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This seventh edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions.

Foreign investment continues to garner a great deal of attention. This trend is expected to continue as the global economy further integrates, the number of cross-border and international transactions keeps increasing, and national governments continue to regulate foreign investment in their jurisdictions to an unprecedented degree. Reviews of cross-border mergers have, in some instances, been characterised recently by a rising tension between normative competition and antitrust considerations on the one hand, and national and public-interest considerations on the other; the latter sometimes weighing heavily against the former. As a result, more large, cross-border mergers are being scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Many factors are driving these emerging trends – the rise in populist political movements has increased the focus on national interest considerations such as protectionism; there are concerns over the export of jobs and industrial policy; heightened concerns over cybersecurity have led to enhanced national security protection measures; and an increased focus in some jurisdictions on the stream of capital flowing from state-owned enterprises has driven greater scrutiny of proposed investments, particularly those in economic sectors such as information technology and natural resources. Where, historically, national security concerns were limited to businesses involved in manufacturing or supplying military equipment and to infrastructure industries critical to national sovereignty, the scope of transactions reviewed on the basis of national security has broadened significantly. Transactions in sectors such as banking and finance, media, telecommunications, and other facets of the digital economy, as well as transportation industries and even real estate, may be potential focal points for foreign investment review.

Efforts to overhaul the regulatory landscape have been seen in the United States with the expansion of the review authority of the Committee of Foreign Investment in the United States (CFIUS), including a broadening of transactions under CFIUS’s scrutiny. In turn, France is trying to generate support to revise the European Union’s competition reviews to, among other things, more closely scrutinise mergers in the technology sector. Other major jurisdictions in Europe, including Germany and the United Kingdom, have shown greater interest in increased regulatory authority in regard to foreign investment reviews.

Differences in foreign investment regimes (including in the timing, procedure, thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) are contributing to the relatively uncertain and unpredictable
foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant ‘chilling’ effect on investment decisions and economic activity. Foreign investment regimes may be challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate.

The American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law has built on the work of the ABA ALS previous Task Force on Foreign Investment Review. It has looked more closely at the potential implications of national interest considerations and evolving breadth of national security reviews, including, in some cases, as they may relate to, or interface with, normative competition reviews. In so doing, the Task Force has examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In August 2019, the report of the Task Force was considered and approved by the Council of the ABA ALS.

These emerging trends and the evolving issues in the interface of foreign investment and competition reviews were the subject of panel discussions at the Annual Conference of the International Bar Association in Rome in October 2018 and the ABA ALS Global Seminar Series in Düsseldorf, Germany in May 2018, among others in recent years. The evolving issues have also attracted attention in recent years in international fora of public authorities, such as the International Competition Network and the Organisation for Economic Co-operation and Development’s Competition Committee.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 17 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition, or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients or the editors or publisher.

Calvin S Goldman QC and Michael Koch
Goodmans LLP
Toronto
September 2019
Chapter 1

EU OVERVIEW

Lourdes Catrain and Eleni Theodoropoulou

I INTRODUCTION

This chapter provides an overview of the recently adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU \(^2\) (the Framework Regulation) and discusses the importance of this new piece of legislation for foreign investors.

The Framework Regulation aims at addressing the growing concerns in the EU stemming from the rising number of acquisitions of EU companies by non-EU investors, in particular Chinese companies. Many of these acquisitions involved EU companies active in sensitive and strategic sectors.

Since the controversial acquisition in 2016 of KUKA AG, a German robotics engineering company, by Midea, a Chinese air-conditioning and home appliances company, there have been various controversial acquisitions by Chinese corporations into the EU. At the end of July 2018, Germany blocked a 20 per cent acquisition by the State Grid Corporation of China of 50Hertz, a transmission system operator in Germany, on national security grounds and the shares at issue were temporarily acquired by KfW, a government-owned development bank in Germany.\(^3\) Albeit Chinese foreign direct investment (FDI) into the EU has been declining in the past couple of years, from €37 billion in 2016 to €17.3 billion in 2018,\(^4\) concerns remain with respect to the sectors in which Chinese companies invest.\(^5\)

The focus of Chinese investment flows in the EU is thus primarily on the sectors of advanced industrial machinery and equipment, information and communications technology,

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1 Lourdes Catrain is a partner and Eleni Theodoropoulou is an associate at Hogan Lovells International LLP in Brussels.
3 Deutsche Welle, 'Berlin beats Chinese firm to buy stake in 50Hertz power company', 27 July 2018.
5 China’s strategic ambition of becoming a major player in the technological sector is reflected in (1) China’s 13th five-year plan for innovation-driven, green and inclusive growth, which sets out the country’s ‘strategic intentions and defines its major objectives, tasks and measures for economic and social development’, and (2) China Manufacturing 2025, which aims to raise the competitiveness of its industry by increasing the levels of local content in Chinese manufacturing by 70 per cent by 2025, and to create ‘national champions’ in 10 high-tech manufacturing sectors.
utilities, transport and infrastructure and energy. Certain Member States consider these sectors to be highly sensitive, as they are often linked to the defence industry and hence they raise national security considerations.

Against this background, in late July 2017, France, Germany and Italy launched the debate for the introduction of common rules in the EU for the scrutiny of FDI in strategic sectors. This debate eventually resulted in the adoption of the Framework Regulation, which provides for an enabling framework for Member States to review FDI on grounds of security and public policy and to increase cooperation among Member States, and between Member States and the European Commission (Commission).

II FOREIGN INVESTMENT REGIME

The Framework Regulation creates the legal framework to allow for greater coordination in screening FDI in the EU, without establishing a mandatory screening mechanism at EU level. To date, 14 Member States have adopted different policies for securing their vital national security interests against FDI, ranging from screening procedures to partial or total prohibition of FDI in specific sectors, notably defence.

The legal basis for such mechanisms is the Treaty on the Functioning of the European Union (TFEU), which allows Member States to ‘take such measures as [they] consider necessary for the protection of the essential interests of [their] security that are connected with the production of or trade in arms, munitions and war material’, on the condition that the measures do not ‘adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes’.

Article 63 TFEU prohibits all restrictions on the freedom of movement of capital and payments between Member States or between Member States and third countries. Article 65 TFEU provides for derogation from this prohibition, allowing Member States to take measures that are justified on grounds of public policy or public security. The invocation of public policy and public security reasons must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

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8 Article 346(1)(b) of the Treaty on the Functioning of the European Union (TFEU).
9 Article 63 TFEU states: (1) within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and third countries shall be prohibited; and (2) within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and third countries shall be prohibited.
10 Article 65(1)(b) TFEU states: (1) The provisions of Article 63 shall be without prejudice to the right of Member States: [...] (2) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
11 Article 65(3) TFEU.
According to the case law of the Court of Justice of the European Union (CJEU), national measures may be justified on the grounds set out in Article 65(1)(b) TFEU, namely public policy or public security\textsuperscript{12} or by overriding reasons in the general interest ‘to the extent that there are no [EU] harmonising measures providing for measures necessary to ensure the protection of those interests’.\textsuperscript{13} Those overriding interests have been held to include environmental protection, town and country planning and consumer protection,\textsuperscript{14} and exclude purely economic objectives.\textsuperscript{15}

However, national measures must respect the limits provided by the TFEU and observe the principle of proportionality, in that restrictive measures must be appropriate to secure the objective that they pursue and not go beyond what is necessary to achieve it.\textsuperscript{16}

The CJEU has also held that the scope of the public security exception must be interpreted strictly and cannot be unilaterally determined by the Member States without any control by the EU institutions.\textsuperscript{17} Member States may rely on this exception only in the presence of a ‘genuine and sufficiently serious threat to a fundamental interest of society’.\textsuperscript{18} Moreover, such derogations must not be applied for purely economic purposes,\textsuperscript{19} while persons affected by such restrictive measures must have access to legal remedies.\textsuperscript{20}

Finally, Council Regulation 139/2004 on the control of concentrations between undertakings (Merger Regulation)\textsuperscript{21} aims at establishing whether appraisals of mergers and acquisitions within the EU are compatible with the common market and do not pose impediments to effective competition therein. For transactions with an EU dimension, the Merger Regulation affords the Commission with exclusive competence to make decisions.\textsuperscript{22} Once the Commission has taken jurisdiction over a transaction, Member States’ domestic legislation does not apply.\textsuperscript{23} However, Article 21(4) of the Merger Regulation explicitly provides that Member States ‘may take appropriate measures to protect legitimate interests
other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security is listed as a legitimate interest in this regard.

### III REVIEW PROCEDURE

The Framework Regulation establishes a common basis for the screening of FDI into the EU on grounds of security or public order, aiming at enhancing cooperation of Member States’ national screening mechanisms. It sets out the requirements that national mechanisms must comply with. Importantly, it does not create a mandatory screening mechanism at EU-level, nor does it impose an obligation upon Member States to adopt such a mechanism. FDI screening remains within the competence of Member States. Further, it sets out a cooperation mechanism (1) among Member States, and (2) between Member States and the Commission, which aims at facilitating the exchange of information concerning potential investments that might have an impact on other Member States’ national security or other strategic or sensitive areas, or on projects and programmes of EU interest.

The Framework Regulation applies to FDI, which is explicitly defined (thus excluding other forms of investment, such as portfolio investment). Consequently, it covers investments of any kind that aim to establish or to maintain lasting and direct links between the foreign investor and the acquired company to carry on an economic activity in a Member State, including investments that enable effective participation in the management or control of a company carrying out an economic activity. This section analyses the main elements of the Framework Regulation.

#### i Member States’ screening mechanisms

Member States are solely responsible for protecting their essential security interests. As a result, they may maintain any existing mechanisms for the screening of FDI into their territory on security or public order grounds. The Framework Regulation does not impose an obligation on Member States to have a screening mechanism in place. However, it sets out certain common principles by which any such mechanism must abide:

- procedures and rules, including time frames, must be transparent;
- relevant rules must set out the conditions for initiating a FDI review, the grounds for screening and the applicable procedural rules on a non-discriminatory manner between third countries;
- applicable time frames for the review must take into consideration potential comments by other Member States or Commission opinions, in accordance with the Regulation (see Section III.iii below);

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24 id., Article 21(4).
25 Article 2(1) of the Framework Regulation.
26 Article 1(3) of the Framework Regulation; see also Article 4(2) TEU and Article 346 TFEU.
27 Article 3(1) of the Framework Regulation.
28 Article 3(2) of the Framework Regulation.
29 ibid.
30 Article 3(3) of the Framework Regulation.
foreign investors must be able to have recourse to judicial review of the authorities' decisions;\(^3\)1
any confidential information (including commercially sensitive information) made available to the Member State concerned in the context of its review must be protected;\(^3\)2
and
Member States must provide for measures allowing the identification and prevention of circumvention of applicable screening mechanisms and decisions.\(^3\)3

Any existing or newly adopted screening mechanisms must be notified to the Commission, which is responsible for maintaining an updated list of all mechanisms in the EU.\(^3\)4 On 24 June 2019, the Commission published a list of screening mechanisms notified by 14 Member States.\(^3\)5 Further, Member States must submit an annual report to the Commission, in which they include information about any FDI that took place in their territory in the preceding year, the operation of their screening mechanism, as well as any requests received by other Member States in the context of the cooperation mechanism (see Section III.iii below).\(^3\)6 On that basis, the Commission will submit an annual report to the Parliament and the Council on the implementation of the Framework Regulation.\(^3\)7

ii Screening factors
The Framework Regulation provides for an illustrative list of factors and criteria that Member States (or the Commission) may consider in determining whether a particular FDI may affect their security or public order. These factors include the potential effects of an FDI on the areas of:

- critical infrastructure, physical or virtual (such as energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, as well as land and real estate crucial for the use of such infrastructure);
- critical technologies and dual-use items (such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy, storage, quantum and nuclear technologies, nanotechnologies and biotechnologies);
- supply of critical inputs (such as energy, raw materials or food security);
- access to sensitive information (such as personal data or the ability to control such information); and
- freedom and pluralism of media.\(^3\)8

\(^{31}\) Article 3(5) of the Framework Regulation.
\(^{32}\) Article 3(4) of the Framework Regulation.
\(^{33}\) Article 3(6) of the Framework Regulation.
\(^{34}\) Article 3(7) and (8) of the Framework Regulation.
\(^{35}\) Article 5(1) and (2) of the Framework Regulation.
\(^{36}\) Article 5(3) of the Framework Regulation.
\(^{37}\) Article 4(1) of the Framework Regulation.
Further criteria that may be taken into account include whether:

a. the foreign investor is controlled by a third country government, state bodies or armed forces (through ownership or significant funding);

b. the foreign investor has been involved in activities affecting security or public order of another Member State; or

c. there is a serious risk that the foreign investor engages in illegal or criminal activities. 39

iii Cooperation mechanism 40

An innovative element of the Framework Regulation is the establishment of a cooperation mechanism (1) among Member States and (2) between Member States and the Commission, aiming to the exchange of information about FDI in a Member State that may affect security of public order also in other Member States. The cooperation mechanism will work via contact points established in each Member State and the Commission respectively. 41 It applies both to FDI already undergoing screening in a Member State 42 and to FDI in a Member State not yet subject to screening, 43 with different nuances in each process.

The Member State in which the investment takes place must notify the other Member States and the Commission of such FDI 44 and may request that they provide comments or an opinion, respectively. 45 It must also provide information about the FDI, including, among others, on the ownership structure of the foreign investor; the value of the FDI; the products, services and business operations of the foreign investor; other Member States where the foreign investor conducts relevant business operations; the funding of the FDI and its source; and the date of (expected) completion of the FDI. 46 Such information is protected as confidential. 47 The other Member States and the Commission may, within 15 calendar days from receiving the above information, request more information and notify the Member State reviewing the FDI about their intention to provide comments. 48

If any other Member State or the Commission considers that the FDI at issue is likely to affect security and public order in another Member State, it can provide comments or an opinion, 49 within a ‘reasonable period of time’, and within a maximum of 35 calendar days from receiving the relevant information by the Member State concerned. 50 The deadline can

39 Article 4(2) of the Framework Regulation.
41 Articles 6(10) and 11 of the Framework Regulation.
42 Article 6 of the Framework Regulation.
43 Article 7 of the Framework Regulation.
44 Article 6(1) of the Framework Regulation.
45 Article 6(4) of the Framework Regulation.
46 Article 9(1) and (2) of the Framework Regulation. In exceptional circumstances where it is not possible to obtain such information, the Member State concerned must explain its inability to provide this information to the Commission and the other Member States (see Article 9(5) of the Framework Regulation).
47 Article 10(1) of the Framework Regulation.
48 Article 6(6) of the Framework Regulation.
49 Article 6(2) and (5) of the Framework Regulation.
50 Article 6(7) of the Framework Regulation.
be extended by 20 calendar days if additional information is requested from the Member State concerned.\textsuperscript{51} The Member State conducting the screening may make a decision earlier in exceptional circumstances requiring immediate action.\textsuperscript{52}

The cooperation mechanism applies also to FDI not undergoing screening, completed as of 10 April 2019.\textsuperscript{53} The process is triggered if a Member State considers that a planned or completed FDI in another Member State is likely to affect its own security or public order. The Commission may also initiate the process if it considers that the FDI concerned might affect security or public order in another Member State. In these cases, Member States or the Commission may provide comments or an opinion, respectively.\textsuperscript{54} Before issuing their comments, the other Member States and the Commission can request information about the FDI at issue.\textsuperscript{55} The general time frame for submitting comments is the same (i.e., 35 calendar days from the receipt of relevant information), but the Commission has another 15 calendar days to issue its opinion.\textsuperscript{56}

In both types of the cooperation mechanism (i.e., for FDI undergoing screening and FDI not undergoing screening), the Member State in which an FDI is planned or completed must give ‘due consideration’ to other Member States’ comments and to the Commission’s opinion.\textsuperscript{57} However, it is not bound by such comments or opinion in its final screening decision.

\section*{Projects or programmes of Union interest}

An interesting element of the Framework Regulation concerns the review of FDI that is likely to affect projects or programmes of Union interest on grounds of security or public order. Projects or programmes of Union interest are defined as those ‘involving a substantial amount or a significant share of Union funding, or […] covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order’.\textsuperscript{58} Such projects and programmes are listed in an Annex to the Framework Regulation.\textsuperscript{59} The Annex currently lists eight EU projects and programmes, such as the Horizon 2020, Galileo and the Trans-European Networks for Telecommunications.\textsuperscript{60}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{51} ibid.
\item\textsuperscript{52} In that case, other Member States and the Commission must make an effort to issue their comments or opinion expeditiously (see Article 6(8) of the Framework Regulation).
\item\textsuperscript{53} Article 7(10) of the Framework Regulation.
\item\textsuperscript{54} Article 7(1) and (2) of the Framework Regulation. Comments by other Member States and the Commission’s opinion are mandatory if at least one third of the Member States consider that the FDI at issue is likely to affect their security or public order.
\item\textsuperscript{55} Article 7(5) of the Framework Regulation. Requested information must be duly justified, limited to information necessary to issue comments or an opinion and not unduly burdensome for the Member State where the FDI has been planned or completed.
\item\textsuperscript{56} Article 7(6) of the Framework Regulation. Comments cannot be provided after 15 months since the completion of the FDI in another Member State (see Article 7(8) of the Framework Regulation).
\item\textsuperscript{57} Articles 6(9) and 7(7) of the Framework Regulation.
\item\textsuperscript{58} Article 8(3) of the Framework Regulation.
\item\textsuperscript{59} Articles 8(3) and (4), and 16 of the Framework Regulation.
\item\textsuperscript{60} Annex to the Regulation. The full list of EU projects and programmes consists of: the European GNSS programmes (Galileo & EGNOS); Copernicus; Horizon 2020; the Trans-European Networks for Transport (TEN-T); the Trans-European Networks for Energy (TEN-E); the Trans-European Networks for Telecommunications; the European Defence Industrial Development Programme; and the Permanent structured cooperation (PESCO).
\end{enumerate}
\end{footnotesize}
Where a project or programme of EU interest is likely to be affected by FDI, the Commission can issue an opinion addressed to the Member State concerned. The Commission must send its opinion to the other Member States (and not only to the Member State where the FDI is taking place). The Member State concerned must take ‘utmost account’ of the Commission’s opinion and provide explanations to the Commission if it does not follow the opinion.61

v Other provisions
The Framework Regulation maintains the group of Member States’ experts on FDI screening (Group) established in 2017 to provide advice and expertise to the Commission. The purpose of the Group is to share best practices and exchange views on current issues and common concerns pertaining to FDI. The Commission would also seek advice of the Group on systemic issues relating to the implementation of the Framework Regulation. The discussions of the Group are confidential.62

The Framework Regulation also allows for the cooperation between Member States and the Commission with the competent authorities in third countries with respect to issues of FDI screening on security and public order grounds.63

The Framework Regulation entered into force in 10 April 2019 and will become fully applicable as of 11 October 2020. In the period between its entry into force and its application, Member States should establish the necessary administrative structures that would allow cooperation at EU level with the other Member States and the Commission, in accordance with the Framework Regulation.

IV FOREIGN INVESTMENT PROTECTION

The EU investment policy aims at securing a level playing field and an open and transparent environment for investing in the EU on the basis of reciprocity. In the past few years, the EU has been negotiating and concluding FDI protection rules in Free Trade Agreements64 or self-standing investment agreements,65 covering issues such as market access and non-discrimination between EU and non-EU investors, creating a favourable regulatory framework for foreign investors and protecting established FDI in the EU, including through both substantive rules and investor-state dispute settlement mechanisms.

Article 207 TFEU sets out the Common Commercial Policy, over which the EU has exclusive competence by virtue of Article 3(1)(e) TFEU. In other words, the EU is exclusively competent to legislate and adopt legally binding acts, whereas Member States may do so only if they are empowered by the EU or for the implementation of such acts.66 The CJEU confirmed that FDI falls within the EU exclusive competence in its 2017 Opinion on the EU–Singapore Free Trade Agreement.67 The Court distinguished between FDI and other forms of investment (e.g., portfolio investment) and held that only FDI falls within the exclusive

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61 Article 8(1) and (2) of the Framework Regulation.
62 Article 12 of the Framework Regulation.
63 Article 13 of the Framework Regulation.
64 See for example Chapter 8 in the EU – Canada Comprehensive Economic and Trade Agreement (CETA).
65 See for example EU – Vietnam Investment Protection Agreement.
66 Article 2(1) TFEU.
67 Opinion 2/15 of the Court (Full Court) of 16 May 2017, ECLI:EU:C:2017:376, at paragraph 80.
The criteria used by the CJEU to define FDI, namely the existence of lasting and direct links and the effective participation in the investment’s management or control, now form part of the definition of FDI in the Framework Regulation.

On that basis, Member States cannot, in principle, conclude investment agreements with third countries on their own (or amend existing ones), unless authorised by the Commission.

**V OTHER STRATEGIC CONSIDERATIONS**

The key objective of the Framework Regulation is to ensure reciprocity in the acquisition of EU companies by non-EU investors and to introduce criteria of fair competition for such acquisitions, based on market rules. At the same time, it aims to strike a balance between maintaining an open environment to FDI in the EU, on the one hand, and the varying interests of its Member States on the other. Notably, many Member States have been tightening their FDI review mechanisms in recent years. The Framework Regulation does not aim at replacing existing Member States’ mechanisms, but only at harmonising national mechanisms to streamline the scrutiny of FDI into the EU. For that reason, foreign investors must observe national requirements in the Member State or States in which they intend to invest (which may vary significantly) and engage with domestic authorities.

At the same time, the new rules would likely affect both the applicable time frames in national reviews and the substantive assessment of a reported FDI. On the one hand, applicable deadlines would have to take into account the time frame for Member States comments and the Commission opinion in accordance with the requirements of the cooperation mechanism. On the other hand, Member States will need to take into account the views expressed by other Member States or the Commission in their decision-making process.

Finally, the Framework Regulation complements the existing framework for mergers and acquisitions (M&A) in the EU and does not seek to replace it. As part of the cooperation mechanism for FDI already undergoing screening, the Member State concerned should indicate whether the FDI at issue is likely to fall within the scope of the Merger Regulation. While the Commission’s role is merely coordination, it would be a relevant actor in the whole vetting process. As a result, companies engaged in M&A transactions would need to conduct a more thorough analysis of potential cross-border security issues to identify the EU Member States in which they would be required to make a filing.

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68 id., paragraphs 80 and 227.
69 ibid; Article 2(1) of the Framework Regulation.
71 Merger Regulation, op.cit.
72 Article 6(1) of the Framework Regulation.
VI CURRENT DEVELOPMENTS

During the past year, certain Member States have been intensifying the discussion about reforming the current EU merger rules to shape a European industrial policy. France and Germany are at the forefront of the request for such a reform, calling for a modernised competition policy apt to address the challenges of the twenty-first century economy through an improved EU industrial strategy with clear objectives by 2030.73 Their proposal includes three main pillars that would allow the EU to compete on the global stage:

a investing in innovation, including through technology funding, supporting high-risk deep technology projects, becoming leaders in artificial intelligence, promoting research and development for cutting-edge technologies and ensuring that the EU financial markets support innovation;

b adapting the EU regulatory framework with a view to creating a global level playing field, through updating competition rules; and

c having in place effective measures to protect EU technologies, companies and markets, including through full implementation of the new FDI screening framework, an effective reciprocity mechanism for public procurement with third countries, promoting multilateralism and an ambitious EU trade policy, adapted to defend the EU’s strategic autonomy.74

While this manifesto has been officially dismissed,75 it is an example of the general constructive discussion towards addressing global competition and securing a strong EU industry, including in sensitive and strategic sectors.

A further debate in the EU concerns the roll out of 5G networks. 5G networks are crucial for the maintenance and development of several critical sectors in the EU, including energy, transport, banking and health, as well as industrial systems transmitting sensitive information or electoral systems. They are also a powerful tool for the EU to compete in global markets. In this light, 5G networks have a paramount strategic importance for the EU as a whole and for Member States individually, as their security against espionage or cyber-attacks must be secured. Because of the interconnected nature of 5G networks, a cyber-attack in one Member State would most likely affect the whole EU.

The roll-out process is within the responsibility of Member States, which are currently working with operators to prepare it. Spectrum auctions of 5G mobile telecoms networks have been planned in 17 Member States in 2019 and 202076 and the ongoing debate revolves, among others, around the access of third country companies (notably, Chinese companies) in the auction process for establishing 5G networks in the EU. While other countries worldwide have imposed bans and restrictions on the access of Chinese companies to 5G networks, the EU seems to be taking a different approach away from bans and closer to measures to mitigate security risks (also in light of certain Member States’ heavy reliance on Chinese parts and equipment in telecommunications). In March 2019, the Commission issued a non-binding

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73 See Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century, 19 February 2019.
74 ibid.
recommendation on the cyber-security of 5G networks,\textsuperscript{77} setting out a common approach for Member States. The Commission recommendation provides for a road map for a coordinated EU risk assessment (based on Member States’ individual risk assessment, which may be based on technical or ‘other’ factors) and for a common set of risk mitigating measures.\textsuperscript{78}

The new framework for FDI screening is one of the various tools of which the EU could avail itself to protect future 5G networks in an effective and coordinated manner, where there are risks for national security and other strategic areas in the EU.

\textsuperscript{78} ibid.; see also Commission Fact Sheet, Questions and Answers – Commission recommends common EU approach to the security of 5G networks, 26 March 2019.
Chapter 2

BRAZIL

Felipe Gruber Ribeiro, Gabriela Claro, Gustavo Alberto Rached Taiar and Ricardo Augusto de Machado Melaré

I INTRODUCTION

Brazil has undergone a massive privatisation programme since the 1990s to deregulate the domestic economy, eliminating obstacles that hindered the country’s development and stimulating various industries by reducing the federal government’s presence in economic activities. Political stability and a steady growth in the economy have helped the country develop more in recent years than throughout its previous existence. During this period, Brazil has established a free foreign exchange market, eliminated price controls, reduced the bureaucracy around foreign trade and capital flows, created mechanisms to allow foreign investors to access Brazilian securities markets and reduced restrictions on foreign investment. Foreign inflow of resources and cash were fundamental for Brazil to foster strong development in several industries, with renowned and internationally recognised results.

The Brazilian government has continued to encourage the private sector to invest in industry sectors that were historically the government’s responsibility, particularly infrastructure. The oil industry, electrical energy, telecommunications and other utility services have been opened up to private initiatives and foreign capital, thus developing and creating opportunities for competition and the subsequent improvement in the quality of these services.

Despite the fact that the current political crisis has affected the economy’s ability to continue the trend for steady growth and has generated uncertainties as to Brazil’s short-term future, in general, foreign investors remain optimistic about investing in Brazil for the medium and longer term and newcomers continue to identify interesting investment opportunities here. Foreign expectations were reinforced and renewed as of 1 January 2019 with the beginning of a (at least) four-year liberal agenda, run by the elected president Jair Bolsonaro and his economic team.

