporate transactions, legal acts or businesses related to the investment, as a result of which a foreign investor would take part in the management or control of a Spanish company. The criteria established in Article 7(2) of the Spanish Competition Act will be applied for the purpose of ascertaining that control.

Other (post-completion declaration)
Any transaction involving: (i) participation in Spanish companies; (ii) establishment of, and increase of capital allocated to branches; (iii) subscription and acquisition of marketable debt securities representing loans issued by residents; (iv) participation in investment funds registered in the Registry of the Spanish National Securities Market Commission (“CNMV”); (v) acquisition by non-residents of real estate located in Spain, valued at more than €3,005,060, or where the investment originates from a tax haven irrespective of the amount of the investment; or (vi) incorporation, formalisation or participation in joint account agreements, foundations, economic interest groupings, cooperatives and co-ownership structures, valued at more than €3,005,060, or where the investment originates from a tax haven irrespective of its amount.
Thresholds that apply

For mandatory prior filing, a foreign direct investment in which the investor reaches a shareholding interest of at least 10% in the Spanish company.

At the present time, all foreign direct investments in Spain higher than €1 million are subject to a prior authorisation.

In addition, until 31 December 2022, RDL 27/2021 determines a transitional regime for those foreign direct investments in non-listed companies if the value of the investment exceeds €500 million. This regime affects those investors who are residents in an EU/EFTA country or Spanish residents whose actual ownership belongs to EU/EFTA residents.

Nevertheless, the Spanish government may establish, by regulation, types of transactions and thresholds below which foreign direct investments shall be exempted from the prior authorisation regime, due to their inexisten or scarce impact on the legal assets protected by this FDI regime (Article 7 bis.6 of FDI Act). For example, Article 14 of FDI Draft RD specifies that a foreign investment in the energy sector (mainly the energy renewal industry) should be exempted from the prior authorisation regime if the parties (both acquirer/target) market share does not exceed the threshold of 5 per cent on the Spanish energy market, among other factors. The Ministry shall consider both current and prospective market shares to determine whether the foreign investment can benefit from this exemption under the FDI Regime.
When can a transaction be called in by a regulator

A transaction can be called in by the regulator when it affects, or may affect, public authorities, public order, security or public health-related activities in Spain – regardless of the sector to which it relates. Also, if the transaction is within the scope of the strategic sectors described above (Question 5), and is not notified by the parties involved, the Ministry may commence its own investigation.

Any review is time-barred five years after the foreign investor takes control of the Spanish company.
Relevant test for intervention

The Spanish Council of Ministers shall take into consideration the Spanish target in order to determine the potential effects on the public policy or public security of Spain (such as whether foreign governments could have access to strategic sectors or infrastructures or the likelihood of a shortage of basic products or inputs), considering mainly:

- the sector in which the target is active
- the size of the target
- the Spanish projects involved
- whether the target is a listed company

Irrespective of the target’s characteristics, the competent authority shall bear in mind the type of foreign investor, considering in particular whether the foreign investor:

- is directly or indirectly controlled by the government (including state bodies or the armed forces) of a third country. The criteria established in Article 7(2) of the Spanish Competition Act will be applied for the purpose of ascertaining that control
- has made investments or has taken part in sectors that affect public safety, public policy or public health in another Member State, particularly the strategic sectors listed above (Question 6)
- is likely to engage in criminal or illegal activities affecting public safety, public policy or public health in Spain. Where court or administrative action has been brought against it “in the state of origin or another state on grounds of having engaged in criminal or unlawful conduct”

Irrespective of the target’s characteristics, the competent authority shall bear in mind the type of foreign investor, considering in particular whether the foreign investor:
SPAIN

Breaking down barriers A global guide to foreign investment regimes

The majority of cases are dealt with pursuant to the consultation procedure (see Question 3). The timeline for a formal review is as follows.

**Mandatory prior filing**

**Phase 1**

The form for making an FDI filing must be drafted and completed in a new document covering all of the topics listed in the table of contents, which is structured around the following four main points: (i) information about the investor, (ii) information about the target, (iii) the operation itself, and (iv) the investor’s business plan for the next three years. The FDI filing form is detailed and exhaustive, requiring the provision of a large amount of technical information on all elements involved in and potentially affected by the operation.

The request for authorisation shall be made in writing to the Director General of Trade and Investment. It must be drafted and completed in a document containing all of the points listed in the official FDI filing form.

**Phase 2**

If the Spanish Council of Ministers authorises the investment, the submission must contain the terms within which the authorised investment must be made. The authorisation will expire if the investment is not made within the established term.

If the Spanish Council of Ministers does not adopt a decision within the deadline of six months, the transaction shall be deemed to be prohibited.

**3. Consultation procedure**

As described above (Question 1), such consultation procedure is not currently established in the law in force and has been a consolidated administrative practice up to now.

The form for FDI consultation must be submitted to the Sub-Directorate General for Foreign Investments of the Directorate General for International Trade and Investment. It must be drafted and completed in a document covering all of the points listed in the official FDI filing form.

Based on the administrative practice, the consultation should be addressed by the Sub-Directorate General for Foreign Investments which, in turn, would be replied to within 30 days by the General Directorate for International Trade and Investment.

Other (in relation to post-completion declarations)

**Phase 1**

The Ministries which have obtained information about a foreign investment that affects or may affect, public authorities, public order, security, or public health-related activities shall initiate a procedure to suspend the liberalised system as soon as possible.

The notice of suspension of the liberalised system will be made by joint resolution and shall be published in the Spanish official journal (BOE) or notified to the person concerned.

The Ministry of Industry, Trade and Tourism and, where appropriate, the head of the Department concerned, subject to a previous report from the Foreign Investments Board.

If the General Directorate for International Trade and Investment does not reply within the deadline, the transaction shall be deemed to have been prohibited.

The FDI Draft RD not yet in force states that consultations should be replied to within 30 days by the General Directorate for International Trade and Investment.
The Spanish Council of Ministers and General Directorate for International Trade and Investment can prohibit the closing of a given or impose conditions if it affects, or may affect, public authorities, public order, national security or public health-related activities. Such a decision is enforceable by the Spanish administration and Courts.
The Spanish Council of Ministers and General Directorate for International Trade and Investment may authorise with conditions a foreign investment in order to address national security risks. This possibility was introduced by Article 6 of the FDI Act, in which it is indicated that operations within the scope of suspension of the liberalisation regime can be carried out with prior administrative authorisation and under the conditions established as part of that authorisation. A breach of any such conditions shall be considered as a very serious infringement.

There have been seven cases of conditional clearance since the FDI Regime entered into force, but only one of these has been published, the decision of 3 August 2021 regarding the acquisition of 22.68% of share capital by the Australian fund IFM in the Spanish company Naturgy. According to a press release of the Spanish Council of Ministers, up to nine behavioural conditions were addressed in particular to the members of the board of management appointed by IFM who should consider them when voting within the board. Examples of such conditions include the following: (i) to support the investment of the company in projects relating to energy transition in Spain, (ii) to support the maintenance of the effective management and headquarters in Spain, (iii) to support the maintenance of a significant part of the group in Spain, and (iv) not to support any divestment proposal that would involve the loss of control of subsidiaries that could put at risk the proper functioning of gas and energy transportation in Spain.

Article 9.3 of FDI Draft RD specifically develops the conditions or measures for mitigating national security risks.
A transaction carried out without the required prior authorisation will have no legal validity and legal effect and shall be considered as a serious infringement which may be subject to the following sanctions: (i) a fine which could amount up to the economic content of the transaction and which may not be less than €30,000, and (ii) a public or private admonition.

There is a five year statute of limitations on the sanctions described in this section.
Right of Appeal

Yes, any decision adopted by Spanish administrative authorities is subject to administrative and/or judicial appeal.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

COVID-19 has given rise to legal rules suspending the liberalisation of foreign direct investments in Spain in critical sectors and concerning specific investors by way of a mandatory regime.

In light of the foregoing, companies must consider in their SPA and prior negotiations the need for notification to the Competition Authorities, as well as, at the same time, to the Foreign Investments Competent Authorities.

The foreign investments regime in Spain has shifted from being a post-completion declaration system to a mandatory prior authorisation system.
Separate vetting process or part of merger control?

Direct foreign investments in Swiss companies are currently not subject to state approval, which stands in stark contrast with the majority of the EU and all G7 Member States. However, the Swiss Parliament has instructed the Federal Council (government) to draft the necessary legislation, and a legislative proposal for a "Federal Law on the Examination of Foreign Investments" was published on 18 May 2022. The bill aims to prevent threats to public order and security as a potential consequence of foreign investors acquiring control of Swiss companies. Parliamentary debate begins in Autumn 2022 and so the final wording of the bill is not known at the time of publication of this guide.

The remainder of this chapter is based on the draft bill which was made available in May 2022.

According to the draft bill, there will be a separate vetting process.
### Relevant authority and decision-maker?

1. **Direct Approval**
   In general, it is the State Secretariat for Economic Affairs ("SECO") in consultation with the other interested administrative units and after hearing the Federal Intelligence Service ("FIS").

2. **Screening Procedure**
   If there is no consensus, there will be a separate screening. After this screening, it is again the SECO which decides in accordance with the interested administrative units and after hearing the FIS. Should SECO or one of the administrative units object, or if the decision is of considerable political significance, it is the Swiss Federal Council which ultimately decides.
Mandatory or voluntary filing?