Government authorities have also undergone major changes to attract foreign investment to the domestic capital markets, enacting updated regulations and reducing bureaucracy for offshore investors. In December 2000, the Brazilian stock exchange (formerly BM&FBOVESPA SA (Bolsa de Valores, Mercadorias e Futuros) and currently named B3 SA (Brasil, Bolsa, Balcão)) introduced the Novo Mercado, a listing category focused on foreign investments in the largest Brazilian companies by applying stricter rules on

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corporate governance, accounting and disclosure, while improving the treatment of minority shareholders – emulating more developed and mature capital market regimes around the world in many ways.

The Brazilian Securities and Exchange Commission (CVM) has enacted and modernised the Brazilian capital markets since its creation by Law 6,385 of 7 December 1976. This Law sets out the general functioning of the Brazilian capital markets, including public offerings, securities registrations, stock exchange negotiation, disclosure of information and types of securities.

Entities with the authority to self-regulate, typically stock exchange and OTC market entities, are subject to supervision by the CVM. These entities are responsible for overseeing their members and ensuring their compliance with applicable rules and regulations. There are also entities that are purely self-regulators, such as the Brazilian Financial and Capital Markets Association (ANBIMA), a private body engaged in promoting codes of best practice to participants in the financial and capital markets to engender the optimal environment for the evolution of these markets.

II FOREIGN INVESTMENT REGIME

i Regime and registration

Direct foreign investments in the Brazilian economy are governed by Law 4,131 of 3 September 1962 as amended by Law 4,390 of 29 August 1964, while foreign investments in the financial and securities markets are governed by Resolution 4,373 of 29 September 2014 of the Brazilian Monetary Council. Both categories are regulated, controlled and registered by the Brazilian Central Bank and must be carried out through exchange rate contracts.

The definition of foreign capital encompasses goods, machinery and equipment brought into Brazil without any initial expenditure of foreign currency for use in the production of goods or services, as well as financial resources brought into the country to be invested in economic activities. Such assets will only be considered foreign capital if held by individuals or corporate entities who are resident, domiciled or have their registered office abroad.

Direct investments

Direct investments may be made through the remittance of foreign currency as a capital contribution to a Brazilian company or for the purchase of existing equity interests, or through the contribution of assets to a company.

A foreign investment must be registered with the Central Bank if (1) it is in a productive activity that may, in whole or in part, be conducted by a foreign investor, and (2) the investment qualifies as a foreign capital investment under the Brazilian foreign investment regulations. Therefore, with respect to investments in business activities such as trade, manufacturing or rendering of services, the initial investment, capital repatriations and dividend remittances must be registered with the Central Bank.

Registration of a foreign investment must be submitted electronically to the Central Bank by the company receiving the investment (the investee), using the Central Bank’s electronic system for direct foreign investments (RDE-IED). This electronic registration must be made within 30 days of the date of the liquidation of the currency exchange agreement and does not require preliminary approval, considering it has a merely declaratory nature.

Foreign investments should be registered in the national currency of Brazil (i.e., reais). Profits should be remitted in the currency of the country where the investor is resident or
has its head office (or where the branch making the investment is located). Reinvestments of profits should be registered in the currency of the country to which the profits would otherwise have been remitted.

To use the RDE-IED system, the investee (Brazilian company) and the foreign investor must obtain a National Registry of Legal Entities (CNPJ) or Individual Taxpayer Registry (CPF) identification number, or both, by registering the relevant data about themselves and their respective representatives. After obtaining CNPJ and CPF identification numbers, as required, the investee is able to obtain an RDE-IED number for the investor–investee investment relation. This number is permanent and personal to the investor–investee pair, and must be used for any financial transaction between the investee and the foreign investor.

Brazilian entities and foreign investors must update information concerning their investments with the Central Bank whenever a corporate act modifies the company’s equity structure, and must do so within 30 days of the modification. In addition to the information update whenever a transaction takes place, Brazilian entities with foreign investors must also update certain information with the Central Bank either annually or quarterly, depending on the value of their net worth or assets.

Recently, the Brazilian Central Bank system has started requiring Brazilian companies to disclose the country in which the foreign investor is incorporated or resident (as the case may be) and the country in which the ultimate beneficial owners reside. It is expected that the Brazilian tax authorities will start requiring this information for the issuance of tax enrolments for foreign investors in the near future.

**Indirect investments**

Foreign investors may invest in the Brazilian financial and securities markets using the same fixed-income instruments (i.e., bonds, notes, certificates of deposit and debentures), derivative instruments (i.e., swaps, futures, forwards and flexible options), securities (i.e., shares, stock options and stock index warrants), mutual funds, private equity and other investment funds, and other financial instruments available to Brazilian residents, with certain exceptions.

A foreign investor can only purchase or sell securities traded on stock or commodities exchanges, electronic systems or organised over-the-counter (OTC) trades, and securities or financial instruments traded on OTC markets that are either not organised, or organised by entities not authorised by CVM.

Foreign investors may purchase Brazilian depositary receipts (certificates representing securities issued by foreign publicly held companies, issued for the purposes of trading on the Brazilian securities market).

To invest in the Brazilian financial and securities markets, a foreign investor must: (1) appoint an agent in Brazil (which must be a financial institution or an institution authorised by the Central Bank); (2) register with the CVM; and (3) enter into a custody agreement with a financial institution authorised to provide custodian services, in accordance with CVM Instruction 560 of 27 March 2015, as amended.

Transfer or remittance of such investments abroad is not permitted, except in cases of merger, amalgamation, spin-off, corporate reorganisation or succession.
Foreign debt transactions

Foreign debt transactions may be made through the exchange of foreign currency (i.e., loans, certificates of deposit, private debentures, etc.) directly between a foreign and a domestic party or by investments in publicly traded securities (i.e., bonds, notes, certificates of deposit and debentures) by a foreign party.

A foreign debt transaction must be registered with the Central Bank before the actual inflow of funds, and submitted electronically by the investee using the Central Bank’s electronic system for foreign debt transactions (ROF). This electronic registration does not require preliminary approval.

Foreign debt transactions shall be registered in the currency of Brazil. Interest shall be remitted in the currency of the country where the transaction was originated. (See also Section VI.i.)

ii Restrictions

As a rule of thumb, Brazil does not impose restrictions on foreign investments. Nevertheless, some industries and assets are subject to specific laws and requirements by government authorities.

Rural land

The acquisition of rural land by Brazilian entities controlled by a non-citizen, a non-citizen residing in Brazil or a foreign entity authorised to operate in Brazil is subject to specific legal requirements. These restrictions are also applicable to corporate transactions resulting in the direct or indirect transfer of rural land.

Frontier areas

Acquisition, rural lease or other rights over real estate property located within frontier areas all require prior approval by the Secretary of the National Security Council.

Financial institutions

Participation of foreign capital in financial institutions is limited to specific situations, such as a presidential decree attesting the importance of the foreign capital for the national financial system or non-voting stock.

Newspapers, magazines and other publications, and radio and television broadcasting

There are restrictions on foreign investments in the ownership and management of newspapers, magazines, other publications, radio and television (e.g., a limit of up to 30 per cent on equity interest, and only Brazilians may occupy managerial positions regarding selecting and directing topics).

Mining

Only Brazilian companies (with or without foreign investors holding equity) may develop mining businesses, and they must request and obtain authorisation from the Ministry of Mines and Energy to operate in the mining industry, because the extraction of all natural resources depends on government concessions.
Foreign investments in the following activities are prohibited in Brazil:

- Activities involving nuclear energy;
- Health services, except for prime healthcare operators, family planning activities and research, hospitals, clinics (generic or specialised), polyclinics, non-profit healthcare services and companies for the assistance of their employees;
- Mail services; and
- The aerospace industry (including the launching of satellites, vehicles and spaceships).

**Air transportation services: limitations ended as of May 2019**

On 22 May 2019, Provisional Measure 863/2018 was converted into law by the Brazilian Congress, with immediate effects for the purpose of increasing foreign capital in the Brazilian aviation industry.

Prior to this Provisional Measure, the Brazilian Aeronautical Code (Law No. 7,565/1986) limited to 20 per cent the interest held by non-Brazilians in the voting capital of companies authorised to explore carrier services in Brazil.

The new rule amended the Brazilian Aeronautical Code to establish that the public concession or authorisation to develop airline services may be granted to companies incorporated in Brazil regardless of any kind of foreign capital invested.

In addition to allowing foreign investment without restrictions, the Provisional Measure also revoked the obligation to submit corporate documents of airlines to the Brazilian Aviation Agency prior to the filing of such documents with local commercial registries.

In conclusion, the new law of foreign capital is beneficial to the country considering the current economical conjuncture as it aims to increase the competition on the Brazilian carrier market, allowing the entry of new companies in the domestic market and an expansion of the investment in the sector.

**III TYPICAL TRANSACTIONAL STRUCTURES**

Notwithstanding certain restrictions or limitations established by the Brazilian Federal Constitution and infraconstitutional laws for some activities, such as those mentioned previously, Brazilian laws allow any foreign individual or entity to freely invest in the Brazilian market or to hold equity interest in a Brazilian company, provided that a legal representative residing and domiciled in Brazil is appointed with powers to, among other things, receive orders for service of process in any matter related to the appointor being a partner of a Brazilian company and, if it is a foreign entity (not an individual), to also manage its assets in Brazil through the Brazilian federal tax authority (RFB).

In any case, the foreign partner must be registered with the RFB, either through the Individual Taxpayer Registry or the National Registry of Legal Entities (CNPJ), as appropriate.

With respect to managerial positions in Brazilian companies, only individuals (as opposed to legal entities) may be appointed to a management post in a Brazilian company, as further detailed below. Only permanent residents of Brazil may be appointed to executive posts in Brazilian companies; although, as a general rule, both Brazilian residents and foreigners may be appointed to roles on collective boards, such as boards of directors.

Although there are several types of corporate entities provided for in Brazilian law, business activities are mainly carried out by foreign investors in Brazil through one of three structures: limited liability companies, individual limited liability enterprises and
corporations. Limited liability companies and individual limited liability companies are governed by the Brazilian Civil Code\(^2\) and corporations by a specific law (Federal Law No. 6,404 of 15 December 1976).

**Limited liability companies**

According to data made available by the Brazilian Business Registration and Integration Department (DREI),\(^3\) Brazilian limited liability companies (LLCs) represent more than 98 per cent of all company incorporations registered with the boards of trade throughout Brazil from January 2015 to March 2017. Thus, it is the most common corporate model in Brazil.

The preference for this model is justified not only because of the simplicity of its incorporation and operation, but also because of the low costs of incorporation, maintenance and operation, when compared with those of corporations. Considering only resident stockholders, a limited liability company can be incorporated and ready to start its activities in Brazil in approximately five business days, bearing in mind that the time needed when foreign partners are involved may vary because of the need to obtain official documents in their countries of origin and the procedures required for them to be effective in Brazil.

Currently, Brazilian LLCs can be incorporated by two or more partners, individuals or legal entities, resident or non-resident in Brazil. However, it is important to highlight that Brazil’s President executed the Provisional Measure 881/2019 on 30 April 2019, which authorised Brazilian LLCs to be incorporated by only one partner, individual or legal entity, resident or non-resident in Brazil. To become Law, Provisional Measure 881/201 must be approved by the Brazilian Congress and this procedure can take up to 120 days.

The incorporation procedures are not complex: after execution and filing with the board of trade in the state where the company’s head office is located, the articles of incorporation are registered and the company obtains a CNPJ (tax enrolment) number recognised by the RFB. After that, further steps may need to be taken depending on the activities to be developed by the company, such as obtaining municipal and state tax enrolments and requesting the necessary operational permits, as applicable.

The capital stock is divided into quotas, which represent the share of the capital stock contributed by each partner, and the rights and obligations arising from that contribution. Quotas are mandatorily nominative and their ownership is registered in the articles of incorporation. Quotas mandatorily have a par value and their issuance must represent the amount of the capital contribution in monetary values. Any assignment or transfer of quotas must be formalised through an amendment to the articles of incorporation of the company, which must be registered with the local board of trade to be effective to third parties and are publicly available for consultation.

Generally, there are no minimum or maximum limits for the capital stock of an LLC, nor minimum capital stock to be paid in advance for incorporation purposes.

The management of LLCs may be exercised by one or more individuals residing and domiciled in Brazil (it is not mandatory to be a partner), appointed in the articles of incorporation or through a separate act. Therefore, only Brazilian natural individuals residing

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3 The Brazilian governmental body responsible for proposing rules and guidelines for the Commercial Registry, supervising the Boards of Trade and centralising commercial information and systems, among other activities.
in Brazil or foreigners with a working visa can take office as a manager of a Brazilian LLC. For
the latter option, Brazilian law provides five visa options: (1) family reunion, (2) retirement
transfer, (3) foreign investor, (4) director, manager, officer or executive with management
powers representing an economic group or conglomerate, and (5) officer, manager or director
of a non-profit private company.

In the case of a permanent visa for a director, manager, officer or executive with
management powers representing an economic group or conglomerate, the Brazilian
company must have a minimum capital stock of 150,000 reais to obtain a visa for each
foreign officer, in view of the fact that, among other requisites provided in the applicable law,
the foreign company needs to make an investment in the Brazilian company in the amount
of: (1) 150,000 reais and hire 10 employees in the two years following the appointment of
the manager; or (2) 600,000 reais to obtain a visa for each foreign officer, without the need
to hire employees.

It is also possible for Brazilian LLCs to have a board of directors of a deliberative nature,
in which case non-resident individuals are allowed to take office, provided they appoint a
legal representative in Brazil with powers to receive orders for service of process.

As a rule, the partners’ liability in an LLC is limited to the total number of quotas
subscribed by each of them. However, all partners are jointly liable for fully paying up the
stock capital. Managers should not be liable for any of the company’s obligations, except when
their acts exceed their powers and responsibilities, they violate any law or act in discordance
with the articles of incorporation. However, in light of the very high number of statutory
obligations of a labour and tax nature, the limitation of liability in this corporate model
should be assessed on a case-by-case basis by legal counsel.

LLCs have no obligations regarding the bookkeeping, preparation or publication of
financial statements or independent audit, unless they qualify as a ‘large-size company’, so
understood as those companies or groups of companies under the same control with total
assets or annual income greater than 240 million reais or 300 million reais, respectively, in
the previous fiscal year.

ii Individual limited liability enterprise

The individual limited liability enterprise (EIRELI) is the most recent corporate type created
by Brazilian law, and it emerged from a shortcoming verified in the corporate legal system:
the lack of a corporate type that can be created by one person or legal entity without risk to
the personal property of that person or legal entity. Prior to the creation of the EIRELI, a
sole person could only have a business as an individual entrepreneur, which, despite being
widely used in the Brazilian market, has always been criticised for failing to separate the
entrepreneur’s personal assets from the business itself. The legislator created the EIRELI
corporate type as a hybrid combining the individual entrepreneur (a sole undertaking) and
the limited liability company (allowing for the latter’s limitation of liability).

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5 Normative Resolutions Nos. 45 and 95 of National Immigration Council.
6 Normative Resolution No. 118 of National Immigration Council.
7 Normative Resolution No. 62 of National Immigration Council.
8 Normative Resolution No. 70 of National Immigration Council.
9 Empresa Individual de Responsabilidade Limitada.
10 Federal Law No. 12,441 of 11 July 2011.
In general terms, an LLC with only one partner is the same as an EIRELI, except for three main differences:

\[\begin{align*}
  a & \quad \text{the EIRELI must have capital stock of at least 100 times the highest minimum wage in force in Brazil,}^1\text{ duly paid up in cash or assets;} \\
  b & \quad \text{LLCs must restore a plurality of members within 180 days, under penalty of being } ipso jure \text{ dissolved; and} \\
  c & \quad \text{investors are allowed to hold equity in only one EIRELI at a time.}
\end{align*}\]

Not only is the EIRELI almost the same as a single-partner LLC, but the applicable law is also substantially the same: the law that created the EIRELI added only one article to the Brazilian Civil Code and determined that the articles of the Code that govern LLCs should be applicable, whenever possible, to the EIRELI. Also, for this reason, in practice, the EIRELI resembles the LLC in several respects: the incorporation documents and arrangements are equivalent, the maintenance costs are basically the same and, in general terms, the administration is similar to that of an LLC.

At the time of the creation of the EIRELI by the Brazilian legislature, it was not clear whether legal entities could incorporate an EIRELI; however, recent commercial registration rules have made it clear that legal entities are allowed to incorporate EIRELIs.

### Corporations

A corporation is the most commonly used structure for larger businesses, in view of its robustness in terms of corporate governance, transparency in terms of publicity, and the range of alternative fundraising structures available. One reason for this is that the corporation is the only corporate type to have a dedicated law, consisting of 300 articles: the Brazilian Corporation Law (Federal Law No. 6,404/1976).

Brazilian corporate law allows the securities of corporations to be traded in the capital markets, thus corporations may be closely held or publicly held, with the latter being subject to several additional specific regulations established by the CVM.

Until the issuance of Law 13,818, dated 24 April 2019, as a general rule, corporations were obliged to publish their financial statements annually in the local official gazette and another local newspaper of wide circulation in the place where the corporation had its head office, this requirement imposing a financial burden on the corporations. Currently, as per Law 13,818, as a general rule, corporations must publish a summary of their financial statements annually in the local newspaper of wide circulation in the place where the corporation has its head office and simultaneously their full financial statements at the website of such local newspaper. Besides that, Law 13,818 stated that corporations with less than 20 shareholders and 10 million reais of net equity (used to be one million reais) are excused from publishing their financial statements. Publicly held corporations are subject to more comprehensive regulations, requiring, for example, disclosure of quarterly financial statements and publication of other information, such as material facts.

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11 Brazilian Law allows limited liability companies to remain with only one partner for a maximum period of 180 days.

12 The 2019 national monthly minimum wage in Brazil is 998 reais.

13 Article 980-A.
With the exception of Brazilian wholly owned corporations, which have specific incorporation requirements, Brazilian corporations must have at least two stockholders, which can be legal entities or individuals, Brazilian residents or foreigners or any combination thereof.

The capital stock of both publicly and closely held corporations is represented by shares. All shares must be nominative. Bearer shares have not been permitted in Brazil since the early 1990s.

Shares may be common or preferred, and may be issued with or without par value. As a general rule, both types of shares entitle their holders to voting rights; however, the voting rights of preferred shares may be suppressed or limited. Under Brazilian corporate law, the number of preferred shares with suppressed or limited voting rights may not exceed 50 per cent of all shares issued by the corporation concerned.

The preferences of the preferred shares may consist of priority in the distribution of fixed or minimum dividends or priority in the reimbursement of capital, with or without premium.

Preferred shares of publicly held corporations without voting rights or with limited voting rights must entitle their holders to broader preferences regarding other dividend rights or tag-along rights in the event of a public offering for change of control.

Certain stock exchange listing segments, such as the above-mentioned Novo Mercado, require the corporate capital to be represented by common shares only.

Closely held corporations may issue different classes of common and preferred shares. The differences between the classes of common shares issued by closely held corporations largely consist of: (1) convertibility into preferred shares; (2) a requirement that the shareholder be a Brazilian resident or not; or (3) the right to vote separately to fill certain positions in administrative bodies of the corporation. Publicly held corporations may only issue preferred shares of different classes.

Payment of the stock capital may be made by cash contributions or transfer of assets (assets, credits or rights), provided that any asset to be contributed is suitable to be valued in monetary terms. In addition, to be mandatory, the appraisal report of the assets must be approved by the general shareholders’ meeting.

As a general rule, Brazilian corporate law does not require a minimum capital amount, although companies in certain industries are set a minimum capital amount by the competent regulatory agency.

Payment of the corporate capital in cash may be made by means of a single instalment or several instalments (credit payment); however, at the point when the shares are issued to be paid in cash, at least 10 per cent of the subscription amount must be paid promptly in cash at the moment of the subscription.

In contrast to Brazilian LLCs, corporation stockholders are not jointly liable for payment of the stock capital. The liability of a given stockholder is limited to the amount the stockholder has subscribed to the corporation. However, in view of the very high number of statutory obligations relating to labour and tax, the limitation of liability in this corporate type should be assessed on a case-by-case basis by legal counsel.

Only individuals (rather than legal entities) may be appointed to management positions. The management of a corporation consists of a board of officers with at least two Brazilian residents and a board of auditors that operates on a non-permanent basis. The members of the board of officers are the only individuals entitled to represent the corporation, subject to the provisions of the by-laws.
The Corporation Law also provides for a board of directors, comprising at least three individuals, who may be Brazilian residents or foreign individuals. As a general rule, having a board of directors is not mandatory; however, publicly held corporations must have a permanent board of directors. The Corporation Law also provides for other cases in which a board of directors is mandatory, such as corporations with authorised capital and government-controlled corporations.

If a board of directors is to be created, the general shareholders’ meeting shall appoint its members and the members of the board of officers shall be appointed by the board of directors. If there is no board of directors, the members of the board of officers shall be appointed by the general shareholders’ meeting.

The Corporation Law also provides for other securities that might be issued by a corporation, such as participation certificates, debentures and subscription bonuses. Certain stock exchange listing segments do not allow the issuance of certain securities.

Certain transactions involving publicly held corporations are subject to specific rules, such as the acquisition of control, which requires the acquiring party to make a public offer to acquire the remaining common shares (not included in the control block) for at least 80 per cent of the amount paid per share for the shares held by the selling entity or entities.

The Corporation Law distinguishes between a ‘shareholder’ and a ‘controlling shareholder’ of a corporation. The latter is a person or entity (or a group of persons or entities) (aligned through shareholders’ agreements) who: (1) permanently owns the majority of voting rights in the shareholders’ meetings, electing the majority of the company’s managers; and (2) effectively uses this position to direct and manage the company.

A takeover bid is a type of corporate transaction in which the acquiring person or entity (or group of persons or entities) makes an offer to the target company’s shareholders to buy the shares issued by the target company to acquire corporate and management control of its business; takeover bids may be either friendly or hostile.

A hostile takeover bid is typically presented through a tender offer intended to acquire the common shares at a substantial premium. It is usually presented directly to the target company’s shareholders because management is not on board with the deal. Furthermore, hostile bids can result in major changes to the organisational and administrative structure of the target company.

iv Joint ventures

Joint ventures resulting in a limited liability company or a corporation are permitted according to the applicable law, provided the foreign partner of the joint venture complies with the requirements to be a shareholder or partner (as the case may be) described herein. Furthermore, a joint venture with a foreign partner usually results in a corporation in view of the stricter and thorough corporate governance of a corporation.

Joint ventures can also be structured on a contractual basis only, without incorporation of an actual entity.

v Private equity investment funds

Foreigners may also seek to carry out investments through investment funds – the main type pursued by foreign investors is the private equity investment fund (FIP).

A FIP is organised as a condominium (a pool of assets), without legal personality, which must be registered with the CVM: authorisation is automatically granted upon presentation of the required documentation. A FIP can receive foreign investments through the indirect
investment regime referred to in Section II.ii. A FIP must invest at least 90 per cent of its net assets in shares, debentures, warrants or other securities that may be converted into or exchanged for shares issued by publicly held or privately held Brazilian corporations, and, occasionally, in quotas of LLCs. In addition, the offering of an FIP’s quotas is always deemed a public offering of securities and is subject to registration with the CVM. The prior registration of the public offering will be waived if the FIP carries out a ‘limited effort’ public offering (similar to a private placement in the United States), which limits the offering by: (1) accessing no more than 75 investors; and (2) at most 50 investors may effectively purchase quotas on the basis of head count.

A FIP must be administered and managed by a legal entity authorised by the CVM to conduct professional asset management activities, and it can have an investment committee, which may share investment and disinvestment decisions with the administrator or the manager.

The general meeting of investors is the highest authority of the FIP. It shall meet at least once a year to approve the FIP’s financial statements and additionally whenever the interests of the FIP so require. Any amendment to the by-laws of the FIP shall require the approval of a general meeting of investors.

Investing through FIPs grants the foreign investor certain tax benefits, provided certain requirements are met (such as not being headquartered in a tax-haven jurisdiction and not holding more than 40 per cent of the FIP’s quotas). If these requirements are met, all gains resulting from transactions carried out by the FIP when distributed to the foreign investor are subject to a zero per cent withholding tax.

vi  Branches

Although the vast majority of foreign businesses are set up in the form of Brazilian subsidiaries or affiliates, Brazilian law recognises the legal personality of a foreign company, allowing the formation of a branch of a foreign company in Brazil. However, the formation of a branch in Brazil requires specific government authorisation, which is granted after generally long and bureaucratic proceedings. Upon request, the foreign company must deposit an amount of the capital destined for the operations in Brazil. Nonetheless, for convenience, this structure tends to be adopted by some industries, such as international airline carriers. Investments using this form may typically involve the direct acquisition by the foreign company of assets or a business unit in Brazil. Some specific tax and liability suboptimal characteristics of a Brazilian branch are applicable and must be assessed on a case-by-case basis.

IV  REVIEW PROCEDURE

Brazilian law and regulations distinguish between domestic and foreign investors. Brazilian investors are those with residency and living in Brazil, and foreign investors are those living outside Brazilian borders, including Brazilian citizens living abroad.

For both Brazilian and foreign investors – whether for private equity and joint ventures or mergers, amalgamations and acquisitions, or other associative agreements of any kind – depending on the involved parties’ gross revenue amount (see below), an approval by Brazil’s Administrative Council for Economic Defence (CADE) may be necessary prior to the closing of the transaction.
Pursuant to the Competition Law, any transaction in which at least one of the parties involved has registered gross revenue in the preceding year (or businesses in Brazil) above the threshold of 750 million reais, and at least one other party involved has registered a gross revenue in the preceding year (or businesses in Brazil) above the threshold of 75 million reais, must be filed with CADE, as a request for market concentration approval. In this context, a ‘party’ effectively includes the economic group revenue of that party in Brazil as well.

Under the Competition Law, a request for market concentration approval may be classified as a summary procedure or an ordinary procedure. The request shall be treated as a summary procedure:

a. for transactions involving joint ventures;
b. when there is no relationship (horizontal or vertical) between the economic groups of the parties involved;
c. when the horizontal market concentration is less than 20 per cent of the relevant market;
d. if none of the parties involved in the transaction holds a 30 per cent share or more in vertically related markets; or

e. if the transaction constitutes a horizontal market concentration between the economic groups of the parties concerned in excess of 20 per cent but less than 50 per cent.

The request will be treated as an ordinary procedure in all other scenarios.

The analysis of a request by CADE may result in three outcomes: (1) approval with no restriction; (2) approval with restrictions; or (3) refusal. In the case of points (2) and (3), the parties involved in the transaction may file an appeal against the decision. CADE’s internal regulation establishes that an appeal will be reviewed and judged by CADE’s General Superintendence, which acts as a superior body, similar to an administrative court of second instance, within CADE’s organisational structure.

There is also the option for third parties unrelated to the transaction but with a direct interest in it to appeal any of CADE’s decisions, and these appeals are subject to the same administrative formalities and procedures as those lodged by the parties involved.

All request procedures for market concentration approval submitted to CADE will be treated as non-confidential, in keeping with the publicity principles applicable to administrative bodies in Brazil. This non-confidential aspect of the procedures contributes to third-party control of market concentration approval requests, given that these are public interest matters, and a market concentration must not harm any market participants, either by way of market position or prices for products, goods or services related to the transaction.