1. The following takeovers of domestic companies by foreign investors must be approved by SECO before they are closed:
   - takeovers of domestic companies by a foreign investor that is directly or indirectly controlled by a state agency
   - takeovers of the following domestic companies by a foreign investor:
     - companies that supply defence equipment or provide services
     - companies that produce goods whose export is subject to authorisation under the War Material Act and the Goods Control Act
     - companies that operate the domestic transmission network for electricity or distribution networks
     - companies that operate or own domestic power plants for the production of electricity or domestic high-pressure natural gas pipelines
     - companies which supply domestic water to more than 100,000 inhabitants
     - companies that supply central security-relevant IT systems for domestic authorities or provide such IT services
   - takeovers of the following domestic companies by a foreign investor, provided that they have generated an average annual turnover of at least 100 million Swiss Francs in the past two financial years, or in the case of gross income in the case of banks:
     - university hospitals and general hospitals with center care;
     - companies active in the research, development, production and distribution of medicinal products, medical devices, vaccines and personal medical protective equipment;
     - companies which operate or own central domestic hubs for the transport of goods and passengers, namely ports, airports and transshipment facilities for combined transport of national transport importance;
     - companies which operate or own:
       - domestic railway infrastructure;
       - central domestic food distribution centres;
       - domestic telecommunications networks,
       - systemically important financial market infrastructures;
     - systemically important banks.

2. The Federal Council may make other categories of domestic companies subject to the approval requirement for a maximum of 12 months, provided that this is necessary to ensure public order or security.

3. Takeovers of domestic companies that in the past two business years have comprised an average of less than 50 full-time positions and have generated a worldwide annual turnover of less than 10 million Swiss Francs in the past two business years are not subject to any approval.
### Switzerland

**Need for prior approval before closing?**

Yes, see Question 3 above. Aside from this, there is no obligation for prior approval.

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### Switzerland

- **Separate vetting process or part of merger control?**
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- **Right of Appeal**
- **What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**

**Is it targeted only at “foreign” investments and if yes, what is “foreign”?**

The draft bill defines a “foreign investor” as one of the following persons who intends to take over a domestic company:
- a company whose head office and principal place of business are outside of Switzerland,
- a company with assets that is controlled by one or more persons abroad or by another state,
- a natural person without Swiss citizenship who acts as a direct investor; natural persons from EU/EFTA Member States who intend to take over a domestic company in order to be able to pursue self-employment in Switzerland are not considered foreign investors.
### Sectoral focuses

Please refer to Question 3 above.

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### Switzerland

**Types of transactions caught (e.g., acquisition of significant influence, certain shareholdings or assets)**

The term “takeover” is defined very broadly. It includes any operation by which one or more investors directly or indirectly directly acquires control of an entity or parts thereof, in particular by way of merger, acquisition of a participation or significant assets or by entering into a contract. Accordingly, a takeover covers both share and asset deals.

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Thresholds that apply

The level of shareholding which qualifies as the acquisition of control cannot be determined in absolute figures, as it is dependent in particular on the form of the company and other legal and factual circumstances. In the case of a company limited by shares with several shareholders, the critical threshold is usually exceeded at a share of 50% of the voting rights. If the representation of small investors in the general meeting is notoriously weak or widely spread, a share of 20 or 30% of the voting rights may be sufficient for the acquisition of control.
If there is any suspicion that the approval requirement is being disregarded or circumvented, the SECO can initiate an approval procedure ex officio as soon as it becomes aware of a possible breach of the authorisation requirement. The prerequisite for intervention is the existence of concrete indications that the foreign investor has not or not properly fulfilled the approval requirement. Circumvention occurs if a takeover subject to approval was carried out without an application for approval.
Relevant test for intervention

- SECO approves the respective takeover if there is no reason to assume that public order or security is endangered or threatened. It shall take into account in particular whether:
  - the foreign investor is engaged or has engaged in activities that are or have been detrimental to the public order or security of Switzerland or other states
  - the foreign investor or his home state has attempted or attempted to acquire information on the domestic company by means of espionage
  - the foreign investor is engaged in or has engaged in espionage
  - sanctions have been imposed directly or indirectly on the foreign investor
  - the services, products or infrastructures of the domestic company can be replaced within a reasonable period of time
  - the foreign investor has access through the takeover to central information relevant to security or to data that is particularly worthy of protection
  - significant distortions of competition result from the takeover
1. Direct Approval
SECO and the interested administrative units decide one month after having received a request.

2. Screening Procedure
In this case, SECO and the interested administrative units decide three months upon initiation of the screening procedure. If the Swiss Federal Council is responsible (see Question 2 above), it decides at the latest at the first Federal Council meeting following the expiry of the three month period mentioned before. These meetings usually take place every week.

If there is no decision within the deadlines mentioned before, the respective takeover is deemed as approved. However, SECO is allowed to extend the deadlines, if (i) the foreign investor or the domestic company has obstructed the examination or (ii) required information from a foreign authority is pending.
**Ability to prohibit / unwind a transaction?**

Yes. If a takeover requiring approval is carried out without authorisation, the Federal Council may order the necessary measures to restore the proper state of affairs. In particular, it may order a divestment that reverses an unlawfully completed takeover.
**Q13**

**SWITZERLAND**

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Yes. Approval of a takeover may be subject to appropriate types of requirements or conditions, provided that the threat or endangerment of public order or security is eliminated.
Yes. A fine of up to 10% of the transaction value shall be imposed on a foreign investor who:

- carries out a takeover requiring authorisation without authorisation
- carries out a takeover that was approved on the basis of intentionally made false statements and is prohibited after reconsideration
- fails to carry out measures to restore the property to its proper condition

The individual fine is determined by SECO in accordance with the severity of the offence and taking into account all the circumstances of the individual case.
Right of Appeal

Appeals against decisions under the new law can be initiated at the Federal Administrative Court in St. Gallen, Switzerland. However, this is only possible for the foreign investor and the concerned domestic entity.

In the interest of accelerating the proceedings, this restriction is intended to refrain from giving third parties who may be particularly affected the right to appeal. An example of a particularly affected third party would be another bidding investor who is also interested in the takeover of the domestic company.
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### Separate vetting process or part of merger control?

Separate.
Relevant authority and decision-maker

Operation of the new UK regime is administered by the Investment Security Unit ("ISU") within the Department for Business, Energy and Industrial Strategy ("BEIS") and the decision maker is the Secretary of State for BEIS.

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**UK**

- Separate vetting process or part of merger control?
- Mandatory or voluntary filing?
- Is it targeted only at "foreign" investments and if yes, what is "foreign"?
- Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)
- When can a transaction be called in by a regulator?
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**Relevant authority and decision-maker**

- Relevant authority and decision-maker
- Need for prior approval before closing?
- Sectoral focuses
- Thresholds that apply
- Relevant test for intervention
- Ability to prohibit/unwind a transaction?
- Potential sanctions for gun jumping/failure to file
- What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?
Mandatory or voluntary filing?

Both. The new regime requires mandatory notification of qualifying transactions in 17 key sectors which are regarded as being the most sensitive areas of the economy. In addition, transactions in the wider economy (i.e. outside of the 17 key sectors) may be voluntarily notified where the parties consider that their deal may raise national security concerns.

The UK Government will also be able to “call in” transactions which are not subject to mandatory notification, but which it considers could be a risk to national security.
Need for prior approval before closing?

Where a transaction falls within the mandatory part of the regime, approval must be sought and received prior to closing. There is no such requirement for transactions which are not subject to mandatory notification, even though the parties may choose to notify such transactions and the transactions may be called in for review by the Secretary of State for BEIS.
Is it targeted only at “foreign” investments and if yes, what is “foreign”?

No. Unlike similar regimes already in force in other jurisdictions, especially in the EU, the UK regime will apply to investors from any country, including the UK.

When considering whether to exercise the call-in power, one of the factors which will be taken into account by the Secretary of State will be the ‘acquirer risk’ (i.e., the extent to which the acquirer raises national security concerns), and factors which are relevant to the assessment of the acquirer risk include the following:

- those in ultimate control of the acquiring entity, or whether the acquirer can readily be exploited
- the track record of those people in relation to other acquisitions or holdings
- any relevant criminal offences or known affiliations of any parties directly involved in the transaction

The Government has indicated that characteristics of the acquirer such as the sector(s) of activity, technological capabilities and links to entities which may seek to undermine or threaten the interests of the UK, including the integrity of the UK’s democracy, the UK’s public safety, the UK’s military advantage and the UK’s reputation or economic prosperity, are likely to be considered in order to understand the level of risk the acquirer may pose.

In contrast, characteristics such as a history of passive or longer-term investments may indicate low or no acquirer risk.
Sectoral focuses

The 17 key sectors which will fall within the mandatory notification regime are as follows: 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.

In addition, parties can choose to make a voluntary notification, and the Secretary of State could call in for review, any transaction within the wider economy (i.e. outside of the 17 key sectors outlined above) if they consider that the deal could raise national security concerns.
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

The new UK rules apply to “qualifying acquisitions”, that is acquisitions of (i) a “qualifying entity” (being a UK company or a company which carries on activities, or supplies goods or services to persons in, the UK) or (ii) a “qualifying asset” (including land, tangible movable property and intellectual property situated in the UK, or outside the UK if used in connection with activities carried on in the UK or the supply of goods or services to persons in the UK).

However, only acquisitions of qualifying entities require mandatory notification – acquisitions of assets are not subject to the mandatory rules.