CADE shall reach a decision about any requested procedure for market concentration approval within 240 days, with the option of a single 90-day extension period, if duly justified by CADE.

In the case of investigations by CADE into misconduct, the procedure will be confidential until its conclusion, and CADE will notify the parties regarding the submission of their administrative defences. The Competition Law sets out behaviour that constitutes misconduct by market participants, including cartels, international cartels, cartels in public

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15 These thresholds may be amended without the need of an amendment to the Competition Law; the current thresholds were set on 30 May 2012 by means of a joint resolution by the Ministry of Justice and the Ministry of Finance.
bid procedures, influencing uniform conduct, predatory pricing, retail price fixing, territorial fixing and client bases, exclusivity agreements, combined sales, abuses of dominant market position, refusal to hire, sham litigation and imposing difficulties on competitors.

V FOREIGN INVESTOR PROTECTION

Brazil treats foreign capital with the same responsibility and weight as it does domestic capital (the Brazilian real) in the majority of situations. There are exceptions, however, with some restrictions set out in specific regulations regarding foreign investments in local securities markets.

The Brazilian economic scenario has changed radically with the move to sophisticated domestic transactions and investment structures. Also, local judicial courts now specialise in reviewing complex corporate matters and transactions (i.e., specific courts have been created to deal solely with corporate-related disputes). Furthermore, Brazil has increased the use of arbitration as a means of resolving disputes.

The legal agenda in relation to international commercial arbitration in Brazil has also improved, following the enactment in 1996 of a modern Arbitration Law. The constitutionality of the new Arbitration Law was confirmed in 2001 by the Federal Supreme Court and this, with the ratification of the New York Convention in 2002, was a key milestone in making Brazil a more arbitration-friendly jurisdiction.

Arbitration is now considered a common method of dispute resolution among private contracting parties engaged in complex deals in Brazil in view of the level of expertise and agility available for the analysis and resolution of complex issues. Although the Arbitration Law may not always have been applied uniformly by the courts in the 26 states of Brazil and the Federal District, the Brazilian judiciary has a good track record of upholding arbitration agreements and supporting the arbitral process.

VI BRAZILIAN TAX SYSTEM – KEY STRATEGIC CONSIDERATIONS

Brazil is a complex jurisdiction when it comes to taxation of economic activities. However, the Brazilian tax system should not be seen as a limiting factor for launching new business in the country, even though it shall not be denied that the tax burden is a challenge for newcomers.

Its complexity arises from its division into three different levels; namely, federal, state and municipal. In addition to that, it is composed of a large number of taxes that require an endless number of legislations to regulate triggering events, define taxpayers, tax obligations and several other factors that affect the routine of companies operating in Brazil.

For no other reason, any investment in Brazil must be preceded by a detailed tax study, to analyse the main tax aspects that may impact the activities carried out by the company in the country.

In this sense, a tax study should be based on the identification of taxation on the activities carried out, as well as the best way of structuring the legal entity, to minimise tax impacts and provide an effective repatriation of profits to its investors.

Investors should always bear in mind topics such as transfer pricing rules, thin capitalisation, repatriation mechanisms and tax incentives. Any newcomer that invest in the country without considering tax attributes might face several obstacles.

Finally, please find below a brief overview of the taxes and topics most frequently discussed in relation to foreign investors.
i  **Tax on financial transactions**

The Brazilian tax on financial transactions (IOF) is levied on all foreign exchanges (securities or bonds, credit and insurance transactions). The triggering event for IOF taxation involves the conversion of reais into foreign currency, or the conversion of foreign currency into reais. There are certain exemptions to the IOF in specific cases.

ii  **Income tax**

Capital gains on disposal of assets located in Brazil by one entity to another (e.g., non-resident to resident, or non-resident to another non-resident) are subject to income tax. The general rule is that capital gains arising from a disposal of Brazilian assets (not carried out on a Brazilian stock exchange) are subject to income tax at the rates varying from 15 per cent to 22.5 per cent or 25 per cent for beneficiaries located in low tax jurisdictions.

iii  **Dividends and interest on shareholders’ equity**

Dividends paid by Brazilian legal entities, either to resident or non-resident shareholders (including stock dividends) are not subject to withholding tax in Brazil.\(^{16}\) Payments of interest on shareholders’ equity to non-Brazilian residents are subject to income tax at the rate of 15 per cent, or 25 per cent if the investor is domiciled in a low or nil-taxation jurisdiction, as determined by the RFB. There are some strategies to combine dividends and interest on net equity as an efficient repatriation mechanism.

iv  **Other Brazilian taxes**

There are no federal inheritance, gift or succession taxes applicable to the ownership, transfer or disposal of Brazilian assets by a non-Brazilian investor. Gift and inheritance taxes, however, may be levied by some states on gifts made or inheritances bestowed by a non-Brazilian investor on individuals or entities resident or domiciled within those states in Brazil. There are no Brazilian stamp, issue, registration or similar taxes or duties payable by non-Brazilian investors in shares, fixed-income assets or other investments available in the local markets.

VII  **CURRENT DEVELOPMENTS**

The current Commercial Code is one of the oldest laws still in force in Brazil, having been enacted in 1850. However, it has been subject to several amendments and partial revocations. Nowadays, only maritime law is governed by the Code, whereas corporate law is mainly governed by the Civil Code and the Corporation Law.

Nevertheless, a bill\(^{17}\) was filed in 2011 with a view to enacting a new Commercial Code. This project has been under discussion for the past several years in the National Congress and it is expected to take several years more for the legislative process to be concluded. Furthermore, this is also subject to a potential veto by the president.

The bill seeks to amend certain provisions of the Corporation Law and the Bankruptcy Law, both commonly deemed to be advanced laws by local commentators. Nevertheless, certain positive proposals have been made regarding Brazilian LLCs, which would acquire greater stability, legal certainty and flexibility, and would become less subject to internal

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16 Amounts are related to profits generated as from 1 January 1996.
17 Draft Bill No. 1572.
corporate bureaucracy. Other proposals relate to technological developments, with the inclusion of provisions concerning e-commerce and electronic maintenance of corporate accounts, records and files.

Finally, some provisions of the bill being discussed by the National Congress may directly affect foreign investors in Brazil, such as the preference of payment of national creditors in cases of bankruptcy of Brazilian companies, and the requirement to indicate all direct and indirect partners of a foreign company holding equity interest in a Brazilian company.
I  INTRODUCTION

After the collapse of the Soviet bloc, Bulgaria underwent substantial socioeconomic restructuring and opened its market to global capital, while integrating into European and worldwide production networks. A critical element of the reform was to build a sound business environment in which companies can start, invest, expand and exit. All this was achieved with the support of the European Union (EU), which Bulgaria joined in 2007.

The attractiveness of Bulgaria as an investment destination lies in the combination of three main factors: the committed and skilled workforce, the low costs for doing business (including labour), and the full openness to trade and investment. The Bulgarian government seeks to attract foreign investors by offering them state financing, favourable tax treatment (including 10 per cent flat tax rate), possibilities for preferential purchase of land and many other types of assistance and advantages. The generally sound economic performance, gradual convergence with the EU common market, political stability, fiscal prudence, and a national currency pegged to the euro have provided stability and enabled Bulgaria to attract leading foreign investors.

Bulgaria has a long, rich tradition in the IT sector and is still known as the Silicon Valley of Southeast Europe. Many world-renowned companies such as SAP, Cisco, Atos, VMware, Johnson Controls, Microsoft, IBM and Oracle have already set up operations here. Bulgaria ranks 17th globally for 2019 and has traditionally been placed among the top 20 destinations for outsourcing in the world by AT Kearney Global Services Location Index. Among the foreign investors attracted by the outsourcing opportunities in Bulgaria are Coca-Cola, Concentrix, Experian, HP and Sutherland. The Bulgarian automotive industry has also received significant attention from foreign investors. It produces components and auto parts for brands such as Lamborghini, Bentley, Porsche, Mercedes-Benz, BMW, Audi and Tesla. Bulgaria can boast that 90 per cent of the airbag sensors in European cars are made

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1 Nikolay Kolev is a counsel and Trayan Targov is an associate at Boyanov & Co.
2 The average gross wage in Bulgaria is about €620 according to the National Statistical Institute, Average Monthly Wages and Salaries of the Employees under Labour Contract in 2019, available at: http://www.nsi.bg/en/content/6410/total [accessed on 12 June 2019].

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Other best prospect industry sectors for Bulgaria include: environmental technology (including waste treatment and waste-to-energy technologies); power generation (including biomass, gas and nuclear energy); travel and tourism (plays a critical role in the country’s economy); agriculture (including the beverage and food industry, as well as agricultural equipment and machinery); safety and security; pharmaceuticals; and healthcare and medical.\(^6\)

As a rule, Bulgaria affords national treatment to foreign investors and there are no general limits on foreign ownership or control of companies, nor is there screening\(^7\) or restricting of foreign investment in Bulgaria. By way of exception, the 2014 Offshore Companies Act\(^8\) lists 27 activities banned for business by companies registered in tax heavens and the entities under their control but also provides a number of exceptions.\(^9\) There also are specific restrictions on the foreign investments in the gambling industry under the 2012 Gambling Act\(^10\) and in respect of the acquisition of farmland under the 1991 Agricultural Land Ownership and Use Act.\(^11\) However, these restrictions basically apply to countries that are not members of the European Economic Area (EEA), respectively the EU. Regulatory restrictions on business activities such as licensing, registration and permission requirements sometimes imply corporate registration under the laws of Bulgaria or another EU/EEA Member State, but this is not in itself an obstacle to investment because foreign investors are free to incorporate or participate in Bulgarian companies.

## II FOREIGN INVESTMENT REGIME

There are no general restrictions upon foreign investors wishing to invest in Bulgaria either by acquiring an existing business or establishing a new business. No prior government approval of the foreign investment is needed. The few exceptions to this rule are addressed below.\(^12\)

### i Restrictions on investments by offshore companies and entities under their control

The Law on the Economic and Financial Relations with Companies Registered in Jurisdictions with Preferential Tax Regime, Entities Controlled by Them and Their Beneficial Owners (referred to as the Offshore Companies Act) was enacted in 2014 and amended several times

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7. On 19 March 2019 the EU adopted Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU to create a system to cooperate and exchange information on investments from non-EU countries that may affect security or public order.

8. See Section II.i.

9. See Section IV.i.

10. See Section II.ii.

11. See Section II.iii.

12. The investment certification regime introduced by the Investments Promotion Act and discussed in Sections II.iv and IV.ii aims only at providing eligible investors with additional benefits and incentives and does not in any way limit the possibilities for investment in the country. Nonetheless, it forms an integral part of the overall foreign investment regime in Bulgaria.
since. It prohibits companies registered in jurisdictions with preferential tax regimes (also called tax heavens) and the entities under their control from directly or indirectly engaging in 27 different types of economic activities in Bulgaria.

**Countries considered to be offshore jurisdictions**

The scope of the restrictions imposed by the Offshore Companies Act is determined by the legal definition of the term ‘jurisdictions with preferential tax regimes’ (i.e., offshore jurisdictions). The Corporate Income Tax Act lays down the offshore criteria and entrusts the Minister of Finance with the task of adopting a list of the offshore jurisdictions. The current list approved by the Minister of Finance\(^\text{13}\) indicates 26 countries or territories: Antigua and Barbuda; Brunei Darussalam; Virgin Islands (USA); Grenada; Guam Island (USA); Dominican Republic; Guyana; Labuan; Macao; New Caledonia; UAE; Bahamas; Oman; Christmas Island; Cook Islands (New Zealand); Pitcairn; Vanuatu; Liberia; Maldives; Marshall Islands; Palau; Panama; Fiji; Sark; Saint Lucia; Hong Kong (China). Companies and other forms of business, corporate or unincorporated, registered there (referred to as offshore companies) and the entities under their control are subject to the prohibitions against carrying on business in Bulgaria introduced by the Offshore Companies Act. The definition of ‘control’ includes, in general, holding of more than 50 per cent of the voting rights in the general shareholders’ meeting or in the management bodies of the other entity, as well as the right to exercise decisive influence on another legal entity (e.g., on the basis of a contract).

**Prohibited activities**

The offshore companies and the entities under their control are prohibited from directly or indirectly:

- obtaining a licence for a credit institution or possessing a qualifying holding in it;
- obtaining a licence for an insurance or reinsurance undertaking or possessing a qualifying holding in it;
- obtaining a licence for a supplementary social security company or holding 10 per cent or more in it;
- obtaining a licence to carry out a service or activity under the Law on the Markets in Financial Instruments or possessing a qualifying holding in a licensed company;
- obtaining a licence, permit or registration under the Law on the Activities of Collective Investment Schemes and Other Collective Investment Undertakings or possessing a qualifying holding in such an undertaking;
- obtaining a licence for a payment institution or possessing a qualifying holding in a licenced payment institution;
- participating in a procedure for selection of concessionnaire or award of concession for extraction of underground natural resources or for granting an authorisation for prospection and exploration or only for exploration of underground natural resources;
- participating in a public procurement procedure irrespective of the nature or the value of the public procurement;
- participating in privatisation transactions;
- acquiring state or municipal property through sale or exchange;

\(^{13}\) The list is adopted by Order No. ZMF-1303 dated 12 December 2016 of the Minister of Finance, promulgated in State Gazette, issue No. 103 as of 27 December 2016, Unofficial Section.
obtaining a licence under the Excise Duties and Tax Warehouses Act;
incorporating or acquiring shareholdings in licenced professional sports clubs where such participation is providing entitlement to 10 per cent or more of the voting rights in the general shareholders' meeting of the club;
applying for certificates for Class A, B or C investment or priority investment projects under the Investments Promotion Act;
obtaining a licence under the Energy Act;
obtaining a licence under the Gambling Act;
obtaining a licence for trade in dual-use goods;
obtaining a licence for a provider of public electronic communications networks or services or acquisition of 10 per cent or more of the voting rights in it;
obtaining contracts awarded for the supply of water or removal of waste water;
obtaining contracts awarded for waste collection and disposal, waste treatment in waste disposal plants or other facilities, or for cleaning of public spaces;
icorporating or acquiring 10 per cent or more of the voting rights in the general shareholders' meeting of entities that are applying for or have obtained a licence for a radio and television operator or in companies measuring radio and television ratings;
icorporating or acquiring 10 per cent or more of the voting rights in the general shareholders' meeting of entities publishing periodicals;
icorporating or acquiring 10 per cent or more of the voting rights in the general shareholders' meeting of social research agencies or entities conducting general public opinion surveys;
icorporating or participating in entities engaged in activities under the Independent Financial Audit Act;
icorporating or participating in entities engaged in activities under the Independent Evaluators Act;
icorporating or participating in entities engaged in activities under the Energy from Renewable Sources Act;
participating in commercial companies with state or municipal ownership provided that the state or municipal shareholding in the company is at least 33 per cent; and
acquiring ownership of land and forests from the state forests fund.

The Offshore Companies Act provides several exceptions to these prohibitions, which, together with the procedure for their application, are addressed in Section IV.i. From another perspective, the above list provides a brief overview of some of the most heavily regulated sectors of the Bulgarian economy. Investors in these sectors, irrespective of whether they are foreign or domestic, may face specific licencing, registration and permission requirements.

**ii Restrictions on foreign investments in the gambling industry**

The 2012 Gambling Act stipulates that gambling operations may be performed in Bulgaria only after the issuance of a game-specific licence. In the general case, companies registered under the laws of Bulgaria, another EEA Member State or Switzerland are deemed eligible to apply for such licences.

Pursuant to the Gambling Act, foreign persons (i.e., persons other than companies or individuals registered in or citizens of an EEA Member State or Switzerland) may not have any interest in a locally licensed company unless they have invested at least €10 million in other activities in Bulgaria and have created more than 500 jobs or unless they own a hotel of
four stars or more and operate a casino in it. This provision is controversial as worded to the extent that it may prohibit large European operators with international shareholding bases (particularly listed companies) to apply directly for a local licence because any non-EEA (or Swiss) shareholding in a licensed company is prohibited.

iii Restrictions on foreign investments in farmland

Bulgarian law and in particular the Agricultural Land Ownership and Use Act, enacted in 1991 and substantially amended in 2014, provides for restrictions on foreign ownership of agricultural land. Foreign (non-EEA) nationals and legal entities as well as commercial companies held by them are generally prohibited from acquiring farmland in the country, unless expressly permitted by an international treaty to which Bulgaria is a party. Companies that are directly or indirectly held by offshore companies, joint-stock companies that have issued bearer shares, political organisations and foreign states are also prohibited from acquiring agricultural land in Bulgaria.

Pursuant to the terms of accession of Bulgaria to the EU, from 2014 onward the EU or EEA citizens must enjoy national treatment in respect of the acquisition of agricultural land in Bulgaria. In the face of this commitment (and despite of it), in 2014 Bulgaria modified its national regime by introducing long-term residence requirements for Bulgarian nationals and legal entities wishing to acquire farmland, thus creating acquisition barriers also for the EEA companies and citizens. In particular, the Agricultural Land Ownership and Use Act stipulates that ownership rights over agricultural land may be acquired by individuals or legal entities that have been residing or established in Bulgaria for more than five years. The legal entities that have been registered under the laws of Bulgaria for less than five years are allowed to acquire farmland provided that their shareholders are natural persons who have resided in Bulgaria for more than five years. As a reaction to these restrictions, in 2015 the European Commission opened infringement procedure against Bulgaria. In December 2018, the Bulgarian government opened public consultations on a draft law on the agricultural lands which, among other things, should abolish the restrictions for EEA citizens and companies. As of June 2019, however, this draft law has not yet been submitted to the Parliament.

iv Certification of foreign investments under the Investments Promotion Act

The legal framework for promotion and certification of foreign investments is provided for mainly in the Investments Promotion Act (IPA) enacted in 1997 and the Regulation for the Implementation of the IPA adopted in 2007 (IPA Regulation). The Minister of Economy, with the support of the Invest Bulgaria Agency, is directly responsible for implementing the government policy towards foreign investments. IPA supports the foreign investments by introducing a system of incentives for certified investments in tangible and intangible assets and the creation of new jobs related thereto in accordance with the General Block Exemption Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market.

Bulgarian law implements an investment certification approach. Depending on the size of the investment, the economic sector and the region of the country in which the investment

14 See Section II.i about the term offshore companies.

is made, the investor may obtain a certificate for class of investment (Class A or Class B)\textsuperscript{16} or for priority investment projects. Based on this, the investor may benefit from a wide range of government incentives such as:

- \textit{a} purchase of, or acquisition against consideration of, limited rights \textit{in rem} in immovable private state or municipal property located near the investment site without participating in a public tender procedure;
- \textit{b} state financing for the construction of elements of the technical infrastructure such as roads, drainage networks and facilities;
- \textit{c} state financing for the professional training of employees hired in relation to the investment;
- \textit{d} state financing in the form of partial reimbursement of the statutory social security contributions and health insurance contributions paid by the investor for newly hired employees;
- \textit{e} reimbursement of up to 100 per cent of the paid corporate income tax on taxable profits from manufacturing activities in municipalities with an unemployment rate higher than Bulgaria’s average (60 per cent of the municipalities qualify for 2018);
- \textit{f} VAT advantages for large investment projects (simplified reverse-charge mechanism and monthly instead of quarterly VAT refunds); and
- \textit{g} provision of fast-track and individual administrative services.

The certification of the investments under the IPA depends on the fulfilment of a number of requirements discussed in more detail in Section IV.ii.

\section*{III TYPICAL TRANSACTIONAL STRUCTURES}

Investments in Bulgaria are usually carried out either through establishment of a local subsidiary or branch office, or through entering into a joint venture with a local or another foreign partner. These points are covered in more detail below.

\subsection*{i Establishment of a local subsidiary}

Foreign investors may freely set up a local company through which they would be able to conduct business in Bulgaria. Bulgarian law allows for the incorporation of several different types of companies but the most frequently used are the limited liability company (OOD) and the joint-stock company (AD).

A limited liability company may be formed by one or more shareholders who, subject to limited exceptions, are not liable for the company’s liabilities. The minimum registered capital of a limited liability company is 2 Bulgarian levs. The capital contributions may be monetary or in-kind. In-kind contributions must be evaluated by three independent experts appointed by the Commercial Register. The company’s affairs are administered by its manager or managers and by the general meeting of the shareholders. The managers do not need to be shareholders. There are no restrictions on the participation of foreigners in the management of the company or as shareholders. A transfer of shares in a limited liability company requires a sale and purchase agreement in notarised form. The transfer has to be

\footnotetext[16]{Certain municipalities such as Sofia and Varna have implemented investment Class C schemes for investment initiatives of municipal importance.}
registered in the Commercial Register to become effective with regard to third parties. In case the transferee is a non-shareholder, the transfer has to be approved by at least three-quarters of the shareholders in the company. Because of the existence of potentially serious risks for expulsion by the other shareholders, it is advisable that foreign investors avoid using limited liability companies when they do not hold 100 per cent of their share capital.

Joint-stock companies are generally preferred by foreign investors because of their greater flexibility in management and decision-taking. The company may be formed either by a public offering of its shares in accordance with the Public Offering of Securities Act (very rare in practice) or, alternatively, without such a public offering in accordance with the provisions of the Commerce Act (the usual case). The minimum registered share capital of a joint-stock company is 50,000 levs. Shares of a joint-stock company may be physical (evidenced by transferrable share certificates) or non-physical (book-entry form) shares existing in the form of entries in a registry maintained by the Central Depository, which is the institution responsible for maintaining the share registries of all companies with non-physical shares. The Commerce Act no longer allows for issuance of bearer shares (i.e., shares that do not indicate the name of the shareholder). There are two systems of management: the one-tier system (with board of directors); and the two-tier system (with supervisory board and management board, appointed by the supervisory board). The ultimate managing body for both systems is the general meeting of the shareholders, which approves certain decisions of the utmost importance for the company. In the two-tier system, no person may sit on both boards of the same company. In practice, the two-tier system is preferred for companies with a large number of shareholders and complicated activities. Physical shares are transferred by endorsement on the back of the share certificates, which, to be binding on the company, must be recorded in its shareholders’ book. The statutes may provide for other conditions or restrictions for the transfer of shares. Non-physical shares are transferred by way of registration of the transfer with the Central Depository. Joint-stock companies are widely used by foreign investors because of the straightforward process of share transfers, flexible majorities for decision-making, flexibility in management and impossibility for expelling shareholders (which exists in limited liability companies). Joint-stock companies are particularly suitable in case of joint ventures.

ii Setting up a branch office

Foreign companies may open a branch office in Bulgaria. A branch office must be registered with the Commercial Register on the basis of application, indicating the seat and purposes of the branch, the person who manages the branch and the scope of his or her representation powers. The rules applicable to Bulgarian companies would apply accordingly to branches of foreign companies. Branches, including those of foreign companies, are not independent legal entities. All contracts to which a branch is a party are in fact contracts with their principal. Therefore, the decision whether to open a branch office or a company (independent legal entity) is also an element of the risk management policy of the foreign principal.

iii Joint venture with a local or foreign partner

A foreign investor may choose to establish a joint venture with a local or foreign partner or partners to carry on business in Bulgaria and there are no specific statutory requirements in respect of entry into such arrangements. Usually, the joint venture is established and governed
by a joint venture agreement (or a shareholders’ agreement, when the joint venture is in the form of a jointly-owned company). This agreement sets out the main terms and conditions for establishment and operation of the partnership.

Joint venture projects are usually implemented through the incorporation of a local company (typically a joint-stock company) in which the joint venture partners hold respective shares. The relations between the parties in respect of the running of the business are normally governed by special agreement (joint venture or shareholders’ agreement). Another option is to have the joint venture established in the form of a contractual general partnership (which is not a separate legal entity), which is usually established by general partnership agreement for completion of special projects (e.g., infrastructure construction projects or concession award procedures). In the latter case, the partners are responsible for the obligations of the partnership with regard to third parties.

IV REVIEW PROCEDURE

i Application of exceptions for offshore companies and entities under their control

There are eight groups of exceptions to the prohibitions introduced by the Offshore Companies Act,17 which could be applied by the offshore companies or the entities under their control to be allowed to carry on the otherwise prohibited activities listed in Section II.i. These exceptions are subject in any case to disclosure of the individuals who are the ultimate beneficial owners (UBOs)18 of the company. The Offshore Companies Act provides for the following exceptions:

a the shares of the company in which the offshore company participates (directly or indirectly) are admitted to trading on an EU or EEA regulated market or equivalent regulated market;

b the offshore company is part of an economic group the parent company of which is a tax resident of a state with which Bulgaria has concluded a treaty for the avoidance of double taxation or information exchange agreement;

c the offshore company is part of an economic group the parent company of which, or a subsidiary company of which, is a Bulgarian resident entity and its UBOs are announced in the Commercial Register or its shares are admitted to trading on an EU or EEA regulated market;

d the company in which the offshore company directly or indirectly participates is a publisher of periodicals;

e the offshore company is a tax resident of a state party to the Agreement on Government Procurement under the auspices of the World Trade Organization (WTO) or state with which the EU has concluded a bilateral treaty guaranteeing access to the EU’s public procurement market (in respect of the activities to which the relevant treaty applies);

f the offshore company is a tax resident of an overseas country or territory under Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the EU (in respect of the activities to which this decision applies);

17 See Section II.i.
18 The Bulgarian anti-money laundering legislation imposes additional requirements for disclosure of the UBOs of almost all commercial companies established in Bulgaria, irrespective of their ownership, by registration of the UBO at the Commercial Register.
the offshore company is a tax resident of a state with which Bulgaria has concluded international trade or economic agreement, including obligations under the WTO’s General Agreement on Trade in Services; or

the offshore company is part of an economic group the parent company of which is tax resident of a state with which Bulgaria has concluded international trade or economic agreement, including obligations under the WTO’s General Agreement on Trade in Services.

The details about the offshore company that will directly or indirectly participate in some of the 27 restricted activities, the particular exception that is relied upon and the information about its UBOs are subject to registration in the Commercial Register. The entries are to be made in the company file of the Bulgarian company controlled by the offshore company. If the offshore company performs the respective activity directly or through a subsidiary that is not registered in Bulgaria, the application of the respective exception serves as a basis for its registration in the Commercial Register.

The registration of the exception in the Commercial Register normally takes three to five business days and the refusals for registration are subject to judicial appeal. The registration of the exception in the Commercial Register needs to be completed prior to taking part in the procedure for carrying out the respective prohibited activity. The competent authority leading the procedure is responsible for overseeing the fulfilment of the requirements imposed by the Offshore Companies Act.

**ii Certification of investments under the IPA**

To be eligible for certification under the IPA, the investments should be related to the setting up of a new enterprise, the expansion of an existing enterprise or business activity, the output diversification into new products or a fundamental change in the overall production process of an existing enterprise.

The Class A or Class B certification requires that the investments are pertinent to one or more of the following business activities specified in the IPA Regulation: manufacturing; software publishing; computer programming, consultancy and related activities; information service activities; accounting, bookkeeping and auditing activities or tax consultancy; activities of head offices; architectural and engineering activities, technical testing and analysis; scientific research and development; education; human health activities and residential care activities; warehousing and storage; office administrative and support activities; activities of call centres; business support service activities. These sector qualification requirements apply only to Class A or Class B certification and not to investments certified as priority investment projects that can be implemented in all sectors of the economy.