Qualifying acquisitions require mandatory notification where one (or more) of the following trigger events occurs:

- a person acquires more than 25%, 50%, and 75% of the voting rights or shares in a UK company (or a company which carries on activities, or supplies goods or services to persons in the UK). Additional filings must be made where any of the above thresholds are exceeded i.e. separate filings would need to be made where the acquirers existing shareholding increases from, for example, 15% to 30%, 30% to 55% and, once more, from 60% to 80%

- a person acquires voting rights enabling it to secure or prevent the passage of any class of resolution governing the affairs of the qualifying entity

The above trigger events are also relevant for the voluntary regime, and in addition a voluntary notification may be advisable where the following circumstances arise:

- the acquisition, whether alone or together with other interests or rights held by the person, enables a person materially to influence the policy of the entity (though this does not include a case where the person already holds any interest or right that enables the person materially to influence the policy of the entity)
Thresholds that apply

No turnover or market-share based thresholds.
When can a transaction be called in by a regulator?

The Secretary of State must call in a transaction either (i) within six months of becoming aware that a trigger event has taken place or (ii) within five years of the trigger event taking place. However, the five year limitation period does not apply to transactions which should have been mandatorily notified.
The Secretary of State may call in a transaction if they reasonably suspect that:

- a trigger event (see Question 7 above) has taken place in relation to a qualifying entity or qualifying asset, and the event has given rise to or may give rise to a risk to national security

OR

- arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event taking place in relation to a qualifying entity or qualifying asset, and the event may give rise to a risk to national security

When determining whether a transaction has given, or may give rise to a national security risk, the Secretary of State will have regard to the following risk factors:

- **the target risk** – this concerns whether the entity or asset being acquired is being used, or could be used, in a way that poses a threat to national security

- **the acquirer risk** – this concerns whether the acquirer has characteristics that suggest there is, or may be a risk to national security if the acquirer gains control of the target

- **control risk** – this concerns whether the amount of control has been, or will be acquired through the qualifying acquisition poses a risk to national security.

A higher level of control may indicate a higher level of national security risk

The UK Government has stated that qualifying acquisitions which occur outside the 17 key sectors subject to mandatory notification are unlikely to be called in as national security risks are expected to occur less frequently in these areas.
Following submission of a mandatory filing the Government has 30 working days (the “review period”) to decide whether to either “call the transaction in” or notify the parties that no action will be taken.

If the Government decides to call the transaction in, it is required to undertake its assessment within a further 30 working day period (the “initial assessment period”) which is extendable by a further 45 working days in the event that the assessment requires additional time.

Absent any voluntary extensions of time which may be agreed with the parties, the maximum length of time for the process is therefore 105 working days, albeit the Government can stop the clock on the review if it decides to issue an information or attendance notice. In the event that such notice is given, the clock will restart once the Secretary of State confirms that the requirements of the notice have been complied with.
Ability to prohibit/unwind a transaction?

If the Government decides that it cannot clear a transaction in its current form, it may impose certain conditions or, if necessary, unwind or block the acquisition (either partially or completely).

Transactions that are covered by the mandatory notification requirement, but which proceed without obtaining clearance, will be considered automatically void.
Any acceptable remedies to address national security risks?

The Secretary of State may impose interim orders during the assessment phase in relation to a call-in notice, or final orders towards the end of an assessment period in relation to a call-in notice for the purpose of preventing, remedying or mitigating the national security risk raised by a transaction.

The following are examples of provisions which may be included in an interim or final order:

- requiring the target not to sell more than a certain percentage of its shares to the acquirer
- ensuring the acquirer cannot access certain intellectual property or limiting access to a particular site or dual-use technology
- requiring the target to regularly report to the government on compliance
- requiring that only persons with appropriate security clearance receive access to confidential information or are part of operational management of the target
- imposing Government checks on the target’s compliance with agreed actions
Potential sanctions for gun jumping/failure to file

There are severe penalties for failing to comply with the regime, including fines of up to 5% of worldwide turnover or £10 million (whichever is the greater) and/or imprisonment of individuals (including officers of the offending party) up to five years.

In addition, transactions that are covered by the mandatory notification requirement, but which proceed without obtaining clearance, will be considered automatically void.
Right of Appeal

Appeals against monetary penalties and requirements to pay associated costs can be brought before the High Court in England and Wales or the Court of Session in Scotland. All other decisions under the new UK regime will be subject to judicial review.
What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?

No specific impact.
### USA

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**Relevant authority and decision-maker**

The Committee on Foreign Investment in the United States ("CFIUS"), an inter-agency US government committee chaired by the Treasury, Defence, Energy, Commerce, Homeland Security and Justice Departments among other key players.
Voluntary except for Pilot Program Investments/ FIRMA (see below).

CFIUS can commence investigations of its own initiative at any time (i.e., before or after a transaction closes), and CFIUS monitors public statements and filings relating to investment activity.

Note that reforms made to CFIUS under the Foreign Investment Risk Review Modernisation Act ("FIRMA") signed into law on 13 August 2018, and in effect as of February 13, 2020, significantly expanded the authority of CFIUS to review and restrict foreign investments on national security grounds and also required CFIUS to establish a mandatory declaration process (i.e. a mandatory filing process) subject to prescribed exceptions and waivers, for certain "covered acquisitions" of a "substantial interest" in a US business involved in critical infrastructure or critical technology, or that maintains or collects sensitive personal data in which a foreign government has, directly or indirectly, a substantial interest.

The meaning of "substantial interest", along with exceptions and waivers, are not set out in FIRMA but rather were developed by way of secondary regulation. In the final regulations implementing FIRMA, CFIUS defined "substantial interest" as a 49% or greater interest, directly or indirectly, between the foreign government and the foreign person, and a 25% or greater interest, directly or indirectly, between the foreign government and the TID US business.

Mandatory filings for Pilot Program/FIRMA Covered Investments

In October 2018, CFIUS promulgated interim regulations, to become effective 11 November 2018 (the "Pilot Program"). This program established mandatory filings for a broad range of transactions involving even very small percentage investments in US firms that either: (1) are utilising a range of technologies deemed critical (including defence, dual use, nuclear, and a range of other "emerging and foundational" technologies to be designated) in one of 27 industrial sectors specified by CFIUS; or (2) have designed such technologies specifically for use in one of these sectors. The industrial sectors include major parts of the economy, including, among others; aerospace, aluminium production, ball bearings, computers, defence, nanotechnology, nuclear, petroleum, semiconductors, wireless communications, and other specified sectors. Parties to mandatory filings have the right to file a short form "declaration" in lieu of a full notification. Upon receipt of a declaration, CFIUS shall "promptly" inspect it and decide whether to accept it or determine it is incomplete and so notify the parties. Once it accepts the declaration, CFIUS then must decide, within 30 days of receipt, whether to: (1) request that the parties file a full notification; (2) initiate a unilateral review of the transaction; or (3) complete the action and clear the transaction.

While the Pilot Program expired on February 12, 2020, the final rule integrated many of the mandatory declaration requirements of the Pilot Program, although some notable differences are present.

In the midst of the pandemic, CFIUS proposed several revisions to its regulations that change when declarations (or "short term filings") are required with respect to covered foreign investments of US businesses which work with critical technology. What is most significant for foreign investors is that the proposed rules expand the mandatory declaration and required CFIUS review to include critical technology transactions that range well beyond the 27 industries originally designated by CFIUS – to cover all sectors of the economy, and recast the requirement instead on companies that have critical technology that would require certain export licenses or other authorizations to export, re-export, transfer (in-country) or re-export. This program establishes a new "qualifying voting interest" in a person described in the previous four points.

In effect, CFIUS has doubled down on export controls as the criteria for mandatory filing – the item must be on a controlled list and a license must be required for the particular foreign acquirer that is a party to the transaction. CFIUS has specifically indicated that this requirement "leverages the national security foundations of the established export control regimes, which require licensing or authorization in certain cases based on an analysis of the particular item and end-user, and the particular foreign country for export, re-export transfer (in-country) or retransfer." 85 Fed. Reg. 30894. While many of the items on the CFIUS export control lists do require licenses or other authorizations for export, this is not always the case.

As a result, a transaction is now subject to a CFIUS mandatory filing if (1) the US business produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies," and (2) a US regulatory authorization would be required for the reexport, export or transfer of that technology to any foreign party that:

- Could directly control a US business involved with "critical technologies," "critical infrastructure," or "sensitive personal data" (a so-called "TID US business") as a result of the covered transaction.

- Is directly acquiring an interest that is a "covered investment" in a TID US business.

- Has a direct investment in a TID US business, where the rights of such person with respect to the TID US business are changing and that change could result in a covered control transaction or a covered investment.

- Is a party to any transaction, transfer, agreement, or arrangement the structure of which is designed or intended to evade or circumvent CFIUS review with respect to the TID US business.

- Individually holds (or is part of a group of foreign persons that (or in the aggregate), holds) a "qualifying voting interest" in a person described in the previous four points.
### Need for prior approval before closing?

The regime is voluntary except for the Pilot Program Covered Investments mentioned above, and so transactions can complete without prior approval.
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<td>Is it targeted only at “foreign” investments and if yes, what is “foreign”?</td>
<td>Yes. A “foreign person” is defined as: any foreign national, foreign government, or foreign entity; any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity. “Foreign entity” in turn means any corporation, division, or other organisation organised under laws of a foreign state if either its principal business place is outside the United States or its equity securities are primarily traded on one or more foreign exchanges, unless it is ultimately majority owned by US nationals.</td>
</tr>
</tbody>
</table>
Sectoral focuses

All sectors – CFIUS can review any "covered transaction" which may impact US national security.