Among the other certification requirements, the investors have to implement the investment within three years, maintain the investment and the newly-created jobs for an additional three to five years, acquire fixed assets that are new and are purchased from third parties not related to the investor under market conditions, finance at least 40 per cent of the investment with their own or borrowed funds, excluding state aid.

The IPA Regulation establishes minimum thresholds for certification of the investments on the basis of which the investments are classified into Classes A or B. Depending on the economic sector, the Class A certification requires an investment of between 2 million and 10
Bulgaria

million levs. The Class B thresholds are half the size of the Class A thresholds. The creation of a significant number of new jobs (100 for Class B and 150 for Class A) may result in a substantial reduction of the minimum threshold values.

The priority investment projects are investment projects that are particularly important for the national or regional economic development of Bulgaria. In the general case, the issuance of a certificate for a priority investment project requires an investment of 100 million levs and the creation of 150 new jobs. The IPA Regulation, however, introduces certain exceptions where reduced requirements apply.19

Before starting work on the investment project, the investor wishing to obtain an investment certificate needs to submit an application to the Invest Bulgaria Agency (IBA) accompanied by, among other things, the investment project. The IBA appoints a working group for each applicant and issues a document obliging the Bulgarian administration to provide full cooperation to the investor in the process of obtaining the documents necessary for the investment certification. Based on the opinion of the working group, the IBA prepares a reasoned proposal for a decision on the application and submits it to the Ministry of Economy within 30 calendar days. The Minister of Economy would then have 14 calendar days to issue the Class A or Class B investment certificates or to reject certification. For priority investment projects, within 30 business days the Minister of Economy submits a proposal to the Bulgarian government for approval of a memorandum of understanding between the government and the investor. Based on the government’s decision, the Minister issues or refuses to issue the certificate for priority investment project. The certification refusals are subject to judicial appeal.

V FOREIGN INVESTOR PROTECTION

At the international level, Bulgaria is a party to the Incorporation Act of the International Financial Corporation (member of the World Bank Group), the Convention on the Settlement of Investment Disputes between State and Nationals of Other States, the Convention establishing the Multilateral Investment Guarantee Agency and the Agreement establishing the WTO, as well as to more than 130 agreements on mutual encouragement and protection of investments or avoidance of double taxation. Domestically, the principle of protection of foreign investment and economic activity is enshrined in the Constitution of 1991 and forms part of the substantive foundation of fundamental principles underpinning the Bulgarian legal order.

Foreign investors are guaranteed the full and unconditional protection of their rights and interests in Bulgaria. Only where a public need cannot be met by other means, the Bulgarian government, the regional governor or the municipality mayor, as the case may be, may expropriate land provided that the owner is compensated at fair market value and always subject to judicial appeal.

Bulgarian law offers foreign investors protection from unfavourable changes in the national legislation. Pursuant to the IPA, any foreign investment made prior to the adoption

19 For example, in case of development of industrial zones or high-tech parks the minimum threshold value for priority investment projects is reduced to 15 million Bulgarian lev and the number of minimum newly-created jobs to 50 for high-tech parks and 15 for industrial zones.
of legislative changes imposing legal restrictions solely on foreign investments is to be
governed by the legal provisions that were effective at the moment of implementation of the
investment.

VI OTHER STRATEGIC CONSIDERATIONS

Investors contemplating a foreign investment in Bulgaria may be faced with some challenges,
some common to any foreign investment, others peculiar to the country. Regulatory and
bureaucratic setbacks are possible. That is why it is important to have good local knowledge
to set your business up for success in Bulgaria.

In the 2019 Doing Business Report, the World Bank ranked Bulgaria 59th globally
for ease of doing business. This report highlights certain shortcomings in areas such as getting
electricity for newly constructed facilities because of the lengthy and complicated procedures
for connecting to the network, dealing with construction permits and resolving insolvency.
Foreign investors intending to enter into commercial relations with Bulgarian companies
should be aware that the resolving of insolvency is a lengthy process that could take more
than three years and end up with a low recovery rate.

Bulgarian merger control legislation is basically in line with EU merger control regime
and applies equally to foreign and domestic mergers. The Commission for Protection of
Competition has general powers to assess notifiable mergers under the Bulgarian merger
control regime, but additional regulatory clearance may be required in the strongly regulated
sectors such as banking, energy, financial services and insurance.

VII CURRENT DEVELOPMENTS

In February 2018, one of the three major players in the Bulgarian electricity market, the
Czech company CEZ, announced its intention to divest from Bulgaria and sell its assets to a
rather small Bulgarian energy company with questionable control. The merger, however, was
not cleared by the competition regulator. Meanwhile, and despite the lodged appeals, CEZ
initiated talks with other prospective buyers. This deal has been widely criticised for its lack
of transparency and triggered legislative changes in the Energy Act in May 2018, equipping
the energy regulator with a new power to permit any transfer of more than 20 per cent of
the capital of companies holding energy transmission licences. This general power is to be
exercised with a view to safeguarding the security of supply, protecting the national security
and public policy. In June 2019, the publicly listed holding company Eurohold Bulgaria
announced an agreement to acquire the assets of CEZ for a total of €335 million. The
closing of this deal will, however, be subject to clearance from both the competition regulator
and the energy regulator.

20 Doing Business 2019: Training for Reform, Economy Profile Bulgaria, A World Bank Group
eurohold.bg/eurohold-agreed-to-acquire-cez-group%E2%80%99s-assets-in-bulgaria-717.html [accessed on
2 July 2019].
Chapter 4

CANADA

David Rosner and Justine Johnston

I  INTRODUCTION

Foreign investment in Canada has been regulated since the Foreign Investment Review Act was introduced in 1973. While this Act was emblematic of Canada’s protectionist stance towards foreign direct investment in the 1970s and early 1980s, its replacement by the Investment Canada Act (ICA) in 1985 made Canada a friendlier environment for foreign investment.2

Although the overwhelming majority of foreign investment reviews in Canada are still successful, the marked increase in contentious reviews in the past eight years demonstrates that Canada is not entirely immune to the parallel rising tide of economic protectionism and concern for national security that is increasing in various jurisdictions across the globe. Nonetheless, recent developments suggest that the Liberal government of Prime Minister Justin Trudeau is seeking to encourage increased foreign investment.

II  FOREIGN INVESTMENT REGIME

The stated purpose of the ICA is to review ‘significant investments’ by non-Canadians with a view to encouraging investment and economic growth, as well as to review investments by non-Canadians that ‘could be injurious to national security’.3 The ICA applies when non-Canadians acquire existing Canadian businesses or establish new Canadian businesses.

The Minister of Innovation, Science and Economic Development (the Minister) is responsible for administering the majority of investments subject to the ICA, save for acquisitions or investments concerning ‘cultural’ businesses, which fall under the responsibility of the Minister of Canadian Heritage, as discussed in Section IV.iv.4

There are two separate but interdependent regimes for review under the ICA – net benefit reviews, aimed at determining whether the proposed transaction is likely to be of net benefit to Canada, and national security reviews.

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3 Investment Canada Act, RSC 1985, c 28, Section 2 [ICA].
4 id., Section 4.
i  Net benefit reviews
Proposed transactions subject to the net benefit review provisions of the ICA are either notifiable or reviewable, depending on whether the applicable statutory financial threshold is met. When investments are considered notifiable, the foreign investor need only file a short notice of the transaction with the Director of Investments within 30 days of closing. In contrast, investments that are reviewable cannot be completed until the foreign investor has received, or has been deemed to receive, prior approval.

When a transaction is reviewable, the non-Canadian investor applies to the Investment Review Division (IRD) of Innovation, Science and Economic Development. The IRD is led by the Director of Investments, who is appointed by the Minister. It is the Director's duty to assist the Minister and make recommendations as to whether a proposed investment would be of net benefit to Canada. However, the Minister is not bound by the Director's recommendation and can approve or deny any investment. The Director and his or her officials are guided in assessing the net benefit of a transaction by a series of factors set out in the ICA, as discussed in Section IV.i. Consultations also occur with provincial governments affected by the proposed transaction, and with the Competition Bureau.

ii  National security reviews
All foreign investments in Canadian businesses may also be the subject of a national security review if the investment could be injurious to national security. The national security review provisions in the ICA do not specify threshold requirements based on the size of the transaction or the extent of the interest being acquired by the foreign investor. Accordingly, a national security review may be invoked in any transaction involving a non-Canadian investor in a Canadian business, even if the transaction is neither notifiable nor reviewable under the net benefit review provisions discussed above. The national security review framework is discussed further in Section IV.ii.

iii  Special rules for state-owned enterprises and cultural businesses
Special guidelines under the ICA also apply to investments by foreign state-owned enterprises (SOEs). These special guidelines are discussed in Section IV.vi. Similarly, transactions involving cultural businesses (e.g., those involved in the production or distribution of books, film, audio and video products), for which the financial thresholds for review are substantially lower, are also subject to special rules, as discussed in Section IV.vi.

III  TYPICAL TRANSACTIONAL STRUCTURES
When determining how to structure the acquisition of a private or public Canadian company, the question is whether to acquire the assets or the shares of the target. Share purchase transactions are usually less complex than asset purchase transactions, which benefits both the

5  id., Section 12.
6  id., Sections 16 and 17.
7  Alternatively, in the context of a cultural business, the non-Canadian investor applies to the Cultural Sector Investment Review Division of the Department of Canadian Heritage.
8  ICA (see footnote 3), Section 6.
9  id., Section 25.3.
buyer and the seller. Specifically, while a single share transfer is required in a share purchase transaction, an asset purchase transaction requires the conveyance of each individual asset and can trigger the need for third-party consents.

Setting aside the simplicity of a share acquisition, an asset acquisition is generally preferable for buyers. In an asset purchase, the buyer can choose to assume only specific assets and specific liabilities, whereas in a share purchase, the buyer acquires all the target’s assets and liabilities. An asset acquisition can also have tax benefits for purchasers, who are often able to allocate some of the purchase price to depreciable property, resulting in future tax deductions.

i Acquisitions of public companies
The acquisition of a public company in Canada by way of an asset purchase generally requires at least 66.66 per cent shareholder approval. The acquisition of shares in a public company is usually achieved through one of three structures: plan of arrangement, amalgamation or takeover bid.

a A plan of arrangement is a statutory procedure that facilitates the acquisition of all the outstanding shares of the target company in a single step.
b An amalgamation is the combination of one or more entities resulting in a single new entity that houses the combined assets and liabilities of both pre-amalgamation entities.
c A takeover bid is an offer to acquire outstanding voting or equity securities where the securities subject to the offer, together with the shares already owned by the potential acquirer, constitute 20 per cent or more of the shares of the class that is subject to the offer. A takeover bid is the only method available in Canada to acquire legal control of a public company without the consent of the board of directors.

While any of these three structures can be used for a ‘friendly’ transaction, most parties prefer a plan of arrangement for several reasons. First, plans of arrangement are subject to court approval while amalgamations and takeover bids are not. The board of directors will often take comfort from judicial approval, which effectively limits the potential liability of the directors in respect of the transaction. Second, plans of arrangement offer significant flexibility by accommodating transaction mechanics that may be difficult or impossible to implement through a takeover bid or amalgamation. For example, a plan of arrangement will permit the precise ordering of transaction steps needed to accommodate tax planning objectives. It will also more easily accommodate the restructuring or acquisition of the target’s options and other convertible securities. In contrast to takeover bids alone, plans of arrangement offer even more benefits, including:

a Complexity: a plan of arrangement facilitates the acquisition of 100 per cent of the target in a single step, whereas a takeover bid inevitably requires a second step to acquire 100 per cent of the shares.
b Timing: depending on the circumstances, a plan of arrangement may be completed more quickly than a takeover bid, particularly if extensions to the bid are required or fewer than 90 per cent of the target shares are ultimately tendered to the bid.
c Procedural requirements: very few technical rules apply to a plan of arrangement, as compared to a takeover bid, which is subject to comprehensive procedural requirements.
Collateral benefits: collateral benefits are permitted in plans of arrangement (subject to minority shareholder approval in most cases). In contrast, a shareholder is not able to receive greater consideration in a takeover bid, in the absence of a statutory exemption or discretionary relief.

IV REVIEW PROCEDURE

As set out in Section II, there are two separate interdependent regimes for review under the ICA – the net benefit review and the national security review.

i Net benefit reviews

When a non-Canadian acquires control of an existing Canadian business, the investment is subject to a net benefit review if it exceeds certain prescribed financial thresholds; otherwise, a notification of the transaction must be filed with the Director of Investments within 30 days of closing.

Key terms: non-Canadian, acquires control and Canadian business

The ICA provides a framework for determining whether an investor is non-Canadian, whether an investment is an acquisition of control by the non-Canadian, and whether the investment relates to a Canadian business.

Non-Canadian

The ICA defines ‘non-Canadian’ as an individual, a government or an agency thereof, or an entity that is not Canadian. An individual is a Canadian under the ICA if she or he is a Canadian citizen or a permanent resident ‘who has been ordinarily resident in Canada for not more than one year after the time at which she or he first became eligible to apply for Canadian citizenship’. An entity is Canadian if it is Canada-controlled. The determination of whether an entity is Canada-controlled is more complex and is determined by applying Part V of the ICA. Subject to additional rules applicable to SOEs, cultural businesses and investments that may be injurious to national security (discussed below), an entity is Canada-controlled if:

a one Canadian owns a majority of the voting interests of the entity;

b two or more members of a voting group who are Canadians own a majority of the voting interests of the entity; or

c a majority of the voting interests of an entity are owned by Canadians and it can be established that the entity is not controlled in fact through the ownership of its voting interests by non-Canadians.

10 id., Section 14.

11 id., Section 3.

12 ibid.

13 id., Section 26(1)(a) to (c).
An entity is also Canada-controlled when less than a majority of the voting interests of the entity are owned by Canadians, but it can be established that:

\(\text{i}\) the entity is controlled in fact through the ownership of its voting interests by one Canadian or by a voting group in which the Canadian members own a majority of those voting interests of the entity owned by the voting group; or

\(\text{ii}\) in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact through the ownership of its voting interests and two-thirds of the members of its board of directors (or, in the case of a limited partnership, two-thirds of its general partners) are Canadians.\(^{14}\)

**Acquires control**

The manner of acquiring control varies under the ICA depending on the target entity. Generally, an acquisition of control occurs upon the acquisition of a majority of the voting shares or voting interests of an entity, either directly or indirectly, carrying on a Canadian business, or upon the acquisition of all or substantially all the assets used to carry on a Canadian business.

In the case of a corporation specifically:

\(\text{a}\) where fewer than one-third of voting shares of the target corporation are acquired, control of the corporation is deemed not to be acquired;\(^{15}\)

\(\text{b}\) where more than one-third but less than 50 per cent of voting shares of the target corporation are acquired, there is a rebuttable presumption that control has been acquired;\(^{16}\) and

\(\text{c}\) where more than 50 per cent of the voting shares of the target corporation are acquired, control of the corporation is deemed to be acquired.\(^{17}\)

In the case of a non-corporate entity, such as a trust, partnership or joint venture, the acquisition of less than 50 per cent of the voting interests of the entity is deemed not to be an acquisition of control.\(^{18}\)

When the foreign investor is an SOE,\(^{19}\) the acquisition is in respect of a cultural business or where a transaction may be injurious to national security,\(^{21}\) the Minister is given the flexibility to make a fact-specific determination as to whether an acquisition of control has occurred.

**Canadian business**

A Canadian business is defined as ‘a business carried on in Canada that has (1) a place of business in Canada, (2) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (3) assets in Canada used in carrying on the business’.\(^{22}\) The ICA also contains provisions relating to businesses that are carried on only partially in Canada.

\(^{14}\) id., Section 26(1)(d).

\(^{15}\) id., Section 28(3)(d).

\(^{16}\) id., Section 28(3)(b).

\(^{17}\) id., Section 28(3)(a).

\(^{18}\) id., Section 28(3)(b).

\(^{19}\) id., Section 28(6.1).

\(^{20}\) id., Section 28(4).

\(^{21}\) id., Section 28(4.1).

\(^{22}\) id., Section 3.
Threshold requirements

Foreign investments are reviewable by the IRD (or the Cultural Sector Investment Review Division of the Department of Heritage Canada when the target engages in cultural business activities) if a foreign investor acquires control of a Canadian business and the value of the business exceeds certain statutory thresholds.23

Threshold factors

The applicable statutory threshold depends on a number of factors:

a. whether the investor, or investors, is a World Trade Organization (WTO) investor or trade agreement investor, or the target Canadian business is controlled by such an investor. A ‘WTO investor’ generally refers to an individual who is a national of a WTO Member State, the government of a WTO Member State and a WTO-controlled entity. A ‘trade agreement investor’ refers to the subset of WTO Member States with which Canada executes a trade agreement, such as the North American Free Trade Agreement (NAFTA) or the Comprehensive Economic and Trade Agreement (CETA);24
b. whether the investor is an SOE;
c. whether the target entity carries on a cultural business;
d. whether the acquisition is direct or indirect. Pursuant to the ICA, an indirect acquisition is a transaction involving the acquisition of the shares of a company incorporated outside Canada, which owns subsidiaries in Canada; and
e. whether the investment raises national security concerns.

Statutory financial thresholds

In determining whether an applicable financial threshold has been met, either the book value or the enterprise value of the transaction must be determined, depending on the type of transaction. The book value is determined by the value of the assets acquired as reflected in the business’s most recent annual audited financial statements.25 The calculation of enterprise value depends on the structure of the transaction:

a. In the case of an acquisition of shares of a public entity, enterprise value is equal to the market capitalisation of the entity plus its liabilities (excluding operating liabilities), minus its cash and cash equivalents.26
b. In the case of an acquisition of shares of an entity that is not publicly traded, enterprise value is equal to the acquisition value plus the entity’s total liabilities (excluding operating liabilities), minus cash and cash equivalents.27
c. In the case of an acquisition of assets, enterprise value is equal to acquisition value plus liabilities assumed by the investor (excluding operating liabilities), minus cash and cash equivalents.28

The 2019 reviewable threshold for direct private sector investments involving WTO investors either as purchaser or seller is C$1.045 billion in enterprise value. This threshold has more

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23 id., Section 14.
24 id., Section 14(6).
25 Investment Canada Regulations, SOR/85-611, Section 3.1.
26 id., Section 3.3.
27 id., Section 3.4.
28 id., Section 3.5.
than doubled since 2013. Additionally, since 1 January 2019, this reviewable threshold is adjusted annually to reflect the change in Canada’s nominal gross domestic product. The 2019 equivalent reviewable threshold for private sector investments involving trade agreement investors is C$1.568 billion in enterprise value. This threshold is also adjusted annually based on changes in nominal gross domestic product.

The reviewable threshold for direct acquisitions by investors not belonging to a WTO Member State, or for direct acquisitions of Canadian cultural businesses (irrespective of investor nationality), is only C$5 million.\(^\text{29}\) For direct acquisitions by SOEs from WTO Member States, the 2019 reviewable threshold is C$416 million (book value of assets).

Indirect acquisitions (in which a non-Canadian parent company that controls a Canadian subsidiary is being acquired) by investors from WTO Member States are not reviewable, unless the Canadian subsidiary of the target is a cultural business.\(^\text{30}\) Indirect acquisitions of cultural businesses are reviewable if the book value of the assets involved exceeds C$50 million, but this threshold is reduced to C$5 million if the asset value of the target exceeds 50 per cent of the asset value of the international transaction.

**Applicable time frames**

When a transaction is reviewable, the investor must submit an application to the IRD to aid the Minister in determining whether the proposed transaction is likely to be of net benefit to Canada. The Minister has 45 days from the date of receiving a sufficient application to complete the net benefit review and issue an opinion.\(^\text{31}\) The Minister can (and typically does) unilaterally extend the review period by an additional 30 days.\(^\text{32}\) In practice, investors should therefore allow at least 75 days for the process. The review period cannot be unilaterally extended by the Minister beyond 75 days without the consent of the investor.

As previously noted, when a transaction is notifiable (i.e., not reviewable), the investor must file a completed notification of the transaction with the Director of Investments within 30 days of closing.\(^\text{33}\)

**Net benefit test**

In determining whether the proposed transaction is of net benefit to Canada, the Minister considers a set of factors enumerated in the ICA, none of which is individually determinative. These include:

\begin{itemize}
  \item a \hspace{1em} the effect of the investment on the level and nature of economic activity in Canada, including employment, resource processing, and the utilisation of parts, components and services;
  \item b \hspace{1em} the degree and significance of participation by Canadians in the business;
  \item c \hspace{1em} the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety;
  \item d \hspace{1em} the effect of the investment on competition within any industry or between industries in Canada;
\end{itemize}


\(^{30}\) ibid.

\(^{31}\) ICA (see footnote 3), Section 21(1).

\(^{32}\) id., Section 21.

\(^{33}\) id., Section 20.
the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

the contribution of the investment to Canada’s ability to compete in world markets.\textsuperscript{34}

The broad language of the net benefit factors listed in the ICA (such as ‘compatibility with industrial policies’) provides the Minister with wide discretion to approve or reject proposed transactions.\textsuperscript{35} While ministerial decisions approving a proposed transaction are published (usually with a summary of the undertakings given by the acquirer unless competitively sensitive), the Minister may, but is not under a statutory obligation to, publicise his or her reasons for rejecting reviewable investments.\textsuperscript{36} Commentators have suggested that the Minister make available information concerning the net benefit determination and ‘create a “jurisprudence” of decisions that could inform future investors of the commitments that are likely to be required’.\textsuperscript{37}

In making an assessment under the net benefit test, the Minister will consider the investor’s plans for the Canadian business and proposed undertakings, and may also consider representations made by other federal departments and agencies, any provinces likely to be significantly affected by the investment, and the Competition Bureau.\textsuperscript{38}

Although not mandatory under the ICA, in practice, the Minister requires undertakings from the investor regarding the acquired Canadian business (i.e., contractual commitments from the investor) in virtually all reviewable transactions. The undertakings, which are legally enforceable commitments to the Government of Canada, usually have a term of three years and address matters such as employment levels in Canada, Canadian participation in management and the board of directors, production targets, research and development, future capital expenditures and charitable contributions.

In the 2017–2018 fiscal year, 751 investment filings (both applications for review and notifications) were certified under the Act. These filings were categorised into five broad sectors, with 250 transactions in the business and services sector; 179 transactions in the manufacturing sector; 141 transactions in other services; 115 transactions in the wholesale and retail sector; and 66 transactions in the resources sector.\textsuperscript{39} More than 50 per cent of these filings were for companies worth C$10 million or less. Notably, only nine applications for net benefit review were approved in the 2017–2018 fiscal year. This is a significant decrease from the 22 net benefit review applications that were approved in the 2016–2017 fiscal year.\textsuperscript{40} The decrease in the number of net benefit review applications corresponds to the increase in the net benefit review financial threshold.

\textsuperscript{34} ibid.
\textsuperscript{35} Brian Facey and Joshua Krane, \textit{Investment Canada Act: Commentary and Annotation} (Toronto: LexisNexis Canada, 2014) at 54.
\textsuperscript{36} The Minister must provide reasons for rejecting a proposed investment to the non-Canadian investor – ICA (see footnote 3), Section 23.1.
\textsuperscript{37} Facey and Krane (see footnote 35) at xiv.
\textsuperscript{38} ICA (see footnote 3), Section 19.
\textsuperscript{40} ibid.
ii National security reviews

Alongside the net benefit review regime is the national security review regime under the ICA. In 2009, the ICA was amended to give the Canadian government the explicit statutory power to review proposed investments on national security grounds. Investments may be reviewed where the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, considers that ‘the investment could be injurious to national security’ and the Governor in Council (i.e., the federal Cabinet) makes an order for review.\(^{41}\)

The national security review process runs on a different timeline from the net benefit review process, and can take up to 200 days under current regulations, or longer on consent. If the Minister believes that an investment could be injurious to national security, the Governor in Council, within 45 days of receipt of a notification or an application for review under the net benefit provisions, may order a formal national security review. Alternatively, the Minister may, within that same 45-day period, notify the investor that such a review may be commenced. If the transaction is not reviewable or notifiable, however (for example, because there is no acquisition of control), this same 45-day period only begins to run after the transaction closes.\(^{42}\) If during that 45-day period the Minister notifies the investor that the Minister is considering commencing a review, the Governor in Council has a further 45 days from the date of the notice to order the review.\(^{43}\)

When a formal national security review is ordered, the review itself may take 45 days to complete; this period may be unilaterally extended by a further 45 days. Following the review, unless the Minister sends a notice that no further action will be taken, she or he can refer the matter to the Governor in Council, who has 20 days in which to take any measures advisable to protect Canada’s national security, including blocking the investment, allowing the transaction to close subject to undertakings by the investor or certain terms and conditions, or, in the case of a completed transaction, order a divestiture.\(^{44}\) The investor may be required to make legally binding undertakings to the Government of Canada to mitigate potential harm to national security. Undertakings may require the investor to (1) obtain government approval of proposed locations to avoid proximity to strategic assets; (2) service and support some or all business lines in Canada; (3) create approved corporate security protocols to protect information; (4) conduct third-party compliance audits; and (5) provide access to facilities for compliance inspection.

As noted above, unlike a net benefit review, which is limited to acquisitions of control over certain thresholds, a national security review may be invoked in any transaction involving a non-Canadian investor, irrespective of both the size of the transaction and the extent of the interest being acquired by the foreign investor. This can be particularly problematic from a timing perspective in situations where no application for review or notification is required under the net benefit provisions of the ICA, but a transaction may, nonetheless, raise national security concerns; for example, because of the nature of the target. Formal pre-acquisition clearance cannot be obtained under the national security provisions of the ICA.

\(^{41}\) ICA (see footnote 3), Section 25.3.

\(^{42}\) ICA (see footnote 3), Section 25.2(1); National Security Review of Investments Regulations, SOR/2009-271, Section 2.

\(^{43}\) ICA (see footnote 3), Section 25.3(1); National Security Review of Investments Regulations, note 41, Section 4.

\(^{44}\) ICA (see footnote 3), Section 25.4(1); National Security Review of Investments Regulations, note 41, Section 6.
Commentators have expressed concern that the ICA does not provide sufficient guidance on what may constitute a threat to national security. The ICA does not define ‘national security’, which commentators have said gives the Minister broad discretion to review investments and can lead to uncertainty for non-Canadian investors seeking to do business in Canada. In December 2016, the government issued guidelines detailing the factors that it will consider in either ordering or considering a national security review. While the guidelines do not provide a definition of national security, they list a number of factors the Minister or Governor in Council may take into account when assessing a proposed or implemented investment under the national security provisions of the ICA. The factors include:

- potential effects of the investment on Canada’s defence capabilities and interests;
- potential effects of the investment on the transfer of sensitive technology or know-how outside Canada;
- potential effects of the investment on the security of Canada’s critical infrastructure;
- potential effects of the investment on the supply of critical goods and services to Canadians or the Canadian government;
- potential for the investment to enable foreign surveillance or espionage, hinder current or future intelligence or law enforcement operations, or involve or facilitate the activities of terrorist organisations or organised crime; and
- potential effects of the investment on Canada’s international interests, including foreign relationships.