National security is not strictly defined, but CFIUS is particularly concerned with transactions involving the following:

- Critical infrastructure – assessed on a case-by-case basis, generally defined as a "system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security".

- Critical technologies – defined to include export controlled defence articles, services and technical data covered by the United States Munitions List, dual items on the Commerce Control List, certain nuclear-related equipment and facilities, and items covered by the Select Agents and Toxins regulations, and other foundational and emerging technologies to be designated by commerce.

- Personal identifiable information – focused on companies with considerable volumes of sensitive personal information (social security number, financial information, medical information, etc.) – that could potentially be exploited by a foreign buyer, including in particular data of US government and military officials.

By enacting FIRRMA, Congress expanded the reach of CFIUS by extending the definition of a "covered transaction". It did this by amending the term "covered transaction" to include the following:

- any non-passive investment by a foreign person in any U.S. business involved in critical infrastructure, the production of critical technologies or that maintains sensitive personal data that, if exploited, could threaten national security
- any change in a foreign investor’s rights regarding a U.S. business
- the purchase, lease, or concession by or to a foreign person of certain real estate in close proximity to military or other sensitive national security facilities
- any other transaction, transfer, agreement, or arrangement designed to circumvent or evade CFIUS

Two significant expansions of CFIUS’ jurisdiction can be deduced from these changes:

1) real estate transactions of developed and undeveloped land
2) non-controlling foreign interests in critical infrastructure, critical technologies or sensitive personal data
Types of transactions caught (e.g. acquisition of significant influence, certain shareholdings or assets)

CFIUS has jurisdiction over any "covered transaction" which is defined as "any transaction...by or with any foreign person, which could result in control of a US business by a foreign person". "Control" is not defined by reference to a particular shareholding or board representation.

- Control exists where the transaction will enable the non-US person, either directly or indirectly, to "determine, direct, or decide important matters" affecting the US business
- This includes the power to make decisions regarding: the sale, lease or transfer of the US business' assets; reorganisation, merger or dissolution of the US business; closing, relocating or substantial alteration of US production, operational or research facilities; major expenditures or investments; issuance of debt or equity; appointment/dismissal of officers or senior personnel; and execution or termination of contracts

The control threshold for CFIUS is lower than would apply under the HSR merger control regime and could certainly apply to a holding of <50% of voting securities or voting board representation.

While prior to FIRRMA CFIUS only was able to review foreign acquisitions of "control" over US businesses, a centrepiece of FIRRMA is its addition of the authority to review "[a]ny other investment" that is not "passive" in nature but in a US business that:

- owns, operates, manufactures, supplies or services "critical infrastructure"
- produces, designs, tests, manufactures, supplies or services "critical technology"
- maintains or collects sensitive personal data of US citizens that may be exploited in a manner that threatens national security

The scope of the passive exemption is quite narrow. To be "passive" and therefore exempt from review, an investment must not afford the foreign person any of the following:

- access to material non-public information in the possession of a US critical infrastructure or critical technology company
- membership or observer rights on the board of directors or equivalent governing body of such firms or the right to nominate an individual to such a position
- any involvement, other than through voting of shares, in substantive decision-making in the management, governance or operation of such firms

Novel fund structures affording foreign investors, sovereign wealth investors and other foreign investors greater rights to participate in the investment decisions of a fund and the governance of the fund's portfolio of companies will not be exempt.

FIRRMA affords CFIUS new authority over any other transaction or arrangement in which the structure is designed or intended to circumvent the application of Exon-Florio authority. CFIUS also now has the authority over the transfer of certain assets pursuant to bankruptcy proceedings or other defaults.

Congress has made it clear that traditional private equity investments will be treated as passive, even when the foreign person investing in the fund has membership on a fund advisory board or committee, provided that the fund's general partner, managing member or the equivalent is not a foreign person; the advisory board or committee has no authority to approve, disapprove or control investment decisions of the fund; and the foreign investor has no control over the fund.
**Thresholds that apply**

No threshold.

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**Separate vetting process or part of merger control?**
- USA

**Relevant authority and decision-maker**
- USA

**Mandatory or voluntary filing?**
- USA

**Need for prior approval before closing?**
- USA

**Is it targeted only at "foreign" investments and if yes, what is "foreign"?**
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- USA

**Thresholds that apply**
- USA

**When can a transaction be called in by a regulator?**
- USA

**Relevant test for intervention**
- USA

**Timetable for review**
- USA

**Ability to prohibit/unwind a transaction?**
- USA

**Any acceptable remedies to address national security risks?**
- USA

**Potential sanctions for gun jumping/failure to file**
- USA

**Right of Appeal**
- USA

**What has been the impact of the COVID-19 pandemic on the foreign investment regime in your jurisdiction?**
- USA
When can a transaction be called in by a regulator?

CFIUS can intervene in any transaction in relation to which it has concerns.
USA

Separate vetting process or part of merger control?

Relevant authority and decision-maker

Mandatory or voluntary filing?

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Relevant test for intervention

The test for CFIUS intervention is whether a covered transaction threatens to impair national security.

National security is not defined in the law or regulations, but is assessed on a case-by-case basis, and generally involves an analysis of the threat posed by the foreign buyer and its host country and the degree to which the US company is vulnerable to exploitation:

– threat assessment (acquirer) – CFIUS reviews the non-US acquirer’s prior record or intent with respect to US national security issues, taking into account whether it is, or is controlled by, a non-US government entity

– vulnerability assessment (target) – CFIUS reviews the importance of the target US business to US national security, with a focus on: classified information or materials; critical infrastructure or technologies; sole source US government contracts; and proximity of the US business to sensitive US government facilities

– risk assessment (acquirer and target) – CFIUS evaluates potential national security consequences if vulnerabilities are exploited by non-US acquirer
Timetable for review

- Pre-filing – today CFIUS need not initiate a review unless it deems the notification filed by the parties “accurate and complete”; in practice, CFIUS is currently taking in the range of 30 days to review and provide comments on filings prior to initiation. Under 2018 legislation, CFIUS is now required to provide comments on draft filings within ten days.
- 45 calendar day initial review period – if no national security risks are identified, or if such risks are resolved, no further action is taken.
- 45 calendar day factual investigation period (if national security risks are not resolved in initial review – under the recent amendments, CFIUS will have the authority to extend the period for a subsequent
- 15 calendar day Presidential review period – if CFIUS cannot reach a decision, or recommends that the transaction be blocked, the transaction is referred to the President.

In an effort to short-cut the current CFIUS process for some transactions, FIRMA authorises CFIUS to establish, by regulation, a process whereby parties in any covered transaction will have the option to submit a short-form declaration (generally not to exceed five pages) with basic information about the transaction instead of a full and detailed written notice. CFIUS must then decide, within 30 days of receipt, whether to:
(1) request that the parties file a full notification;
(2) initiate a unilateral review of the transaction;
(3) complete the action and clear the transaction.
Ability to prohibit/unwind a transaction?

CFIUS has the authority to prohibit a transaction prior to its consummation and post-closing to require a buyer to divest an acquisition (i.e., where that transaction had not been submitted to or cleared through CFIUS). It does not, however, have the authority to "unwind" a transaction (i.e., in the sense of requiring the seller to take ownership again of the US business after the closing of its sale has already occurred).
CFIUS can impose pre-closing "mitigation" remedies (which will often be negotiated with the parties), designed to reduce US national security risks, such as:

- establishing guidelines for handling US government contracts and other sensitive information
- ensuring only US citizens handle certain products and services, and/or ensuring that such products and services are located only in the US
- notifying the US government in advance for approval of non-US nationals’ visits to the acquired US business
- providing the US government with the right to review (and object to) certain business decisions that raise US national security issues

Compliance with mitigation remedies is monitored by the US government post-closing, with penalties for violations. CFIUS can unwind a transaction post-closing (with Presidential approval) if US national security concerns are not resolved to its satisfaction.

Any acceptable remedies to address national security risks?

Q13

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Hungary

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Austria

Czech Republic

EU

France

Germany

Hungary

Italy

Netherlands

Poland

Romania

Slovakia

Spain

Switzerland

UK

USA

Separate vetting process or part of merger control?

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<td>Potential sanctions for gun jumping/failure to file</td>
<td>No, although there are penalties for violations of mitigation remedies, and making false or misleading statements to CFIUS during the review process. Parties who do not file run the risk of CFIUS unwinding the transaction (with Presidential approval) if it finds that there are US national security concerns.</td>
</tr>
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</table>
**Right of Appeal**

Findings and decisions of the President are not subject to judicial review. However, the process that CFIUS/the President apply in reaching a determination can be subject to a due process (constitutional) challenge.
Although not directly attributable to COVID-19, on June 1, 2020, CFIUS launched an online portal and Case Management System ("CMS"). As of Monday, June 1, 2020, transaction parties are now required to use the online portal when submitting declarations and notices (including draft notices) of transactions.

Additionally, the US Department of the Treasury issued an interim final rule, which went into effect on May 1, 2020, requiring the payment of fees for notifying filings to CFIUS. These fees were authorized by FIRRMA, which vary according to the value of the transaction.

Filing fees are required only for a formal written notice of a "covered transaction" as defined in 31 C.F.R. 800.213 or a "covered real estate transaction" as defined in 31 C.F.R. 802.212 (when the value of the transaction is $500,000 or greater).

The regulations do not specify which party to a transaction is responsible for payment of the filing fee. Instead, the parties to a covered transaction are collectively responsible for payment of the filing fee. As a result, the parties to the transaction should allocate costs such as these in their relevant transaction documents.

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