The guidelines encourage early engagement with the IRD when any of these factors may be present.

### Enforcement

If the Minister believes that a non-Canadian has breached the ICA (for example, by implementing an investment that required prior approval without first obtaining the approval, or failing to comply with a written undertaking), the Minister may send a demand to the non-Canadian, requiring the person or entity to cease the contravention, to remedy the default, to show cause why there is no contravention or to justify non-compliance with any undertakings provided.

If a non-Canadian fails to comply with such a demand, the ICA provides for an application to be made to a superior court. The court may make any order that it determines is required in the circumstances, including an order imposing a penalty not exceeding C$10,000 for each day on which the person or entity is in contravention. The penalty is recoverable as a debt and any breach of a court order would constitute contempt of court. An appeal may be brought from any such order by the court.

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46 Facey and Krane (see footnote 35) at 76.
48 ICA (see footnote 3), Section 39.
49 id., Section 40.
iv Exemptions from net benefit or national security reviews

Part II of the ICA provides a list of transactions that are exempt from the review and notification requirements contained in the ICA, and a list of transactions that are also exempt from the national security provisions of the ICA.

Transactions exempt from the review and notification requirements, but still subject to the national security review provisions, include:50

a an acquisition in the ordinary course of business by a trader or dealer in securities;
b an acquisition in the ordinary course of business by a venture capitalist;
c an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance;
d an acquisition of control for the purpose of facilitating financing so long as the acquirer divests itself of control within two years;
e an acquisition of control through an amalgamation, merger, consolidation or reorganisation where the ultimate control through the ownership of voting interests remains unchanged;
f an acquisition of control of a Crown corporation;
g an acquisition of control of a non-profit corporation;
h a transaction to which Part XII.01 of the Bank Act applies;
i an involuntary acquisition of control resulting from the devolution of an estate or by operation of law;
j certain acquisitions of control by non-Canadian insurance businesses or affiliates thereof; and
k an acquisition of control of a farming business where real property is acquired.

Transactions exempt from the review and notification requirements contained in the ICA, and from the national security review provisions, include:51

a an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance where the acquisition is subject to approval under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;52
b an acquisition of control through an amalgamation, merger, consolidation or reorganisation where the ultimate control through the ownership of voting interests remains unchanged and the acquisition is subject to approval under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;
c an acquisition of control of a Crown corporation;
d a transaction to which Part XII.01 of the Bank Act applies; and

50 id., Section 10(1).
51 id., Section 10(2).
52 Note, an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance that is not subject to approval under the Bank Act, SC 1991, c 46, Cooperative Credit Associations Act, SC 1991, c 48, Insurance Companies Act, SC 1991, c 47 or Trust and Loan Companies Act, SC 1991, c 45, is still exempt from the review requirements of the ICA, but not the notification or national security provisions – ICA, note 3, Section 10(1.1).
certain acquisitions of control by non-Canadian insurance businesses, or affiliates thereof, where the acquisition is subject to approval under the Bank Act, the Cooperative the Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act.

v Interplay with competition law

Investments that are subject to foreign investment review may also be subject to review under the Competition Act (CA), whereby certain proposed acquisitions and business combinations trigger advance notification requirements. Specifically, Part IX of the CA establishes a review process whereby parties to a transaction must provide the Commissioner of Competition with pre-transaction notification filings if the proposed transaction exceeds specified monetary and shareholding thresholds. These thresholds are different from those contained in the ICA. When a transaction is subject to review under Part IX of the CA, it cannot be closed until expiry of a 30-day statutory waiting period, which may be extended if the Commissioner requires more information about the proposed transaction. Many reviews under the CA take approximately four to five months to complete; some cases certainly take longer.

Competition and foreign investment reviews in Canada cannot be ‘siloed’, as they require careful coordination, in terms of both timing and message. For example, it is of fundamental importance to ensure that information provided to each authority by the transacting parties is consistent. One of the factors considered in the net benefit test during a foreign investment review is the effect of the investment on competition within any industry or between industries in Canada. Given the Competition Bureau’s expertise in this area, the Minister, through the Director of Investments, will consult the Bureau in respect of this criterion.

Parallel reviews under the CA and the ICA can also have real-world timing implications for a proposed transaction. For example, the Minister might not issue a clearance under the ICA until the Bureau has completed its review, especially where there are significant competition issues. While not usual practice, there is also a possibility that the Competition

RSC 1985, c C-34. Canada’s competition law is governed by the CA, a federal statute that applies across Canada and contains both criminal and civil provisions aimed at preventing harmful anticompetitive practices in the marketplace. The CA empowers Canada’s Commissioner of Competition to challenge transactions that are likely to prevent or lessen competition substantially in a relevant market. Subject to certain exceptions, the Commissioner may challenge a proposed transaction before the Competition Tribunal within one year of the transaction’s substantial completion if it raises competition concerns. The Tribunal, an independent adjudicative body, is distinguished from the Competition Bureau (headed by the Commissioner), which investigates complaints and decides whether to proceed with the filing of an application to the Tribunal. The Bureau is part of the Department of Innovation, Science and Economic Development.

The size of the parties’ threshold is met where the parties to the transaction (with their affiliates) have aggregate Canadian assets that exceed C$400 million or gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate (CA (see footnote 52), Section 109(1)). For the pre-merger notification requirement to be triggered, the size of the transaction must also exceed a threshold, which was C$96 million for 2019 (CA (see footnote 52), Section 123(1)). This threshold value is determined annually according to an indexing mechanism set out in the CA, which is tied to Canada’s gross domestic product.

Bureau may not complete its assessment until the ICA review process is concluded, especially if there are significant foreign investment issues and sufficient competition issues to give rise to a supplementary information request.

vi Special rules for SOEs and cultural businesses

Special considerations apply to investments by foreign SOEs and acquisitions of Canadian cultural businesses.

SOEs

As part of the Minister’s net benefit assessment, investments by foreign SOEs must meet specific guidelines. These guidelines were significantly revised in 2012, following high-profile acquisitions of Canadian oil and gas producers by Asian SOEs.57

Reflecting Canada’s heightened sensitivity to SOE transactions, the ICA definition of an SOE was broadened significantly in the 2012 amendments. Now, in addition to organisations that are directly owned by foreign governments, SOEs include entities ‘controlled or influenced directly or indirectly’ by a foreign government.58 The ICA also allows the Minister to make ‘control in fact’ determinations about SOEs; in practice, this means the Minister can declare that a Canada-controlled investor is controlled in fact by an SOE, possibly subjecting the investment to review under the ICA. The Minister can also determine that an SOE has acquired control of a Canada-controlled entity, subjecting even minority investments by SOEs to ICA review.59

As detailed above, the financial thresholds for review are lower for SOEs, increasing the likelihood of review of SOE transactions. The 2019 financial threshold applicable to a WTO SOE is C$416 million.60

Pursuant to the SOE guidelines, the Minister may consider the governance and commercial orientation of SOEs to determine whether an acquisition by an SOE is of net benefit to Canada. The Minister’s aim is to ensure that foreign SOEs acquiring Canadian businesses will operate in a transparent and commercially oriented manner that mirrors private sector enterprises, and to prevent state owners from using Canadian acquisitions to effect their own undesirable objectives.61 In practice, this means that SOEs seeking to complete investments subject to the ICA must satisfy the Minister that they are free from political influence and will adhere to Canadian laws, implement standards and practices that promote sound corporate governance and transparency, adopt free market principles and make positive contributions to the productivity and industrial efficiency of the Canadian business.62

58 ICA (see footnote 3), Section 3.
60 ‘Thresholds for Review’ (see footnote 29).
To ensure these principles are upheld, the Minister may require that an SOE investor provide additional undertakings, such as the appointment of Canadians as independent directors on the board of directors.\textsuperscript{63} Unlike undertakings required by non-SOE investors, which typically have a three-year term, undertakings required of SOEs might continue indefinitely or for as long as the investor is an SOE.\textsuperscript{64}

**Cultural businesses**

The Minister of Canadian Heritage is responsible for reviewing acquisitions of, or investments in, cultural businesses.\textsuperscript{65} A ‘cultural business’ is defined in the ICA and can include, for example, businesses involved in the publication or distribution of books, film, music and radio communications.\textsuperscript{66} Even if only a small portion of a business’s operations are cultural, it will still be considered a cultural business for the purposes of foreign investment review.

As set out in Section IV.i, the monetary thresholds for review of cultural businesses are much lower than those for non-cultural businesses, ranging from C$5 million to C$50 million. Even when an investment would be otherwise notifiable, the Minister of Canadian Heritage has considerable discretion to review a transaction involving a cultural business when certain notification requirements are met.\textsuperscript{67}

Transactions involving cultural businesses must also align with Canada’s cultural policy objectives, where relevant, in addition to meeting the standard ‘net benefit to Canada’ test.

Specifically, the Minister of Canadian Heritage will consider the consistency of the investment with Canada’s cultural policies in such industries as periodical and book publishing, and film production and distribution.

**V FOREIGN INVESTOR PROTECTION**

There are a variety of trade and investment agreements pertinent to foreign investors in Canada; namely, free trade agreements, plurilateral agreements, WTO agreements and bilateral investment treaties.\textsuperscript{68} In Canada, bilateral investment treaties are called foreign investment promotion and protection agreements (FIPAs), and they aim to promote and protect foreign investment through a mechanism of legally binding reciprocal rights and obligations.\textsuperscript{69}

Although there are a number of exclusions concerning sensitive policy areas, such as environmental protection, FIPAs generally enable foreign investors to receive the same treatment as domestic or other third-party foreign investors,\textsuperscript{70} referred to respectively as ‘national treatment’ and ‘most-favoured-nation treatment’.\textsuperscript{71} FIPAs include provisions

\textsuperscript{63} ‘Investment Canada Act – All Guidelines’ (see footnote 59).
\textsuperscript{64} ‘Statement Regarding Investment by Foreign State-Owned Enterprises’ (see footnote 62).
\textsuperscript{65} ICA (see footnote 3), Section 4.
\textsuperscript{66} id., Section 14.1(6).
\textsuperscript{67} id., Section 15.
\textsuperscript{68} Government of Canada, ‘Agreement Types’ (21 March 2017), online:www.international.gc.ca.
\textsuperscript{69} ibid.
\textsuperscript{70} ibid.
\textsuperscript{71} See, for example, Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Canada and the People’s Republic of China, Articles 5 and 6 (entered into force 1 October 2014) (Canada–China foreign investment promotion and protection agreement (FIPA)).
allowing foreign investors to repatriate their capital and returns, and precluding the Canadian government from expropriating their investments without arranging sufficient and timely compensation.\(^72\)

### Agreements in force and under way

Canada has 37 FIPAs in force, including with Barbados, the Czech Republic, Côte d’Ivoire, Hong Kong, Poland, Romania, the Russian Federation, Thailand and Tanzania.\(^73\) For example, the Canada–China FIPA entered into force on 1 October 2014.\(^74\) The agreement highlights the importance of promoting investment based on principles of sustainable development, and increasing economic cooperation based on equality and mutual benefit.\(^75\) The agreements also include investor–state dispute settlement (ISDS) provisions, which allow investors to bring claims against the Canadian government for discriminatory practices, and to resolve those disputes through an arbitral tribunal.\(^76\)

Similar provisions, subject to a limited number of exclusions, also exist in other agreements. For example, Chapter 11 of the NAFTA pursues the principles of international reciprocity and equal treatment of investors from NAFTA states, allowing those investors to transfer their capital and returns, and precluding the Canadian government from expropriating their investments without sufficient and timely compensation.\(^77\) The ISDS provision in Chapter 11 allows investors from NAFTA states to submit to arbitration claims, including claims for damages, against the Canadian government.\(^78\) NAFTA has been renegotiated, and a new Agreement between the United States of America, the United Mexican States, and Canada (USMCA) was signed in November 2018. While USMCA ratification has yet to occur, Chapter 14 of the USMCA will remove Canada from ISDS three years after NAFTA’s termination.\(^79\) Once ratified, American investors already operating in Canada may use ISDS for three more years before its use is terminated in Canada. Once ratified, Canada’s exit from ISDS will greatly limit protection offered to both US and Mexican investors. Chapter 8 of the CETA, a trade agreement concluded between Canada and the European Union, also provides an ISDS mechanism whereby foreign investors may submit a claim to an arbitral tribunal.\(^80\) The CETA provisionally entered into force on 21 September 2017.

Lastly, following seven years of negotiations, Canada signed the Trans-Pacific Partnership (TPP) on 4 February 2016, with 11 other countries, including the United States. However, President Trump withdrew the United States from the TPP on 30 January 2017 and, without the United States, the TPP could not enter into force. The remaining countries, however, engaged in renewed negotiations, which concluded on 23 January 2018 with the creation

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\(^{72}\) See, for example, id., Articles 10 to 12.


\(^{74}\) Canada–China FIPA (see footnote 71).

\(^{75}\) ibid.

\(^{76}\) See, for example, id., Articles 19 to 32.


\(^{78}\) ibid.

\(^{79}\) Free Trade Agreement between the United States of America, the United Mexican States, and Canada, 30 November 2018, Chapter 14 (not yet in force).

\(^{80}\) Comprehensive Economic and Trade Agreement, Canada and the European Union, 30 October 2016, Article 8.
of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). In October 2018, the Trudeau government implemented and ratified the CPTPP in Canada.81 The CPTPP entered into force (among the first six countries to ratify the agreement) on 30 December 2018. Chapter 9 of the CPTPP includes an ISDS mechanism, which allows foreign investors to submit claims to arbitration and be awarded monetary damages or restitution of property.82

ii Enforcement issues

FIPAs involving Canada include exemptions for cultural industries engaged in the production and sale of books, film and music, and for environmental measures to protect human, animal or plant life or to conserve exhaustible natural resources.83 Other exceptions include measures to ensure the integrity and stability of the financial system, and to protect financial market participants and investors.84 Moreover, a decision by the Canadian government under the ICA regarding the approval of an investment after a review is generally exempted from the dispute settlement provisions.85

Furthermore, general concerns regarding the transparency of arbitration apply but are mitigated by the emergence of mechanisms such as the Rules on Transparency in Treaty-Based Investor–State Arbitration, established by the UN Commission on International Trade Law and which came into effect on 1 April 2014.

VI OTHER STRATEGIC CONSIDERATIONS

With the recent rise in the financial thresholds for review applicable to direct private sector investments, increasingly only the largest transactions are subject to a net benefit review pursuant to the ICA. Such investments tend to be of a very high-profile nature, and the Minister’s discretion to address both national interest and national security considerations means that not only must legal process and substantive considerations be taken into account, but also the political and public relations aspects of a proposed acquisition. Indeed, since the 2012–2013 fiscal year, 80 per cent of the issued Section 25.3 Orders have been for Chinese and Russian investors. This reflects Canada’s fluctuating geo-political relationship with these countries, and the role of politics in foreign investment.86 Accordingly, it is prudent in the planning phase of such a transaction to fully engage not only legal experts, but also government relations experts and communications experts, to ensure there is both an accurate reading of how the particular transaction may be perceived against the political landscape and to develop the key messages that will ensure a consistent, positive public perception regarding the transaction’s benefits for Canada.

82 Trans-Pacific Partnership Agreement, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States (withdrawn) and Vietnam, 4 February 2016, Article 9.
83 See, for example, Canada–China FIPA (see footnote 70), Article 33.
84 ibid.
85 id., Annex D.34.
Those proposing major transactions in sensitive economic sectors, such as Canada’s oil and gas sector, or transactions of any size that might raise national security considerations, are also encouraged to arrange a meeting with the IRD at an early stage in their planning to identify any policy concerns that may be raised by a particular transaction.

VII CURRENT DEVELOPMENTS

Increased scrutiny in recent years of foreign investment internationally has been driven by the rise of both national interest considerations, such as the importance of infrastructure, and the rise in various jurisdictions of national security considerations more generally. In the 2017–2018 fiscal year, four Notices were issued to non-Canadian investors under section 25.2 of the ICA on the grounds that the investment could be injurious to Canadian national security, and two National Security Reviews were ordered under Section 25.3 of the ICA. Notwithstanding this emerging trend, the election of the Liberal government of Prime Minister Justin Trudeau in 2015 ushered in a new era for foreign investment in Canada. The Trudeau government has placed significant emphasis on attracting foreign direct investment in infrastructure projects, and holding seminars aimed at encouraging investors to deploy capital in Canada.

The Trudeau government has also specifically welcomed investment from China, putting Canada on a unique footing when compared with some of its Western allies. Whereas the former Conservative government of Prime Minister Steven Harper had blocked or ordered the divestiture of a number of transactions on national security grounds, the Trudeau government has taken a markedly different approach, particularly towards investments from Chinese SOEs. Many examples demonstrate this change in direction for Canada.

In March 2017, the Trudeau government reversed a decision of the Harper government to block the purchase of a Montreal-based technology company, ITF Technologies Inc, on national security grounds.

In 2015, O-Net Communications Group Ltd, a developer of optical networking components based in Hong Kong reported to be a subsidiary of Chinese state-owned China Electronics Corporation, acquired ITF Technologies, which specialises in fibre components and modules, for C$5 million. Following the closing, the federal cabinet exercised its powers under the national security provisions of the ICA to require the divestiture of O-Net’s investment.

O-Net brought its concerns about the secretive national security process before the Federal Court of Canada by way of an application for judicial review filed in August 2015. In its application, O-Net claimed that the government breached its right to procedural fairness by, among other ways, failing to disclose its national security concerns regarding the transaction or to provide an opportunity to respond.

In late 2016, it was announced that the new Liberal government had agreed to an order that it would undertake a new review of the ITF Technologies acquisition. At the time, the government faced public criticism for opening the door to a fresh review of a transaction. As reported in The Globe and Mail, a nationally distributed Canadian newspaper, the Canadian national security agency had warned that transfer of the target’s technology would undermine a technological edge enjoyed by Western militaries over China.

The reversal of the O-Net divestiture order followed on the heels of remarks by the newly appointed Chinese ambassador to Canada, who was reported in the 24 March 2017 edition of The Globe and Mail as stating that China would view as ‘trade protectionism any attempt
to invoke national security to block state-owned firms from buying Canadian companies or doing business with the federal government’. This comment regarding national security reviews was made in an interview dealing more broadly with Beijing’s desire for unfettered access for Chinese state-owned firms to all key sectors of the Canadian economy. The access sought would require the reversal of a policy put in place by the Harper government to block future acquisitions of control by SOEs over Canadian oil sands businesses.

In announcing its decision to reverse the divestiture order, the government made it clear that its ruling is subject to conditions. An unnamed source within the government also explained that there were no other buyers for the Canadian business, and a divestiture might have resulted in the scattering of the expertise and knowledge residing within the business.

In May 2017, the Trudeau government cleared the purchase of Norsat, a Canadian manufacturer of communications equipment with military applications, by Hytera, a Chinese SOE. Norsat makes microwave components, portable satellite systems, maritime communications equipment and radio frequency antenna products. In January 2017, it announced that it had sold portable satellite terminals to the United States Department of Defense in a deal worth C$3.3 million.

In clearing the Hytera transaction, the Canadian government did not conduct a formal national security review, which attracted criticism from opposition politicians and retired security officials within Canada, as well as US legislators. The government defended itself by making clear that a detailed review, albeit an informal one, had been conducted and had included consultation with the security apparatus in the United States.

Two national security reviews were ordered in the 2017–2018 fiscal year. In the first proposed investment, the investor withdrew its notification before a section 25.4 Order was issued. The second proposed investment was the US$1.5 billion acquisition of Aecon Canada, a Canadian construction firm, by CCCI, a Chinese SOE. Following a formal national security review, the Canadian government issued a section 25.4 Order blocking the proposed acquisition of Aecon on the basis that it would be injurious to national security. CCCI’s proposed investment was the third investment to be blocked under the national security regime, and the first transaction blocked by the Trudeau government (other foreign investments have been approved with conditions or divestitures).

Recent developments are nevertheless generally consistent with, and confirm, the widely held view that the Trudeau government is more open to foreign investment than previous governments. What remains to be seen, however, is how successfully Canada may forge its own foreign investment path in a global environment that is increasingly inward facing.
Chapter 5

CHINA

Jianwen Huang

I INTRODUCTION

Since China initiated its policy of ‘openness’ and ‘reform’ in 1979, regulators of the People’s Republic of China (PRC) have continuously refined their approach to regulating foreign investment. Following China’s entry into the World Trade Organization, the pace of reforms accelerated, and sectors of China’s economy previously closed to foreign investment, such as logistics, telecommunications and finance, are now partially open to foreign investors. According to the Ministry of Commerce (MOFCOM), 60,533 foreign-invested enterprises (FIEs) were established in China in 2018, an increase of 69.8 percent from the previous year, and the actual use of foreign capital amounted to 885.61 billion yuan.

Some of the more prominent foreign investment trends of recent years are as follows:

a China is opening up more of its economy to foreign investors and wants to increase foreign access to its market. In June 2018, the State Council issued the Notice of the State Council on Several Measures for Active and Effective Utilisation of Foreign Investment to Promote High-Quality Economic Growth, which emphasises that the use of foreign investment is an important part of China’s basic policy of opening up to the outside world and building a new system of open economy, and calls for significant relaxation of control over market access and an improvement in investment liberalisation, among other things.

b Recent significant revisions to many PRC laws and certain PRC policy developments are facilitating foreign investment in China. In March 2019, the Standing Committee of the National People’s Congress promulgated the Foreign Investment Law of PRC (the Foreign Investment Law). The Foreign Investment Law will come into effect as of 1 January 2020, and would then replace the Law of the PRC on Wholly Foreign-Owned Enterprises (the WFOE Law), the Law of the PRC on Sino-Foreign Equity Joint Ventures (the EJV Law) and the Law of the PRC on Sino-Foreign Cooperative Joint Ventures (the CJV Law) as the fundamental regulation of foreign investment affairs. On 30 June 2019, the National Development and Reform Commission (NDRC) and MOFCOM jointly issued the Special Administrative Measures for Foreign Investment Access (2019 Edition) (the 2019 Negative List) and the Catalogue of Encouraged

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2 In this chapter, ‘China’ and ‘PRC’ refer to mainland China and do not include Hong Kong, Macao or Taiwan.
China

Industries for Foreign Investment (2019) (the 2019 Catalogue), which further reduce the restricted or prohibited industries to be invested and expand the scope of industries encouraged to be invested by foreign investors.

c PRC regulators are simplifying foreign investment approval procedures. The regulatory scrutiny of foreign investment in China has been shifting from an *ex ante* focus to a more *ex post* focus. The State Council has further cancelled or adjusted downwards the number of administrative approvals. For example, the MOFCOM approval process for the establishment or change of FIEs whose business is not included on the Negative List (see Section II for more details) has been greatly simplified into an online record-filing procedure since October 2016.

d China is initiating and introducing more preferential policies in pilot free trade zones (FTZs). Currently, there are 12 FTZs in China. Early in March 2015, the Chinese government started trying out the negative list model in pilot FTZs, resulting in a blossoming of foreign investments in FTZs. In November 2018, the State Council issued the Notice of the State Council on Several Measures for Supporting the Deepening of Reform and Innovation in Pilot Free Trade Zones, which endows much stronger reforming power to the FTZs in terms of administrative approval, taxation, intellectual property regulation, trade policies, etc. In June 2019, NDRC and MOFCOM also issued Special Administrative Measures for Admission of Foreign Investments in Pilot Free Trade Zones (2019 Edition) (the 2019 FTZ Negative List).

II FOREIGN INVESTMENT REGIME

Foreign investors entering the Chinese market must comply with PRC investment policies, national industrial policies and the laws and regulations governing foreign investment.

i National industrial policies

National industrial policies provide guidance to foreign investors regarding the types of industries and regions in China that are open to foreign investment and the restrictions that may accompany that investment. Foreign investors should ensure that they are in compliance with China’s national industrial policies when investing in China.

The national industrial policies governing foreign investment include the 2019 Negative List, the 2019 FTZ Negative List, and the 2019 Catalogue. The 2019 Negative List, which came into effect on 30 July 2019, sets out the industries in which foreign investment is restricted or prohibited. Foreign investors are not allowed to invest in industries where foreign investment is prohibited, but are able to invest in the industries where foreign investment is restricted, as long as they are willing to be abide by certain restrictions and have obtained the relevant investment approvals. For industries not included on the 2019 Negative List, foreign investors who invest in such industries shall enjoy the same treatment as the domestic investors.

Compared with the 2018 version of the Negative List, the number of industries on the 2019 Negative List has been cut to 40 from 48. It also removes ownership caps on industries such as domestic multi-party communication, store-and-forward systems, and call centre in the value-added telecommunications sector. Furthermore, the Negative List provides a transition period for some industries to abolish or ease the foreign investment access limits, which demonstrates China’s determination to offer greater market access to foreign investors.

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The 2019 FTZ Negative List only applies to pilot FTZs. Though most industries in both negative lists are similar, compared with the 2019 Negative List, there are fewer restricted or prohibited industries in the 2019 FTZ Negative List. For instance, in the 2019 FTZ Negative List, the investment of printing publications does not need to be controlled by the Chinese investors, and foreign investment to cultural and artistic performance groups is not prohibited.

The 2019 Catalogue, which came into effect on 30 July 2019, consists of two sub-catalogues: the national catalogue of encouraged industries for foreign investment that applies to China, and the catalogue of priority industries for foreign investment in central and western China that mainly applies to the mid-western and north-eastern China. The number of industries on the 2019 catalogue has been significantly increased, and foreign investors can enjoy preferential policies in more industries and fields accordingly, especially in manufacturing and the productive service industry. The encouraging policies mainly include the taxation preferential policies and the land transfer price preferential policies for industrial projects. To clarify, some industries in the 2019 catalogue overlap with the restricted industries in the 2019 Negative List.

ii Foreign investment-related laws and regulations

The most relevant foreign investment laws and regulations are:

a the Foreign Investment Law of the People’s Republic of China, issued in 2019 and will take effect on 1 January 2020;

b the Company Law of the People’s Republic of China (the Company Law), revised on 26 October 2018 and effective since 26 October 2018;

c the Partnership Enterprise Law of the People’s Republic of China (the Partnership Law), revised in 2006 and effective since 1 June 2007;

d the Law of the People’s Republic of China on Wholly Foreign-Owned Enterprises (the WFOE Law), revised on 3 September 2016 and effective since 1 October 2016 (will be repealed on 1 January 2020);

e the Law of the People’s Republic of China on Sino-Foreign Equity Joint Ventures (the EJV Law), revised on 3 September 2016 and effective since 1 October 2016 (will be repealed on 1 January 2020);

f the Law of the People’s Republic of China on Sino-Foreign Cooperative Joint Ventures (the CJV Law), revised on 4 November 2017 and effective since 5 November 2017 (will be repealed on 1 January 2020);

g the Provisional Regulations on the Establishment of Foreign Investment Joint Stock Companies Limited, revised in 2015 and effective since 28 October 2015;

h the Provisional Measures on Administration of Filing for Establishment and Change of Foreign Investment Enterprises, revised in 2018 and effective since 30 June 2018;

i the Measures for the Administration on the Establishment of Partnership Business by Foreign Enterprises or Individuals in China, revised in 2009 and effective since 1 March 2010; and

j the Administrative Measures for the Confirmation and Recordation of Foreign-Investment Projects, revised and effective since 17 June 2014.
The two major pieces of legislation regarding mergers and acquisitions (M&A) are the Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the M&A Regulations), and the Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors (the Measures for Strategic Investment).

In addition, there are regulations specifically tailored to particular industries or sectors, such as:

- the Provisions on the Administration of Foreign-Invested Telecommunications Enterprises; and
- the Provisions on Foreign Investment in Civil Aviation and its supplementary provisions.

A foreign investment will be subject to review if it is considered to be a threat to national security or triggers antitrust review thresholds. Regulations on national security review include the National Security Law of the People’s Republic of China (the National Security Law) and the Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the Security Review Notice). Regulations on antitrust review include the Anti-Monopoly Law of the People’s Republic of China (the Anti-Monopoly Law).

Chinese regulations regarding state-owned enterprises (e.g., the Law of State-Owned Assets) apply to foreign investors with the intention to acquire a Chinese state-owned enterprise.

If foreign investors want to invest in a publicly traded company or if an FIE is listed on a PRC stock exchange, PRC regulations regarding publicly traded companies and the rules governing PRC stock exchanges, such as the Measures for Strategic Investment, shall apply.

III TYPICAL TRANSACTIONAL STRUCTURES

It is important to select a suitable transaction structure to ensure the success of a foreign investment in China.

Under current PRC law, foreign investors may include foreign companies, enterprises, other types of commercial organisations and individuals. Investors from Hong Kong, Macao and Taiwan are treated as foreign investors.

i Investment vehicles

Under current PRC law, foreign investors may choose, inter alia, one of the following foreign investment vehicles:

- wholly foreign-owned enterprises (WFOEs);
- Sino-foreign equity joint ventures (EJVs);
- Sino-foreign cooperative joint ventures (CJVs);
- representative offices (ROs);
- investment or holding companies;
- partnership enterprises;
- foreign investment companies limited by shares; and
- regional headquarters.

The most common forms of FIEs are ROs, WFOEs, EJVs and CJVs.
Representative offices
Many foreign investors choose to establish an RO when entering the Chinese market. Normally, an RO in China is not a legal person and is forbidden from undertaking any direct business activities, such as the distribution of goods manufactured by its foreign parent company. Moreover, the business scope of an RO may be limited to conducting business liaison activities (such as consultation, coordination and information collection and exchange) on behalf of its foreign parent company, which makes it unattractive as an entry vehicle in many cases.

Wholly foreign-owned enterprises
WFOEs are limited liability companies in which all the equity is owned by one or more foreign investors. The primary advantage of a WFOE is that it allows foreign investors to retain sole control over the management and financial affairs of the company. In general, for foreign companies that understand the Chinese market and wish to operate independently in the PRC without a Chinese partner, a WFOE is a common choice.

Equity joint ventures
EJVs are limited liability companies jointly invested in and managed by both Chinese and foreign investors. The investors share profits and losses of the EJV in proportion to their equity interests. The EJV is a more commonly adopted form of foreign investment than the CJV (described below) and provides investors with greater security and certainty of their investment.

Cooperative joint ventures
Unlike EJVs, CJVs can be set up either as a cooperation entity without legal personality or a limited liability company with legal personality. CJV investors may distribute profits and bear responsibility for losses through contractual terms, rather than in proportion to their equity interests. In addition, the Joint Venture (the JV) contract of the CJV may contain provisions that allow foreign investors to recoup their investment before expiry of the JV term. CJVs may distribute dividends through cash, products or any other means agreed upon between the investors.

Strategic considerations for transactional structures
In addition to considerations such as time and costs, foreign investors seeking to invest in China via greenfield investments or through M&A should consider the following factors.

Restrictions on corporate and shareholding structures
In the ‘Explanation’ part of the 2019 Negative List, it is stipulated that overseas investors shall not engage in business activities in the capacity of an individually owned business, an investor in a sole proprietor enterprise or a cooperative member of a farmers’ speciality cooperative. This measure puts restrictions on the type of entities that may be established by foreign investors in China (i.e., they shall, in the main, engage in business as companies or partnership enterprises). Besides, where a requirement regarding the ratio of equity of foreign capital applies, the form of partnership enterprise is not permitted.
The 2019 Negative List places restrictions on certain foreign investments, including but not limited to investments in:

a. medical institutions, which require the establishment of EJVs or CJVs;
b. pre-school, normal high school and higher educational institutes, which require the establishment of CJVs and shall be led by the Chinese party; 3

c. investment in a market survey is limited to EJVs or CJVs; specifically, investment in a broadcasting and television listening and rating survey must be controlled by the Chinese party;
d. public air transport companies, which require the Chinese party to hold the controlling equity interest, the legal representative to be a Chinese national, and that the investment ratio of one foreign investor and its affiliates shall not exceed 25 per cent; and
e. securities companies, which require that the foreign share of the ratio of securities companies shall not exceed 51 per cent, and that the ratio of foreign shares in securities investment fund management companies must not exceed 51 per cent (the foreign capital ratio limit will be lifted in 2021).

**Licensing requirements**

Foreign investors should consider licensing requirements when investing in certain sectors, such as drug manufacturing and operations, and seed manufacturing.

Foreign investors may establish a WFOE or a JV to acquire permits and licences for these operations. However, if it is difficult for the WFOE or the JV to obtain the required operations licences or permits, foreign investors may also consider M&A arrangements with companies that already hold licences and permits.

**Local policies and the stance of local government authorities**

Although the relevant laws and regulations are uniformly applicable throughout the entire territory of the PRC, interpretation and implementation of the regulations may differ depending on the local authority. Moreover, the attitudes of local authorities towards foreign investments vary from region to region. It is therefore essential that foreign investors conduct both market and legal research regarding the local policies and the attitude of the local government authorities before deciding to invest in China.

**Tax planning and foreign exchange policies**

Tax planning and foreign exchange policies are always key issues when structuring a foreign investment. Foreign investors must carefully plan the structuring of their investment to optimise their tax status and to comply with PRC law. The government authorities have been trying to reassure foreign investors about capital controls. In March 2017, the State Administration of Foreign Exchange announced that FIEs are free to handle profit remittance through normal procedures.

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3 ‘Led by the Chinese party’ shall mean that the principal or key administration officer in charge is a Chinese national, and Chinese party personnel shall make up no fewer than half the members of the council, board of directors or joint administration committee of a CJV educational institution.
IV REVIEW PROCEDURE

Foreign investment may be subject to the following review process by the PRC government authorities.

i Foreign investment review procedures

Project approval

According to the circular issued by NDRC on Effectively Implementing the Relevant Foreign Investment Work concerning Investment Project Catalogue Approved by the Government (2016 Edition), foreign investment projects will be subject to either an approval process or a record-filing process from competent government agencies. Generally, the approval process takes around 20 business days, and the projects are considered case by case, with reference to the specific circumstances of each project.

In practice, whether a foreign investment project requires the approval of NDRC, its local branches, State Council, or other competent government agencies depends on the gross investment amount, industry, circumstances of the individual project, etc. Therefore, it is prudent for a foreign investor to consult the relevant investment department of local governments before initiating the project.

Approval of the environmental protection authority

For foreign investments in construction projects and others that may cause environmental issues (such as pollution or impact on wildlife), a foreign investor must conduct an environmental impact assessment before starting the project and submit the assessment documents to the local environmental protection authority for the approval of the project. The length of the environmental impact assessment process depends on the extent of the environmental impact the project may cause.

Industrial approval by the pre-registration approval authority

Certain types of foreign investment, such as investment in the general aviation industry and tobacco monopoly production, may be subject to pre-registration approval by the relevant government authorities. These approvals must be obtained prior to the application being submitted to MOFCOM and before registration with the State Administration for Market Regulation (SAMR) or its local branch.

The approval procedures and the length of the approval process shall be subject to the different requirements of the government authorities concerned.

Approval by or filing with MOFCOM

All foreign investments included on the Negative List, including M&A transactions or the establishment of FIEs, are subject to MOFCOM approval. For foreign investment activities (including the establishment of an FIE and a change from a non-foreign-invested enterprise

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4 The estimated lengths of the approval processes by the authorities quoted in this section are based on when all the required application documents are agreed upon and accepted by the relevant authorities and no further modification is required.
to an FIE by acquisition, merger or any other means) outwith the Negative List, only an online record filing on the MOFCOM website is required (the record filing process normally takes around three business days to complete).

Registration with the registration authority
For the establishment and change of an FIE, the FIE must register with SAMR or its local branches to obtain or renew its business licences. This registration normally takes 5 to 10 business days.5

Post-registration filing or registration with the relevant authorities
After obtaining its business licence, an FIE must complete the filing or registration procedures (i.e., registering with the tax authorities, opening a foreign currency account and registering for social insurance) with the relevant authorities. It normally takes around 30 business days to complete all these procedures.

ii Other review procedures
National security review
In accordance with both the National Security Law and the Security Review Notice, certain foreign investments with national security implications will be subject to a national security review. The new Cybersecurity Law also emphasises the importance of national security.

A joint committee led by MOFCOM and NDRC is responsible for security reviews. When conducting a security review, regulators will analyse the potential effects of any proposed merger or acquisition on China’s national defence, economic stability, social order and key technologies, and will focus on the issue of control. M&A transactions resulting in more than 50 per cent foreign ownership or de facto control of a domestic enterprise in the sensitive sectors will attract the attention of security review regulators.

Antitrust review
MOFCOM’s Anti-Monopoly Bureau will be notified about transactions in which the foreign investment is, inter alia, deemed to cause a ‘concentration’ under the Anti-Monopoly Law and meets the statutory turnover thresholds. Details of the thresholds can be found in the Anti-Monopoly Law and other relevant laws and regulations.

Review of foreign investment involving state-owned assets
Under the Provisional Measures for the Administration of Valuation of State-Owned Assets of Enterprises, before any assets are transferred to foreign investors, a certified asset evaluation agency must issue a valuation report providing the value of the assets. The transfer price shall not be less than 90 per cent of the valuation value unless expressly approved by the relevant authorities.

5 The estimated lengths of the approval processes by the authorities quoted in this section are based on when all the required application documents are agreed upon and accepted by the relevant authorities and no further modification is required.
Review of foreign investment in listed companies

Based on the Measures for Strategic Investment, foreign investment in listed companies will be subject to the supervision of the securities regulatory authorities.

The above-mentioned foreign investment review procedures are general practice in accordance with PRC laws and regulations. The procedure may vary slightly depending on different factors, such as the type of foreign investment, the amount of the investment, the location of the project and the different requirements of the relevant local governmental authorities.

In addition to the above, FIEs are subject to regulations regarding annual reporting to or inspection by (if applicable) SAMR or its local branches, the administration for foreign exchange or its local branches, and other relevant government authorities once established.

iii Interface with other authorities

Domestic interface

The approval and registration procedures of each government authority follow a general sequence with respect to the approval of a foreign investment, and inter-government and intra-government consultations are very common during the approval process. Some industrial approvals are prerequisites to approval by MOFCOM and therefore must be obtained before applying for MOFCOM approval. The PRC government has started to relax the precondition requirements.

Foreign interface

It is very rare for the PRC approval authorities to directly communicate with foreign government authorities regarding foreign investment reviews. However, in certain circumstances, application materials prepared outside China to obtain relevant approvals will be considered by PRC regulators as valid supporting documentation for a foreign investment in China.

V FOREIGN INVESTOR PROTECTION

i Protection by multilateral and bilateral treaties

The PRC has signed several regional and multilateral treaties and international trade agreements that govern matters including intellectual property (IP) protection, customs, civil aviation and dispute resolution.

According to the State Administration of Taxation, as at 12 December 2018, the PRC has officially signed 107 agreements on the avoidance of double taxation (100 agreements are in effect). Furthermore, as at 6 August 2018, the PRC has signed 16 free trade agreements (FTAs) with 24 countries or regions based on the information listed on China FTA Network.

ii Protection under PRC law

The legal rights and interests of foreign investors are protected under the WFOE Law, the EJV Law and the CJV Law. In addition, as clearly stipulated under the WFOE Law and the EJV Law, the PRC government will generally not impose nationalisation or expropriation measures on WFOEs and EJVs.
To attract foreign investment, some local governments may offer support for foreign investors through the granting of land use rights, providing financial subsidies, etc., and certain sectors, such as high-tech, research and development, and others encouraged by the government, may be eligible for preferential tax policies.

### iii  Legal remedies

#### Dispute resolution

Foreign investors who engage in business or conduct activities in the PRC have the right to protect their legal interests via litigation or arbitration. Generally, litigation allows for appeals, and arbitration is final. Foreign investors tend to prefer arbitration over litigation because it is more international and less time-consuming. Moreover, arbitration commissions in China are becoming more familiar with dealing with complex domestic and international commercial disputes.

#### Recognition and enforcement

Under certain circumstances, in addition to direct involvement in litigation or arbitration proceedings in China, foreign investors may request that the People’s Court system recognise and enforce a foreign arbitral award or judgment.

On 22 April 1987, China became a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). As such, China applies the principles of the New York Convention on a reciprocal basis to enforce foreign arbitral awards from other signatory countries for disputes that are regarded as commercial disputes under PRC law. China has also entered into agreements with Hong Kong, Macao and Taiwan on the mutual recognition and enforcement of civil and commercial judgments.

### VI  OTHER STRATEGIC CONSIDERATIONS

In addition to the foregoing, it is imperative that foreign investors focus on the following:

- **a** labour issues regarding, inter alia, employment contracts, non-compete agreements, occupational safety, social insurance, labour law compliance, labour litigation and arbitration;
- **b** IP protection regarding, inter alia, IP audits and strategic IP, IP portfolio management, commercial IP transactions and IP due diligence;
- **c** exit mechanisms;
- **d** corporate governance and the management of FIEs;
- **e** profit distribution and remittance;
- **f** communication with the relevant government authorities; and
- **g** any amendment or update of foreign investment-related laws and regulations.

In addition, foreign investors should consult a local PRC law firm to assist them with their investments in China. Local attorneys are very familiar with PRC laws, have extensive experience in dealing with foreign investment issues and generally have a good working relationship with local government officials, who can assist foreign investors to navigate through complex PRC laws and regulations.
VII  CURRENT DEVELOPMENTS

i  Overview

On 1 January 2020, the Foreign Investment Law will come into effect and then replace the WFOE Law, the CJV Law and the EJV Law. The Foreign Investment Law is the unified basic law and sets forth the basic legal framework of foreign investment. Several highlights worth mentioning in the Foreign Investment Law are as follows.

The unified law in the foreign investment area

After the Foreign Investment Law replaces the WFOE Law, the CJV Law and the EJV Law, in terms of the organisation form, institutional framework and standard of conduct, FIEs shall comply with the applicable Chinese laws, such as the Company Law, the Partnership Law, and other laws. For example, regarding the organisation form, instead of establishing the WFOEs, CJVs and EJVs, foreign investors might choose limited liability companies, companies limited by shares, partnership enterprises and other forms of organisation specified by relevant laws, while establishing the new FIE after 1 January 2020.

For the WFOEs, CJVs and EJVs established before the effective date of the Foreign Investment Law, they may keep their original organisational forms for at most five years after the effective date of the Foreign Investment Law as a transition period. In addition, as the Foreign Investment Law does not clearly stipulate the legal liabilities of failing to change the organisation forms of the above-mentioned FIEs and the specific implementing measures of the Foreign Investment Law have not been released yet, we suggest that foreign investors continuously pay close attention to the legislative developments.

The principle of treating domestic investments and foreign investments equally

Under the Foreign Investment Law, the principle of treating domestic investments and foreign investments equally applies through all stages of foreign investment.

For the industries not included in the 2019 Negative List, the State shall give national treatment to foreign investment during the stage of investment access; the treatment given to foreign investors and their investments shall be no less favourable than that given to domestic investors and their investments.

National policies on supporting the development of enterprises shall equally apply to FIEs in accordance with applicable law. For instance, the State guarantees the participation of foreign-funded enterprises in government procurement activities through fair competition, and the equal participation of foreign-funded enterprises in setting standards.

The management system of foreign investment

Under the Foreign Investment Law, the management system of foreign investment mainly includes the negative list model, the foreign investment information reporting system, and the security review system for foreign investment.

As introduced above, the negative list model has been implemented since 2016. Under the foreign investment information reporting system, foreign investors shall submit investment information to the competent authorities through the National Enterprise Credit Information Publicity System and enterprises registration system. Currently, the contents and scope of foreign investment information reporting have not been determined, which shall be further completed and refined under the principle of necessity in the future.
The State establishes the security review system to conduct the security review over any foreign investment affecting or having the possibility to affect national security. Though the details of such security review system have not been specified, the Foreign Investment Law stipulates that the decision made upon the security review in accordance with the law shall be final, which might indicate that no further administration review will be available.

Conclusion
Reform of the foreign investment regime is a systematic project. The Foreign Investment Law demonstrates the PRC government’s commitment to encouraging foreign investment to further open up and stimulate the economy. Meanwhile as the Foreign Investment Law is becoming the essential law of foreign investment for China, we believe we will witness the development of a more comprehensive package of foreign investment measures and implementation regulations, which shall be worthy of close attention. Because China is becoming more and more open to foreign investments, as a legal counsel dealing with foreign investment matters for years, I do hope all foreign investors will grasp the emerging opportunities, and participate in economic development.
I INTRODUCTION

French foreign investment controls are on the whole fairly lenient, as financial relations between France and other countries are unrestricted, in principle. This freedom is subject to certain safeguards intended to protect national interests, which allow the government to require notification or prior authorisation of capital flows and foreign investments.

The rules on foreign investments evolve regularly, as the government may promulgate and modify legislation in the field with relative ease. The first law on foreign investment, Law No. 66-1008, was adopted on 28 December 1966. It has been supplemented by other laws (lastly by the Law PACTE enacted in May 2019) and several successive decrees (the latest in 2018) and orders (the latest in 2003), all codified in the Monetary and Financial Code.

According to the latest reports, the foreign direct investment inflows into France have increased (from US$50 billion in 2017 to US$56 billion). The year 2018 was also marked by a relative increase in projects announced by foreign investors in France: +1 per cent compared with 2017 (a total of 1,027 projects), with an average creation of 43 jobs per project. France has become the second most attractive European country in terms of number of announced projects.

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1 Didier Théophile is a partner and Olivia Chriqui-Guiot and Guillaume Griffart are associates at Darrois Villey Maillot Brochier.
2 Article L151-1 of the Monetary and Financial Code.
3 Article L151-2 of the Monetary and Financial Code.
4 Law No. 66-1008 entrusts the government with the power to police foreign investments.
7 Decree No. 2018-1057 of 29 November 2018.
8 Order of 14 February 1996.
9 Order of 7 March 2003.
11 According to the report for the year 2019 prepared by Ernst & Young on investment attractiveness in France, available at https://www.ey.com/Publication/vwLUAssets/ey-barometre-de-l-attractivite-de-la-france-2019/$File/ey-barometre-de-l-attractivite-de-la-france-2019.pdf (Ernst & Young, 'La France résiste aux chocs, Baromètre EY de l’attractivité, France, 2019').
II FOREIGN INVESTMENT REGIME

With freedom as the guiding principle, foreign investments in France will not, as a rule, need to be authorised. However, the sensitive nature of certain investments justifies a departure from this principle. Thus, prior authorisation from the Ministry of Economy (the Ministry) will be required for all foreign investments that affect the exercise of public authority, or that involve an activity that may affect public policy, public safety or national defence, or an activity involving research into, or production or trading of, arms, munitions, or explosive powders or substances.

This rather catch-all provision is detailed in regulatory provisions that, until May 2014, limited the scope of the Ministry’s authority to 11 specific business sectors. Since the Decree of 16 May 2014, six new sectors have been added to this list, and the Decree of 29 November 2018 supplemented it with five new sectors.

Authorisation is required for any foreign investment (in the meaning of the regulatory provisions of the Monetary and Financial Code, for which see Section IV.ii) made by non-EU investors, and for foreign investment made by EU investors and consisting of the acquisition of all or part of a line of business of a company having its registered office in France in the following six sectors:

a private security services;
b businesses involved in the research and development or manufacture of pathogens or toxic substances;
c wiretapping, mail interception and computer data capture;
d evaluation and certification services relating to the security of information technology systems and products;
e services relating to the security of information systems of public or private sector companies managing critical infrastructures; and
f businesses related to certain dual-use items and technology.

The definition of these sectors varies according to the origin of the investor, and is far broader for non-EU investors than for EU investors.

Most investments carried out by an EU investor in these sectors will be restricted only to the extent necessary to fight terrorism and criminal activities, although EU investors face tailored restrictions in certain sectors:
a in sectors related to private security services, where restrictions apply to companies intervening in public and private sector entities operating critical infrastructures to the extent necessary to protect these infrastructures; and
b in sectors where the national defence is at issue (for instance, the sector of dual-use items and technology).

12 Certain investments that exceed the €15 million threshold must be notified to the French central bank for statistical purposes (Article R152-3 of the Monetary and Financial Code). Decree No. 2017-932 of 10 May 2017, which aims to simplify investments for foreign companies, abolished the administrative declaration to the Directorate General of the Treasury.
13 Article L151-3 of the Monetary and Financial Code.
14 Articles R153-2 et seq. of the Monetary and Financial Code.
15 Article R153-5 of the Monetary and Financial Code.
Foreign investments in the gambling industry (except for casinos) are subject to prior authorisation only when they are carried out by non-EU investors.

Ten further sectors are considered highly sensitive; therefore, a uniform definition of ‘sector’ is applied to all foreign investors in: \(^{16}\)

\(a\) activities related to cryptology or services connected to cryptology;

\(b\) activities carried out by companies privy to national defence secrets;

\(c\) activities involving research into, and the development, manufacture and marketing of, weapons, ammunition, powder and explosive substances used for military or war purposes, or other restricted materials;

\(d\) activities carried out by companies that entered into design or supply agreements with the French Defence Ministry; and

\(e\) activities that are essential to France’s interest in matters of public policy, public security and national security in the following sectors:

- energy supply (energy, gas, oil or other energy sources);
- water supply;
- the operation of transport networks and services;
- the operation of electronic communications networks and services;
- the operation of a facility, installation or structure that is of vital importance within the meaning of Articles L1332-1 and L1332-2 of the French Defence Code; \(^{17}\) and
- the protection of public health.

The Decree of 2018 substantially expands this list of highly sensitive sectors, as it provides for the application of the foreign investment regime to the following five new sectors: \(^{18}\)

\(a\) space activities;

\(b\) activities relating to the integrity, security and continuity of the operation of the electronic and computer systems necessary for the performance of the mission of the national police, of the national gendarmerie, of the civil security services or of the Customs authorities’ public safety mission;

\(c\) certain research and development activities relating to cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors;

\(d\) certain research and development activities relating to dual-use goods and technologies, when carried out as part of another listed activity; and

\(e\) data hosting activities whose compromise or disclosure is likely to harm the exercise of the above listed activity or interest (1) related to the supply of the French Ministry of Defence, or (2) essential to France’s interest in matters of public policy, public security and national security, or (3) related to points (c) and (d) above.

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\(^{16}\) Article R153-4 of the Monetary and Financial Code.

\(^{17}\) Facilities, installations and structures that are of vital importance are identified by administrative authorities and are those that, should they become unavailable, would diminish the security of the nation, its potential to wage a war and its capability to survive. They include, inter alia, nuclear installations and certain facilities classified for environmental protection.

\(^{18}\) A uniform definition of ‘sector’ is applied to all foreign investors in these sectors.
III TYPICAL TRANSACTIONAL STRUCTURES

There are no specific restrictions on takeover bids by foreign investors in France. However, the French market regulator may make the opening of the acceptance period (that is, the time from which shareholders may tender the offer, not the completion of the offer) subject to the receipt of mandatory regulatory approvals, including ministerial approval for foreign investments in sensitive business sectors.

Foreign investors are free to enter joint ventures in France, with or without a domestic partner.

IV REVIEW PROCEDURE

i Scope of application

The French authorisation regime initially relied on a very broad definition of investments subject to control, thereby affording the Ministry a wide margin of discretion. This approach was condemned by the European Court of Justice on the grounds that it was incompatible with the EU Treaty rules on the free movement of capital.\(^{19}\) Law No. 2004-1343\(^{20}\) and subsequent decrees have addressed this concern by refining the concept of ‘foreign investor’ and by setting down a precise list of the business sectors that are subject to the regulatory authority of the Ministry.\(^{21}\)

ii Categories of foreign investor

France’s foreign investment regime has been gradually liberalised for EU investors to comply with the EU Treaty rules on the free movement of capital, with the result that there are substantial differences in the treatment of EU investors and third-country investors.

The qualification of ‘EU investor’\(^{22}\) applies to any person who is a national of an EU Member State,\(^{23}\) to any legal entity that has its registered office in an EU Member State\(^{24}\) and to French nationals residing in another EU Member State.\(^{25}\) Investors who do not fall under any of these headings are considered ‘non-EU investors’.

The Decree of 2012\(^{26}\) introduced a new category of foreign investor subject to ministerial scrutiny: the foreign-controlled French investor (FCFI). This category encompasses all

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20 Adopted on 9 December 2004.
21 The list of sensitive business sectors remains limited, although it has recently been expanded, which was not the case before 2004.
22 Article R153-4 of the Monetary and Financial Code.
23 The definition extends to nationals of the European Economic Area (EEA) Member States that have signed an administrative cooperation agreement with France (i.e., Norway, Iceland, Liechtenstein).
24 Or in one of the above-mentioned EEA Member States.
25 Or in one of the above-mentioned EEA Member States.
26 Decree No. 2012-691 of 7 May 2012.
entities that have their registered office in France and that are controlled \(^{27}\) by a citizen of a country other than France, and companies whose registered offices is located outside France or a French citizen residing outside France. \(^{28}\)

iii Forms of foreign investment subject to authorisation

Non-EU investors in all 22 sectors under the Ministry’s authority must seek authorisation prior to any of the following operations: \(^{29}\)

\(\begin{align*}
a & \text{ the direct or indirect acquisition of a controlling stake}^{30} \text{ in a company that has its registered office in France (stock transfer test);} \\
b & \text{ the acquisition of all or part of a line of business of a company that has its registered office in France (asset transfer test);} \\
c & \text{ the acquisition of more than 33.33 per cent of the stock or voting rights of a company that has its registered office in France (threshold test).}
\end{align*}\)

Foreign investment controls are somewhat less stringent for EU investors and FCFIs. The threshold test does not apply to EU investors. \(^{31}\) The stock transfer test and the asset transfer test apply to EU investors only with respect to the 15 business sectors that are considered particularly sensitive. \(^{32}\) For the remaining seven strategic sectors, EU investors are required to seek authorisation only if they trigger the asset transfer test. \(^{33}\)

Investments made by FCFIs will only be subject to authorisation if they trigger the asset transfer test. \(^{34}\)

The Decree of 2012 removed certain transactions from the purview of the Ministry’s control, such as the grant of loans or guarantees, the purchase of licences or patents, the execution of commercial or technical assistance agreements in connection with the acquisition of a French company by a foreign investor, and investments relating to casinos.

In the event of uncertainty as to the application of these rules, the Ministry encourages foreign investors to present a written request to the Ministry to determine whether a transaction requires prior notification. \(^{35}\) Since 1 January 2019, target companies can also request a preliminary ruling from the Ministry. \(^{36}\) Although the law provides for a two-month delay for the Ministry to respond, a response is usually given within three to four weeks in practice (the absence of a reply does not imply that the transaction is exempt).

\(^{27}\) Within the meaning of Article L233-3 of the Commercial Code, which defines ‘control’ as: ‘holding, directly or indirectly, a percentage of the stock conferring the majority of the voting rights in the general meetings of the company; holding the majority of the voting rights in a company pursuant to an agreement concluded with other shareholders, and which is not contrary to the interests of the company; and the power to make decisions at shareholders’ meetings because of the held voting rights. A company is presumed to control another when it holds, directly or indirectly, a percentage of the voting rights above 40 per cent and when no other shareholder holds, directly or indirectly, a percentage higher than its own.’

\(^{28}\) Article R153-5-2 of the Monetary and Financial Code.

\(^{29}\) Article R153-1 of the Monetary and Financial Code.

\(^{30}\) Within the meaning of Article L233-3 of the Commercial Code; see footnote 33.

\(^{31}\) Article R153-3 of the Monetary and Financial Code.

\(^{32}\) Article R153-4 of the Monetary and Financial Code.

\(^{33}\) Article R153-5 of the Monetary and Financial Code.

\(^{34}\) Article R153-5-1 of the Monetary and Financial Code.

\(^{35}\) Article R153-7 of the Monetary and Financial Code.

iv Safe harbours
Several types of transactions are exempt from the authorisation regime, such as intra-group investments (i.e., between companies where more than 50 per cent of the stock or voting rights are held, directly or indirectly, by a common shareholder).\(^{37}\) This exemption will not apply if the proposed transaction is intended to transfer all or part of a strategic line of business abroad (investment triggering the asset transfer test).

Investors who have been previously authorised to acquire a controlling stake in a strategic sector company will also be exempt if they increase their ownership interest beyond 33.3 per cent of the stock or voting rights of said company.\(^{38}\)

v Contents of the authorisation request
The request for authorisation must contain information about the investor, the recipient of the investment and the investment itself.\(^{39}\)

a if the investor is a legal entity, the names, addresses and information about the individuals and public legal entities with ultimate control are required. If the investor is a listed company, it will need to report the identity of the shareholders known to have more than 5 per cent of the stock or voting rights, and the names and addresses of the board members. In the case of a fund, the identity of a fund manager will be required;

b the recipient company's corporate name, legal address, \textit{Kbis} extract (certificate of registration) or registry number (SIREN number), details of the business activity and main customers, and the most recent fiscal year turnover and results are required; and

c regarding the investment, the details required are the shareholding structure before and after the contemplated operation, the purchase option on the remaining capital, if any, and the total amount of the operation, with the financial terms and conditions.\(^{40}\)

The request shall be submitted by email and one original has to be filed with the Ministry.\(^{41}\) The contents of the request for authorisation are defined in the Order of 7 March 2003 to increase the transparency of the authorisation procedure and guarantee equal treatment to all investors. In practice, if the information provided in the request is not sufficiently precise for the Ministry to carry out an assessment of the transaction, investors are likely to receive requests for additional information. Every supplementary request for information suspends the review period, meaning that, in practice, the authorisation procedure could extend well beyond the statutory time frame.

vi Filing date and review period
The foreign investment regulations do not foresee a specific filing deadline, although the authorisation request must be sent once the investor is firmly committed to proceeding with the proposed transaction (in practice, as soon as a put option is signed) and in any case prior to the closing of the proposed transaction (failure to respect the authorisation regime

\(^{37}\) Article R153-6, I of the Monetary and Financial Code.

\(^{38}\) Article R153-6, II of the Monetary and Financial Code.

\(^{39}\) The information is listed in Article 4 of the Order of 2003.

\(^{40}\) The request shall indicate whether settlement has been by way of a transfer of funds from abroad to France or by other means.

\(^{41}\) https://www.tresor.economie.gouv.fr/Ressources/4204_Operation-soumise-a-autorisation-prealable-que faire.
France

may result in heavy sanctions; see Section IV.vii). The Ministry has two months to conduct a review of the transaction from the date it receives a complete notification. If it fails to respond within this time frame, the authorisation will be deemed granted (in practice, this never happens).

The French government has implemented an informal ‘fast-track’ procedure for determining whether an investment falls within the ambit of the prior authorisation procedure. In this regard, the Ministry has committed to respond within three to four weeks to any complete notification. This specific time frame applies without prejudice to the period of review of two months in case it appears that the investment is subject to prior authorisation.

vii Clearance test

The Ministry must verify that the investment will not harm national interests.\(^{42}\) If necessary, it may impose conditions on the investment relating, in particular, (1) to the continuity of the business, (2) its industrial, research and development capacities or related know-how, (3) the safety of its supply chain and (4) the performance of procurement contracts or contracts concerning public safety, national defence or research, or the production or trading of weapons, ammunition, or explosive powders or substances, by companies that have their registered office in France.\(^{43}\) It is possible that additional conditions may not suffice to remedy concerns, in which case the Ministry must refuse to grant authorisation.\(^{44}\)

In addition, the Ministry’s review must determine whether there is a ‘serious presumption’ that the investor is likely to commit any of the following crimes:

\(a\) drug trafficking;\(^ {45}\)

\(b\) criminal exploitation of a person’s weakness or ignorance;\(^ {46}\)

\(c\) procurement and related crimes;\(^ {47}\)

\(d\) money laundering;\(^ {48}\)

\(e\) acts of terrorism or financing of terrorism;\(^ {49}\)

\(f\) corruption and influence peddling;\(^ {50}\)

\(g\) acting in a conspiracy;\(^ {51}\) or

\(h\) any damage to the fundamental interests of the nation.\(^ {52}\)

In the event that such a presumption is established, the Ministry would have to deny the investor its authorisation.\(^ {53}\)

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\(^{42}\) Within the meaning of Article L151-3 of the Monetary and Financial Code (i.e., public policy, public security and national defence).

\(^{43}\) Article R153-9 of the Monetary and Financial Code. The conditions listed in the Monetary Code are not exhaustive.

\(^{44}\) Article R153-10 of the Monetary and Financial Code.

\(^{45}\) Within the meaning of Articles 222-34 to 222-39 of the Criminal Code.

\(^{46}\) Within the meaning of Article 223-15-2 of the Criminal Code.

\(^{47}\) Within the meaning of Articles 225-5, 225-6 and 225-10 of the Criminal Code.

\(^{48}\) Within the meaning of Article 324-1 of the Criminal Code.

\(^{49}\) Within the meaning of Articles 421-1 to 421-2-2 of the Criminal Code.

\(^{50}\) Within the meaning of Article 433-1 of the Criminal Code.

\(^{51}\) Within the meaning of Article 450-1 of the Criminal Code.

\(^{52}\) Within the meaning of Book IV, Title I of the Criminal Code.

\(^{53}\) Article R153-10 of the Monetary and Financial Code.
Although the Ministry is required to explain its refusal,\textsuperscript{54} in practice the courts may accept that the reasons for the decision shall not be disclosed for national security reasons.\textsuperscript{55}

viii Prerogatives of the Ministry

The Ministry has a long tradition of negotiating with foreign investors, but this was an informal practice until 2004. Law No. 2004-1343\textsuperscript{56} gave the Ministry authority to subject the implementation of an investment to conditions to safeguard national interests.

These conditions are specified in Decree No. 2005-1739 of 30 December 2005: typically, investors will commit to continuing the business’s operations in the future. They might also undertake to protect its industrial, research and developmental capabilities, related know-how or the safety of its supply chain. Additional conditions may be imposed on companies that have their registered office in France to guarantee the continued performance of procurement contracts or contracts concerning public safety, national defence, research, or the production or trading of weapons, ammunition, or explosive powders or substances. Conditions related to the protection of sensitive information have become more usual during the past year.

As a consequence of the six sectors added by the Decree of 2014 and the Decree of 2018, the Minister may now also subject the implementation of an investment to conditions aimed at guaranteeing the integrity, security and continuity of the operations of an installation, facility or structure of vital importance,\textsuperscript{57} the transportation and electronic communications networks and services, or the protection of public health.\textsuperscript{58}

Furthermore, the Decree of 2014 authorises the Minister to demand the divestment of part of the target’s activities falling within a strategic sector to an independent third company. This was already provided for by the Decree of 2012, but only if the strategic business concerned was an ancillary activity of the target. Today, the Minister may order the divestment of any activity falling within the scope of the strategic sectors. However, the conditions imposed must be proportional to the protection of the national interest being safeguarded.\textsuperscript{59}

In the course of its assessment, the Ministry may seek the assistance of foreign regulatory authorities to verify the information submitted by foreign investors, in particular regarding the provenance of funds.\textsuperscript{60}

\textsuperscript{54} ibid.
\textsuperscript{55} See, for instance, Decision No. 262626 of the French Council of State (the highest administrative court), dated 3 November 2004. The Council found that the Ministry’s decision to submit a non-governmental organisation to an authorisation regime concerning grounds of national security did not need to be justified.
\textsuperscript{56} Adopted on 9 December 2004.
\textsuperscript{57} Within the meaning of Articles L1332-1 and L1332-2 of the Defence Code.
\textsuperscript{58} Article R153-9 of the Monetary and Financial Code.
\textsuperscript{59} ibid.
\textsuperscript{60} Article R153-12 of the Monetary and Financial Code.
Sanctions

Failure to respect the authorisation regime comes at a potentially heavy price. At the very least, any agreement, understanding or contractual provision purporting to effectuate a foreign investment in one of the sectors identified by the regulatory provisions, without due authorisation, will be considered null and void.\(^{61}\)

When required to do so, the investor will have up to 12 months to accomplish the rescission.\(^{62}\)

The law PACTE enacted in May 2019 has clarified and, at the same time, expanded the Ministry’s sanction powers.

Firstly, in case the investment is carried out without any authorisation, the Ministry can either:
- order the investor to file an application;
- order the investor to return to the status quo ante at its own expense; or
- order the investor to modify the investment.\(^{63}\)

Secondly, in the event of an investment in contravention of the agreed conditions, the Ministry can either:
- order the investor to comply with the unfulfilled condition;
- order the investor to apply remedy actions, including the return to the status quo ante, in substitution to the unfulfilled condition; or
- revoke the authorisation.\(^{64}\)

In any case, the Ministry can attach an interlocutory penalty to the above-mentioned injunction. Moreover, it can take protective measures if it considers that the national interests are at risk: it has the authority, inter alia, to suspend the voting rights, the distribution of dividends or the free disposal of the assets related to the sensitive activities, and to appoint, within the company, an agent entitled to obstruct any decision likely to affect the protection of national interests.\(^{65}\)

Moreover, in any event, infringement of the foreign investments regulation regime may be punished by a civil fine capped to the highest of the following amounts:\(^{66}\)
- twice the amount of the non-complying investment;
- 10 per cent of the annual turnover (excluding tax) of the company carrying out the sensitive activities; and
- €5 million for legal entities and €1 million for natural persons.

However, a fine must be proportional to the gravity of the offence. Investors also face possible criminal sanctions, including imprisonment for up to five years. Legal entities face the imposition of various prohibitions (carrying out certain

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\(^{61}\) Article L151-4 of the Monetary and Financial Code.

\(^{62}\) Article R153-11 of the Monetary and Financial Code.

\(^{63}\) Article L151-3, I of the Monetary and Financial Code.

\(^{64}\) Article L151-3-1, II of the Monetary and Financial Code.

\(^{65}\) Article L151-1-3 of the Monetary and Financial Code.

\(^{66}\) Article L151-3-2 of the Monetary and Financial Code.
activities, participating in public tendering procedure, receiving government subsidies, etc.),
either definitively or for a limited period of time and a fine of up to 10 times the amount of
the investment.\[67\]

\textbf{Right of recourse}

The decisions of the Ministry are subject to full review by the administrative judge.\[68\] Under
this procedure, the judge is given broad powers to control the Ministry’s decision to submit
an investment to prior authorisation,\[69\] to overrule the Ministry’s authorisations or rejections.
The judge may hold the government liable for damages to the investor; although, in practice,
it is extremely difficult to establish the state’s liability.

Moreover, an EU investor may challenge the Ministry’s decision under EU law in
the French courts if it can demonstrate that the French regulatory framework creates an
unjustified restriction of the free movement of capital, or that it lacks proportionality with
regard to the public policy objectives at issue.

\textbf{Declaration of the completed investment}

The completion of an authorised investment gives rise to a notification in accordance with
the conditions laid down by a forthcoming order of the Ministry.\[70\]

\textbf{FOREIGN INVESTOR PROTECTION}

France has signed and ratified bilateral investment treaties with 104 countries, as well as the
multilateral International Centre for Settlement of Investment Disputes Convention on the
settlement of investment disputes between states and nationals of other states. These treaties
offer foreign investors broad guarantees in terms of protection of their investment, resolution
of disputes (such as access to arbitration, and the recognition and enforcement of awards)
and compensation.

There are no significant enforcement issues to report. The latest World Bank Doing
Business report, which ranks France 38th out of 190 countries in terms of protecting minority
investors,\[71\] would seem to confirm this analysis.

Strong guarantees exist at the domestic level: for instance, the right to property is
constitutionally protected in France.\[72\] Investors may seek protection of their right before any
judge and, at the highest level, before the Constitutional Council.

\[67\] Article 459 of the Customs Code.
\[68\] Article L151-1-3, IV of the Monetary and Financial Code.
\[69\] See Decision No. 160550 of the French Council of State, dated 15 April 1996, affirming the power
of administrative courts to control the Ministry’s decision to submit a foreign investment entity to the
authorisation regime.
\[70\] Article R153-13 of the Monetary and Financial Code.
doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf. Since 2015, the
‘protecting investors’ indicator has been changed to ‘protecting minority investors’ to better reflect its scope.
This new indicator measures shareholders’ rights in corporate governance beyond related-party transactions.
\[72\] It was recognised as a constitutional right by the Constitutional Council on 16 January 1982 (Decision
No. 81-132 DC).
VI OTHER STRATEGIC CONSIDERATIONS

It is recommended that foreign investors establish informal contacts with the Ministry prior to filing an official request. The monitoring and control of foreign investments in sensitive business sectors is a highly political process, and it would be impossible to overcome opposition from the government. Additionally, if the Ministry were to deny authorisation on grounds of national interest, it is hard to imagine that administrative courts or eventually the Council of State would overrule this decision.

Certain targets may use regulatory consent for a change of control as an effective means of defence against unsolicited offers, and especially when the offeror is a foreign company. In light of this, it is helpful to secure political approval at an early stage.

VII CURRENT DEVELOPMENTS

The Ministry has recently launched a public consultation on the amendment of the Order of 7 March 2003. The main objective is to speed up the examination of the requests for opinion or authorisation applications.

Currently, the list of requested documents is broadly defined, and additional information is often requested by the administration. The draft aims at clarifying the obligations imposed on stakeholders, which is expected to shorten the time frame of the examination period.

The debated draft also allows the transmission of requested documents by electronic means to modernise the procedure.

To our knowledge, the adoption of a new Decree reshaping the regime of foreign investment is currently contemplated.

Chapter 7

GERMANY

Oliver Schröder

I INTRODUCTION

Rules on foreign investment have been the subject of considerable discussion and public interest in the recent past in Germany. With the background of current trade and political tensions and ongoing uncertainty surrounding Brexit, industrial policy and the creation of European (or German, or both) champions is back on the agenda. The discussions surrounding the Siemens/Alstom merger that was ultimately blocked by the EU Commission as well as the perceived role of the German government in the aborted Deutsche Bank/Commerzbank merger are vivid recent examples of such development. The German Federal Minister for Economic Affairs and Energy has recently announced a ‘National Industrial Strategy 2030’ to promote the creation of European and German champions and political debate is in full swing regarding its implementation.

The traditional market-liberal approach to foreign investment control in Germany has been gradually changing as well. Following the acquisition of German robotics company Kuka by Chinese Midea in 2016, there was widespread political concern and scepticism about the adequacy of existing rules, which did not allow the German government to block the transaction. This led to a first revision of foreign investment rules in 2017, whereby ‘critical infrastructure’ businesses where explicitly addressed and made subject to a notification obligation, and timelines for review were significantly expanded. When State Grid Corporation of China in 2018 tried to purchase a minority stake of 20 per cent in 50Hertz, the electricity transmission system operator, co-shareholder Elia, the Belgian utility, exercised a right of first refusal. Subsequently, a second 20 per cent stake came to market. As foreign investment rules at that time only applied at a threshold of 25 per cent of voting rights, the government had no legal tools at hand to block the acquisition, but negotiated with Elia a renewed exercise of the right of first refusal, with a pre-wired sale of the stake.

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to German state-owned bank KfW.\textsuperscript{5} In August 2018, the German government authorised the prohibition of a transaction for the first time, when Chinese Yantai Taihai Corporation attempted to acquire Leifeld Metal Spinning, as the target produced high-tech materials relevant for the nuclear sector.\textsuperscript{6}

Particularly considering the 50Hertz transaction, German rules on foreign investment have been tightened again effective late-2018\textsuperscript{7} and now already apply when 10 per cent of voting rights in enterprises active in critical infrastructures are acquired directly or indirectly. In this connection, certain media companies were added to the list of critical infrastructures. Outside of critical infrastructures, the applicable general threshold for foreign investment review remains at 25 per cent of voting rights.

Factually, the approach taken by the authorities has seemingly become more cautious as well, and exercise of prolonged review periods is a realistic risk where investments in certain sensitive areas are concerned, with the resulting impact on overall transaction timeline and transaction certainty.

II FOREIGN INVESTMENT REGIME

The foreign investment regime in Germany is bifurcated into a ‘sector-specific’ and a ‘cross-sectoral’ control regime.

i Sector-specific regime

There are specific rules that apply to the acquisition of companies that operate in areas that are relevant to national defence or other similarly sensitive security areas (the sector-specific control regime). In particular, if a company is to be acquired that produces certain goods that are listed in the war weapons control list, specially constructed engines or gears for tanks or military tracked armored vehicles, products with IT security features that are used to process classified government information or certain goods with a specific military use listed in the export list, a notification of such investment pursuant to Section 60, Paragraph 2 of the Foreign Trade and Payments Ordinance (AWV) must be submitted by any non-German investor. The relevant threshold of ownership that triggers such notification obligation is 10 per cent of the voting rights of the company (or the acquisition of a business through an asset deal by a company in which an investor holds at least 10 per cent of the voting rights). Prior to clearance by the Federal Ministry for Economic Affairs and Energy (BMWi) the underlying contracts are invalid and the transaction is therefore provisionally suspended. In its review, the BMWi considers whether the respective acquisition poses a threat to essential security interest of the Federal Republic of Germany. Similar rules also apply to the acquisition of a

\textsuperscript{5} Reuters, ‘Germany moves to protect key companies from Chinese investors’ (27 July 2018), available at www.reuters.com/article/us-50hertz-m-a-kfw/germany-moves-to-protect-key-companies-from-chinese-investors-idUSKBN1KH0RB.


\textsuperscript{7} BMWi, Twelfth Amendment to the Foreign Trade and Payments Ordinance, BAnz AT 28 December 2018 V1; Circular Order 3/2018 of 19 December 2018, BAnz AT 28 December 2018 B1; cf. Annweiler, NZG 2019, 528; Slobodenjuk, BB 2019, 202; Dammann de Chapto/Brüggemann, NZKart 2019, 93.
company operating certain high-grade earth-remote sensing systems (Section 10 of the Act of Satellite Data Security). The sector-specific investment review is not covered in this chapter in further detail, as it is rare in practice because of the narrow focus on military-use technology.

**ii Cross-sectoral regime**

Outside the sector-specific review, a cross-sectoral review system applies pursuant to Section 55 et seq. of the AWV. This cross-sectional review applies to businesses of all sectors regardless of the size of the company involved in the acquisition. However, within the cross-sectoral review scheme, a distinction is made between the acquisition of entities or businesses active in critical infrastructures and other companies.

**iii Type of investors concerned**

Under the cross-sectoral investment regime, acquisitions by any investor outside the EU or the European Free Trade Association (EFTA), or both, are covered. It is irrelevant in this context whether the investor is a private investor or state owned, and whether the investor actually is already operating within the EU or EFTA (e.g., through a branch). For the determination of whether an investor qualifies for the cross-sectoral investment review, its place of incorporation or factual place of management outside the EU or EFTA is decisive.8

As will be discussed below, the cross-sectoral investment review also covers indirect acquisitions of voting rights and businesses. As a consequence, it is sufficient in principle if one entity within a corporate chain is incorporated in or managed from outside the EU or EFTA to trigger a foreign investment review. In particular, under the revised provisions of the AWV, it will generally not be relevant whether the direct acquisition occurs through a German or EU entity, if and as long as such entity is controlled (for purposes of the foreign investment regime) by non-EU or EFTA entities.

The AWV contains a further rule, pursuant to which even acquisitions by EU or EFTA-incorporated investors may be subject to review of the BMWi if there are reasons to believe that the use of the local entity is (at least in part) based on a scheme to circumvent the application of foreign investment rules, particularly because of the acquiring vehicle not having operative business or a local presence in the form of offices, personnel or production assets.9 Because of the broad definition of ‘indirect acquisitions’, further discussed below, it is unclear in which context these anti-circumvention rules will still be relevant in future, outside a scenario where an acquisition vehicle is held in trust.10

**iv Type of investment**

The AWV covers acquisitions of an existing ‘domestic enterprise’ or of a ‘direct or indirect participation’ in an existing domestic enterprise. Consequently, any acquisition of shares in

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8 See the definition ‘EU Resident’ and ‘Non-EU Resident’ in Section 2(18) and (19) of the Foreign Trade Act (AWG); cf. also Böhm, ZBB/JBB 2019, 115, 118.
9 Section 55(2) AWV.
10 Pursuant to some commentators, the circumvention rule should also apply if a domestic entity is the direct acquiror and such entity is held by a non-EU or EFTA investor – this would have the consequence that indirect acquisitions of non-EU or EFTA acquirors with a direct domestic acquiror would only be subject to scrutiny in a circumvention case. Particularly before the background of the recent revisions to the AWV, this position seems inconsistent with the wording of the law and in our experience is also not in line with the interpretation applied by the BMWi.
a German company above the applicable threshold is subject to review, regardless of whether such shares are acquired through a share deal, through a capital increase, through a merger transaction or through a swap transaction. As the law links the acquisition of a participation in a company to certain voting rights thresholds (depending on the business sector concerned, either 10 per cent or 25 per cent, see subsection v, below) that are so acquired, the mere acquisition of non-voting shares or option or preemptive rights to acquire shares in future is, however, not subject to foreign investment review prior to the exercise of such rights.

In addition to the acquisition of voting shares through a share deal or similar transaction, the law also covers the acquisition of an enterprise through an asset deal. As long as the acquisition relates to an enterprise (i.e., a group of assets comprising a business undertaking that are used for a commercial purpose rather than individual assets that do not form an enterprise), any acquisition of such enterprise by an entity in which an investor holds voting rights above the applicable threshold will trigger the foreign investment review.

Contrary to the acquisition of existing enterprises, establishing a new company (greenfield investments) or the creation of commercial joint ventures (i.e., where there is no corporate participation in an existing German entity) will not be subject to restrictions under the foreign investment control regime.

v Applicable voting rights thresholds

Acquisition of voting shares or of a business through an asset deal are only subject to review if certain thresholds of voting rights are reached or surpassed. By contrast, the value of shares or assets acquired is irrelevant for the purposes of foreign investment review.

General rule

First, there is a general threshold of 25 per cent of voting rights covering acquisition of any domestic enterprise irrespective of the business segment it operates in. The review will be triggered at the time the investor ‘reaches or surpasses’ this threshold of 25 per cent of voting rights.

Critical infrastructures

In contrast, the relevant control threshold is significantly lowered if the enterprise in question operates in certain specific business sectors of particular relevance to security within the meaning of Section 55(1), Sentence 2, Nos 1–6 of the AWV. If businesses active in these areas are concerned, an acquisition of 10 per cent of voting rights already suffices to trigger

11 BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 1, Section I Question 2.
12 Ibid.
13 Id., Question 3.
14 It is debatable whether the review will be triggered again once an investor acquires additional voting rights above the applicable threshold. The wording of the relevant provisions in Section 56(1) AWV does not suggest such conclusion. See, for this view Becker/Sachs, NZG 2017, 1336, 1338; Pottmeyer, in: Wolfgang/ Simonsen/Rogmann, AWR-Kommentar, Sections 55 to 59 of the AWV, Paragraph 22; Hasselbrink, GmbHR 2010, 512, 515; Krause, BB 2009, 1082, 1083; Traugott/Strümpf, AG 2009, 186, 191; cf. also for the legislator’s intention reflected in BT-Drs. 16/10730, p. 13. However, certain authors hold that the acquisition of higher or majority rights will justify a renewed review, in particular if the shareholder acquires a relative or absolute voting majority: Hensel/Pohl, AG 2013, 849, 854; Besen/Slobodenjuk, BB 2012, 2390; Söhner, RIW 2011, 454, 459; Stork, EWS 2009, 454, 457.
the foreign investment review process (and, as will be explained below, in case of acquisitions of companies active in these business segments, a mandatory notification obligation applies). At the same time, the law stipulates that in case of acquisitions in these sectors, a threat to public order or security may be considered particularly likely.\(^{15}\)

The critical infrastructures concerned that are subject to the lower 10 per cent control threshold are the following business areas:

German companies that:

- operate critical infrastructures within the meaning of the Act on the Federal Office for Information Security\(^{16}\) (e.g., facilities that (1) belong to the energy, information technology and telecommunications, transport, healthcare, water, food, finance or insurance sector, and (2) are vital to the functioning of the community);
- develop or modify certain sector-specific software\(^{17}\) for the operation of critical infrastructures within the meaning of the Act on the Federal Office for Information Security (e.g., software for (1) power plant or network control technology in the energy sector, (2) control and automation technology in the water sector, (3) cash supply, card-based payments or security transactions, (4) hospital information systems or the marketing of prescription drugs, (5) air, rail or road transport of passengers and goods, and (6) food supply);
- are entrusted with the operation of telecommunications surveillance measures according to the Telecommunication Act or manufacture technical equipment therefor;
- provide certain cloud computing services;
- have an authorisation for components or services related to the telematics infrastructure according to Volume V of the Social Insurance Code; or
- are active in the media sector and, with particular topicality and broad impact, contribute to forming public opinion via broadcasting, tele media or print media.

vi Attribution of voting rights

The AWV contains far-reaching rules on the attribution of voting rights to an investor.

According to Section 56(2), No. 1 AWV, voting rights of third parties in which the acquirer holds a participation corresponding to the relevant threshold applying to the direct acquisition are fully attributed to the investor. Therefore, if, for example, a non-EU or EFTA

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\(^{15}\) It is unclear whether the wording of the law constitutes a presumption, or just mandates a particularly thorough screening of acquisitions in these sectors – in our view the latter interpretation is warranted, as the burden of proof vests with the public authorities pursuant to applicable general administrative law (Section 24 of the German Federal Administrative Procedure Act) and this principle would otherwise be jeopardised. In any event, the list of critical infrastructures provided by the law is conclusive only for the purposes of the notification obligation, but merely illustrative for the purposes of determining a threat of public order or security, so that prohibitions may also be issued based on public order or security outside these sectors (and with a relevant threshold of 25 per cent applying), cf. BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 3, Section II, Question 2.

\(^{16}\) See also the pertinent Ordinance regarding the Determination of Critical Infrastructures (BSI-KritisV) issued by the Federal Office for Information Security.

\(^{17}\) Section 55(1), Sentence 3 AWV sets forth certain further details on the definition of ‘sector-specific software’; pursuant to guidance given by the BMWi, such software must have been developed or modified with the specific purpose of use for critical infrastructures; a software that is not primarily aimed at such purpose (but may be used within critical infrastructures), is not covered by contrast, cf. BMWi, FAQ re investment control under foreign trade laws of May 2019, p. 2, Section I, Question 7.
entity holds 10 per cent of an intermediary entity holding 6 per cent of the shares of a domestic German company operating a critical infrastructure business and the non-EU or EFTA entity acquires 4 per cent of the shares of such German company, this transaction triggers a potential review by the BMWi. Pursuant to Section 56(2), No. 2 AWV, shareholdings of a third party are also attributed if the acquirer and the third party have concluded an agreement on the joint exercise of voting rights (acting in concert).

Moreover, these attribution rules apply through the chain in the case of indirect acquisition.\textsuperscript{18} As a consequence, if, for example, a German company acquires a 10 per cent shareholding in a critical infrastructure business, such German company is majority held (or at least 10 per cent thereof are held) by an EU company and such EU HoldCo in turn is held with a shareholding quota of at least 10 per cent by a non-EU investor, the investment will be subject to review.

As a consequence of these far-reaching attribution rules, which are not linked, in particular, to corporate control thresholds or the relevant control definition under antitrust law, transaction structures will have to be closely scrutinised. As it may be sufficient for one entity within the chain that is not located in the EU or EFTA to acquire, in the context of the transaction, a shareholding of at least 10 per cent or 25 per cent (indirectly) in a German entity, the full transaction structure must be assessed on a case-by-case basis to determine whether notification obligations (in case of critical infrastructures) or review rights (in case of acquisitions not concerning critical infrastructures) apply.

\textbf{vii Intra-group restructurings}

It is debatable whether the attribution of voting rights (and the resulting need to subject an acquisition to foreign investment review) is warranted in case of merely restructuring an existing investment within a corporate group. For example, if a German entity that was indirectly held by a US HoldCo is moved within the corporate structure and thereby becomes the subsidiary of a Chinese interim HoldCo that itself is held by the preexisting ultimate parent US HoldCo, such transaction will, applying the wording of the AWV, be subject to review, although there is no change of control on the level of the ultimate parent. As the competent authority in our experience is not taking a clear position in these cases, the parties should consider an application for a certificate of non-objection at least in cases where it is questionable whether the subsidiary concerned may operate in a critical infrastructure or public order or security may otherwise be affected.

\textbf{viii Notification obligation and application for certificate of non-objection}

Where the acquisition of a business active in critical infrastructures (as described in Section II.v) is concerned, the law requires a mandatory notification of the BMWi by the acquirer.\textsuperscript{19} The notification obligation is triggered by the conclusion of the contract obliging the parties to transact (regularly: the sale contract), not just at the time of transfer in rem or closing. The law only stipulates that the notification is to be made in writing, but does not contain further formal or substantive requirements for the notification as such. Regularly,

\textsuperscript{18} Section 56(3) AWV.

\textsuperscript{19} Section 55(4), (1) AWV. Both a notification with regard to the acquisition of critical infrastructure as well as a certificate of non-objection (see Sections IV.iii and IV.iv) will need to be made in the German language pursuant to applicable general administrative law (Section 23 of the German Federal Administrative Procedure Act).
it will be sufficient to describe the transaction and parties (in particular the investor and the applicable control structure through the corporate chain) and to provide a high-level description of the target's and the investor's business (explaining, in particular, why and to what extent the transaction relates to critical infrastructures). Upon such notification, the BMWi will decide upon the commencement of a formal review procedure (see Section II.vi).

Outside the acquisition of critical infrastructures, there is no obligation to notify. However, to avoid uncertainty with regard to a potential ex officio review, an investor may apply for a certificate of non-objection.²⁰ A certificate of non-objection confirms that the acquisition does not raise any concerns related to public order or security. To apply, the investor should submit basic information on the planned acquisition, the domestic enterprise that is the subject of the acquisition and the respective fields of business of the investor and the enterprise to be acquired to the BMWi. The BMWi will then decide within a time period of two months whether it will enter into a formal review process, failing which the certificate shall be deemed to have been issued (see Section II.vi).

While it is not mandatory to apply for a certificate of non-objection, in practice, it will in many cases be recommendable to do so. As will be explained below, an ex officio review by the BMWi will only be triggered by the BMWi obtaining positive knowledge of a transaction, with a statutory longstop date of only five years from conclusion of the sale contract. Absent an application for a certificate of non-objection, the investor will not be in a position to demonstrate that the BMWi obtained such positive knowledge, so that there will be a prolonged period of uncertainty and a possibility that the BMWi will retroactively seek to unwind the transaction. Therefore, if there is the possibility that the transaction may raise concerns with respect to public order or security, it will be recommendable to apply for a certificate of non-objection. Experience shows that such applications are handled in a pragmatic and time efficient way in most cases where concerns regarding public order or security can easily be ruled out and instances where the BMWi proceeds to a more comprehensive review (e.g., by requesting additional documents) are relatively rare.

III  TYPICAL TRANSACTIONAL STRUCTURES

As explained, the foreign investment regime in Germany covers both share and asset acquisitions of an existing German enterprise.

In a typical share deal, the seller and purchaser will agree on a sale of certain identified shares, but will not immediately consummate such sale. Rather, closing will be conditioned upon obtaining regulatory approvals. Where public order or safety are implied (either because of the acquisition of shares in a company operating critical infrastructures or because of general considerations) and the relevant voting right threshold is reached or surpassed, the parties will regularly include the lapse of the applicable review period or obtaining a certificate of non-objection as a condition precedent for closing. This is to mitigate the risk that (while the review process outside of the sector-specific control regime is non-suspensory) a transaction may have to be unwound in case of an adverse decision by BMWi.

²⁰ Such an application is also permissible in conjunction with a notification pursuant to Section 55(4) AWV – with the effect of shortening the applicable review period from three to two months (see Section II.vi). An application for a certificate of non-objection is deemed to include the required notification (if any), but not vice versa, so that it should always be made clear that a certificate of non-objection is being applied for.
Where share acquisitions through merger or capital increase transactions are concerned, this will be commonly based on an investment agreement and technical implementation of the share acquisition will then occur pursuant to a court sanctioned scheme. Similar to a share purchase transaction, the investment agreement will regularly foresee foreign investment clearance as a condition precedent to proceeding with execution of the relevant corporate acts.

In a public takeover scenario, a separate and well-defined legal regime applies and any decision by a bidder to acquire shares in an entity that is domiciled in Germany\(^{21}\) and listed on an EU organised market will need to be notified to the financial regulator (BaFin), relevant stock exchanges and the public immediately. Thereupon, a strict timeline is triggered, which eventually leads to the publication of an offer document with prescribed acceptance and settlement periods (depending on whether the bidder seeks to obtain control over the target,\(^{22}\) various minimum prizing and most favoured treatment rules may apply as well). For the purposes of foreign investment review, it is generally permissible to make public offers subject to obtaining required regulatory clearances, and the bidder will include a respective condition precedent to settlement of the offer in its offer document. While the law stipulates\(^ {23}\) that the \textit{ex officio} review period is triggered by the BMWi obtaining knowledge of the publication of the bidder’s intention to launch an offer (and not just with the launch of the offer as such), this should be irrelevant in most cases, as a bidder will regularly notify the transaction (or apply for a certificate of non-objection) in a public takeover scenario.

Finally, in case of an asset deal, similar consideration as in a share purchase will apply.

\section*{IV REVIEW PROCEDURE}

\textbf{i Review process and timelines}

With respect to the applicable process and timelines for cross-sectoral review, an \textit{ex officio} review has to be distinguished from a review upon a notification of the transaction, or a review process triggered by the application for a certificate of non-objection.

In all of these cases, from a technical legal perspective, the review procedure has no suspensory effect (so it will be possible to consummate the transaction in theory – while in case of an adverse decision by the BMWi, it will potentially have to be unwound).

\textbf{ii Ex officio review}

To the extent the investor is not obliged to notify the acquisition of voting rights (i.e., where no acquisition of a business in critical infrastructures is concerned) or does not apply for a certificate of non-objection voluntarily, the BMWi may review transactions \textit{ex officio}.

Such \textit{ex officio} review can be commenced by the BMWi if it notifies the direct acquirer and the domestic company affected by the acquisition about the opening of an in-depth investigation procedure within three months of obtaining knowledge of the conclusion of the relevant acquisition documentation. Any such notification by the BMWi must be in writing; for the purposes of determining whether the deadline for initiating an in-depth investigation

\footnotetext{21}{Certain exceptions apply where a company is domiciled in the EU but has a (sole or primary) listing in Germany, see Section 1(3) Takeover Act.}

\footnotetext{22}{The German Takeover Act defines ‘control’ as the acquisition of at least 30 per cent of voting rights. An acquisition of such percentage of voting rights outside a public offer (also based on various attribution rules or acting in concert) triggers an obligation to launch a mandatory offer at a prescribed minimum price.}

\footnotetext{23}{Section 55(3) AWV.}
has been met, service of the notice to the domestic company affected by the acquisition is decisive. In addition, a statutory longstop date of five years from conclusion of the acquisition documentation applies irrespective of the knowledge of the BMWi.

Given that the standard review deadline of three months is only triggered by positive knowledge of the BMWi, it will in practice be very difficult to determine when such period has lapsed if the acquirer does not apply for a certificate of non-objection or files a formal notification pursuant to Section 55(4) AWV in case of the acquisition of critical infrastructure businesses.

### iii Review upon notification

Where the acquisition of critical infrastructure businesses is concerned, such acquisition has to be notified to the BMWi in writing. Through such notification, which can be submitted by the acquirer or the target, the BMWi will obtain positive knowledge of the transaction and the review deadline of three months to determine whether an in-depth investigation will be launched applies, as discussed in the preceding paragraph.

Where an acquirer chooses to apply for a certificate of non-objection, a shortened review period of two months applies (see Section IV.iv).

### iv Review upon application for certificate of non-objection

An acquirer may apply to the BMWi in writing for the issuance of a certificate of non-objection. As explained in Section II.viii, such application will regularly be prudent if there are at least initial concerns that public order or security may be threatened by the transaction. If an application is made, the BMWi has to decide whether it intends to open an in-depth investigation within two months from receipt of the application. In case it does not notify the applicant about its intention to open an in-depth investigation in writing within such two-month period, the certificate of non-objection is deemed to have been issued (and such deemed issuance can regularly not be revoked or withdrawn by the Ministry anymore other than in exceptional cases, such as where the information made available by the applicant was wrong). Applying for a certificate on non-objection does not trigger administrative fees or costs (other than the own costs of the applicant and its advisers).

### v In-depth investigation

In case the BMWi decides to initiate an in-depth investigation, the direct acquirer is required to submit documentation to the BMWi as determined by the Ministry by way of the general instruction published in the Federal Gazette. The BMWi may request all entities directly or indirectly involved in the acquisition to submit additional documentation as needed for carrying out the investigation.

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24 The notification obligation is already triggered by the conclusion of a purchase contract, not just at the time of the in rem acquisition.

25 The BMWi will regularly not inform the notifying parties that no in-depth investigation is launched except in case a certificate of non-objection is being applied for.

26 Such an application can be submitted as soon as the applicant is in possession of the relevant documents and in any case prior to signing on the basis of sufficiently progressed transaction documentation.

27 In particular, Sections 48 and 49 of the German Federal Administrative Procedure Act.

28 The documentation must cover, inter alia, detailed information about the purchaser, the target and its business, shareholdings before and after the acquisition, business contacts to public bodies and the
For the in-depth investigation, a deadline of four months after the receipt of complete documents applies. Within such four months period, the BMWi may prohibit the direct acquirer from making the acquisition, or, in the alternative, it may issue instructions to safeguard the public order and security of the Federal Republic of Germany. If it intends to issue such prohibitions or instructions, it must obtain the approval of the German federal government.

In addition, the BMWi may negotiate and enter into public law contractual agreements with the acquirer which are aimed at guaranteeing public order and security in the Federal Republic of Germany. The four-month deadline for the issuance of prohibitions or instructions is suspended for the time period of negotiations.

If the BMWi intends to prohibit a transaction, it may in particular prohibit or restrict the exercise of voting rights in the acquired company which belong to a non-EU or non-EFTA acquirer or are attributed to him or her, or appoint a trustee to bring about the unwinding of a completed acquisition at the expense of the acquirer.

vi Substantive scope of review, prohibitions and orders

In its review, the BMWi assesses whether an investment may impose a risk to public order or security in Germany that is actually threatening and sufficiently important so that it may affect fundamental public interests. The term public order or security refers to Article 36, Sections 52(1) and 65(1) of the TFEU and has to be interpreted pursuant to EU law.

Under these provisions, grounds of public order and security may justify restrictions of the free movement of goods, capital and payments and the freedom of establishment. Historically, the European Court of Justice has applied these criteria very restrictively and ruled that abstract concerns about investments in undertakings in strategic sectors do not constitute a valid justification based on public order or security. However, the political discussion of the recent past clearly indicates that authorities may apply a broader understanding of public order and security in future and the BMWi has considerable discretion in determining whether public order or security are at risk.

Therefore, and owing to the fact that if a prohibition decision is issued the transaction will likely have to be abandoned irrespective of whether the decision is potentially upheld or not in subsequent litigation against the BMWi, in practice the authority has significant leverage to negotiate public law agreements containing certain security related conditions or commitments with investors (see Section IV.v). In the preceding years, the German government has concluded several such agreements with purchasers.
VII Legal protection against decisions by the BMWi

If the BMWi opens a review procedure, prohibits an acquisition or imposes restrictions, such decisions may be challenged pursuant to general principles of administrative law. Such legal challenges may exclusively be brought by the acquirer or by the seller, but not by the relevant target.\(^\text{32}\) There is no need to carry out previous opposition proceedings as the decisions by the BMWi are issued by a higher federal authority and are thus not open to such opposition proceedings according to Section 68(1), No. 1 of the German Code of Administrative Court Procedure.

Because the foreign investment regime shall only protect public order and security and not the interests of third parties, third parties will not be in a position to challenge a clearance or deemed clearance (or any other decisions by the BMWi) in court.

In practice, these legal protections are not particularly relevant. Even if legal action against a prohibition or instruction by the BMWi can be brought in theory, the timeline and publicity of a transaction will generally not permit sustaining the deal uncertainty for the prolonged time period of a legal proceeding.

V FOREIGN INVESTOR PROTECTION

Germany has entered into more than 130 bilateral investment treaties (BITs) and is the country with the most BITs worldwide. Many of the German BITs have been concluded based on a model agreement and customarily contain protection against expropriation without adequate compensation, principles of fair and equitable treatment, principles of full protection and security, most favoured nation treatment, protection against discrimination and provisions on the unrestricted transfer of capital and profits. While several of these BITs have been concluded a long time ago and older BITs do not always contain state-investor dispute settlement clauses, investor-state dispute settlement by way of arbitration has been provided for in German BITs since the 1980s. In particular, Germany is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID convention) which it signed in 1966 with ratification and entry into force in 1969.\(^\text{33}\)

Cases where a dispute settlement mechanism under BIT against Germany was initiated are very rare. As of June 2019, only one dispute was pending and two cases were settled or discontinued (while there were 25 pending cases by German investors against foreign states and a significant number of decided cases).\(^\text{34}\)

In 2009, competence for foreign investor protection was transferred to the European Union with the entry into force of the Lisbon treaty. As a result, the EU Member States can no longer negotiate BITs without involvement of the European Commission and, since 2009, no new German BITs have entered into force. Existing BITs are grandfathered, however, as long as the EU has not concluded investment treaties replacing the respective bilateral BITs. Since 2009, the European Union has tried to negotiate free trade agreements with a number of countries and concluded negotiations in particular with regard to Canada, Singapore and Vietnam. However, the investment protection provisions of these agreements are currently not yet in force, as ratification by the EU Member States is still outstanding.

\(^\text{32}\) Krause, BB 2009, 1082, 1087; Müller/Hempel, NJW 2009, 1638, 1641; Seibt/Wallenschläger, ZIP 2009, 833, 844; Voland, EuZW 2010, 132, 135.

\(^\text{33}\) BGBl. II 1969, No. 12, p. 369.

\(^\text{34}\) For further information, see the statistical data on www.german-investment-treaty-disputes.de.
VI CURRENT DEVELOPMENTS

On 14 February 2019, the European Parliament approved an EU Regulation\(^{35}\) on foreign direct investment screening, it will apply from October 2020.

Pursuant to this new Regulation, although individual Member States retain their authority to screen foreign investments, numerous procedures and criteria will be established for cooperation among Member States and with the European Commission. Specifically, an EU-wide framework will be established that grants competence to the European Commission to intervene with an official opinion on the grounds of public order or security and a forum for Member States will be provided to weigh in and potentially affect the course of foreign investment activities across the European Union.

In practice, the most significant impact on German foreign investment controls will be the additional potential delays caused by such cooperation and intervention, while the substantive parts of the Regulation (e.g., the definition of strategic sectors and critical infrastructures) should already be mirrored in principle by the current German legislation in force.

Pursuant to the Regulation, Member States will be required to notify the European Commission and all other Member States of an ongoing foreign investment screening\(^{36}\) and provide certain information on the transaction set forth in the Regulation.\(^{37}\) Upon such notification, other Member States may provide comments to the Member State conducting the screening, where they consider that the foreign investment undergoing the screening is likely to affect their public order or security. Equally, the European Commission may issue an opinion where it considers that the foreign investment undergoing the screening is likely to affect public order or security in more than one Member State.

Upon a notification of an ongoing screening and provision of the required information, the European Commission and other Member States have 35 calendar days to provide comments and the European Commission should issue its opinion within that 35-day time frame as well (but is allowed an additional five days if Member States provide comments). If the information provided by the Member State conducting the screening is deemed insufficient, the European Commission and other Members States may also request to be provided with further information within 15 calendar days of the initial notification, and thereupon have 20 calendar days to provide comments or an opinion.

Although the European Commission’s power to issue opinions is discretionary, if at least one-third of Member States consider the foreign investment likely to affect their public order or security, the European Commission must set out its views on the transaction and while the opinion does technically not have binding force, Member States are required to take account of it and provide an explanation if the opinion is not followed. Factually, therefore, the views of the European Commission will have significant relevance and investors will not only need to analyse potential impact in Germany, but also consider impact beyond the borders of the actual transaction based on the very broad concept of public order and security.

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\(^{35}\) Regulation EU 2019/452 (the Regulation).

\(^{36}\) Article 6 of the Regulation; there is also a separate mechanism for the Member States and the European Commission to provide comments or an opinion on transactions not undergoing a screening process yet in Article 7 of the Regulation.

\(^{37}\) Article 9(2) of the Regulation.
INTRODUCTION

The location of choice for investment by multinational corporations, Ireland very much remains open for business as the English-speaking gateway to the lucrative European market. Ireland continues to lead the world in attracting high-value foreign direct investment (FDI) projects and its ability to attract such projects in key sectors – such as ICT, life sciences, and financial and business services – has been globally acknowledged. Leading US companies in the technology and social media sectors with EMEA headquarters in Ireland, such as Google, LinkedIn, Dropbox, Airbnb, Microsoft, Salesforce, Facebook and Twitter are a testament to Ireland’s continued success in this regard. Indeed, nine of the top 10 US ICT companies are located in Ireland and this has earned the country a reputation as the ‘CPU of ICT’ in Europe. Ireland also remains attractive as a holding company jurisdiction for large US-listed multinational corporations seeking to achieve an appropriate balance between the practicalities of day-to-day management, solid shareholder rights and robust corporate governance within a stable and well-developed legal and regulatory environment.

Ireland’s recovery from the sharpest economic contraction in its history is now firmly established and the Irish economy grew at the rate of 6.7 per cent in 2018, well above the euro area average. In light of Britain’s impending exit from the European Union on 31 October 2019, Ireland’s position in and access to one of the world’s largest markets is now even more significant. Already, Bank of America, Morgan Stanley, Barclays and S&P Global have relocated, and others are expected to move all or part of their operations or business lines from the United Kingdom to Ireland to retain access to the European market. The United Kingdom’s vote to leave has no effect on Ireland’s status as a full EU Member State, and both the Irish government and the Irish people are committed to Ireland’s continued membership of the European Union and the eurozone.

Ireland’s attractiveness as an investment location can be attributed to the positive approach of successive governments to the promotion of inward investment, its EU membership, a very favourable corporate tax regime and wider tax infrastructure, and a highly-educated, skilled and flexible labour pool, as evidenced by an Economist Intelligence Unit report examining the main factors that bring foreign investors to Ireland. In the mid

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1 Pat English is a partner and Grace Murray is a senior associate at Matheson.
2 IBM Global Location Trends 2018 Annual Report.
Ireland

1990s, the government embarked on a series of reforms to ensure that the level and structure of taxation, cost and quality of infrastructure, and the effectiveness of training and education were given greater emphasis.5

Irish governments have used Ireland’s tax infrastructure to facilitate the establishment and expansion of overseas companies, and have continually enhanced and refined the tax system to ensure that the country remains attractive to foreign investors.6 Ireland has maintained a corporate tax rate of 12.5 per cent for active business, and has an extensive double taxation treaty network.

The government aims to maintain an open and free market for investors. There are no general restrictions governing FDI in Ireland,7 no limits on the percentage of foreign ownership permitted, no requirements that shares in Irish companies must be held by Irish citizens, and no restrictions on the purchase of land for industrial purposes by foreigners. Private investment, whether domestic or foreign, is not permitted in the arms industry, but there are no other foreign investment restrictions for public policy or security reasons. Indeed, Ireland scored favourably in the Organisation for Economic Co-operation and Development’s (OECD) FDI regulatory restrictive index, which measures statutory restrictions on FDI in 69 countries.8

The Irish legal system, similar to that of the United States, is based on the English common law tradition. It is modified by Irish legislation and case law, and is further influenced by Ireland’s membership of the European Union. In the area of company law, government policy has been 'to establish a legal framework that is among the world's best – an efficient and effective framework that ensures that Ireland is a less bureaucratic place to do business, for both indigenous and foreign-owned companies'.9 Indeed, Ireland was ranked as the 11th best country in the world in which to do business in a recent study carried out by Forbes.10 The study, for which 161 countries were surveyed, was based on analyses of 15 factors, including innovation, taxes, property rights, technology, corruption, infrastructure, market size, political risk, workforce, freedom (personal, trade and monetary) as well as red tape, investor protection and quality of life, with each category being equally weighted.

As part of its active promotion of foreign investment, the government operates a grant aid system administered by the Industrial Development Agency (IDA), which provides grant incentives to companies meeting certain criteria (linked to job creation and investment commitment with respect to specific locations). The IDA is responsible for the promotion and development of foreign investment into Ireland, and targets sectors that produce

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6 Trading and Investing in a Smart Economy: A strategy and action plan for Irish Trade, Tourism and Investment to 2015, p. 33.
7 The Minister for Finance can restrict transfers between Ireland and certain designated countries provided that the restrictions conform with EU law.
8 The FDI index gauges the restrictiveness of a country’s FDI rules by looking at the four main restrictions on FDI: foreign equity limitations, discriminatory screening or approval mechanisms, restrictions on key foreign personnel and operational restrictions (e.g., restrictions on branching and on capital repatriation or on land ownership). Ireland scored 0.043, with zero representing an open market and 1 representing a restrictive market. www.oecd.org/investment/fdiindex.htm.
9 Department of Enterprise, Trade and Innovation, 2010, Trading and Investing in a Smart Economy: A Strategy and Action Plan for Irish Trade, Tourism and Investment to 2015, p. 34.
sophisticated and high-value products and services, such as the technology, online and pharmaceutical sectors. The IDA, which has offices across the globe, can offer invaluable and practical advice, and should certainly be a first port of call for companies evaluating Ireland as a potential location in which and from which to do business.

Ireland does not have a single overarching body responsible for regulating investment into the country. However, depending on the circumstances of the investment and the nature of the industry, compliance with a regulatory regime and approval from a regulatory body may be required.

II FOREIGN INVESTMENT REGIME

The government is keen to ensure that there are no significant barriers to international trade or foreign investment in Ireland. However, certain types of investment and industries are subject to approval, regulation, or both, under Irish law.

i Mergers, joint ventures and acquisitions

Mergers, joint ventures and acquisitions are subject to antitrust legislation in Ireland and the European Union.\(^{11}\) The main Irish legislation in relation to antitrust law is the Competition Acts 2002–2017. Any merger, joint venture or acquisition that qualifies for notification must be notified to the Competition and Consumer Protection Commission (CCPC), which has the power to refuse to allow the transaction to proceed or to impose restrictions on it. A merger will qualify for notification to the CCPC when certain turnover thresholds are met. A merger control notification may be required to be submitted to the European Commission, instead of an Irish notification, where the jurisdictional thresholds of the EU Merger Regulation\(^{12}\) are triggered.

Media mergers are treated separately, however, and must be notified regardless of the turnover of the undertakings involved. Media mergers are subject to an additional review by the Minister for Communications, Climate Action and Environment (the Minister), who must have regard to certain public interest criteria, the extent to which ownership and control of media business is spread among individuals and undertakings, and the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the state.

Acquisition of a stake in an insurance or reinsurance undertaking or a credit institution may also be subject to prior approval from the Central Bank of Ireland (the Central Bank). Investors seeking to acquire a shareholding or other interest that would either give them a 'qualifying holding' in an insurance or reinsurance undertaking, or in a credit institution (authorised or licensed in Ireland), or that increases their control above certain levels (20, 33 or 50 per cent), must first obtain the approval of the Central Bank. A 'qualifying holding' is defined as a direct or indirect holding that represents 10 per cent or more of the capital of, or voting rights in, a target entity, or that confers a right to appoint and remove members of the board of directors or management, or otherwise allows that person to exercise a 'significant influence' over the direction or management of the target entity.

\(^{11}\) Undertakings in Ireland are subject to the antitrust provisions of the Treaty on the Functioning of the European Union (primarily Articles 101 to 109) to the extent that their activities are likely to have an effect on trade between EU Member States.

Public takeovers

Public takeovers are principally regulated by the Irish Takeover Panel Act 1997 (as amended), the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 and the Irish Takeover Rules (the Rules). The Rules operate to regulate the orderly conduct of public takeovers in Ireland and, inter alia, to ensure that no takeover offer is frustrated or unfairly prejudiced and, in the case of multiple bidders, that there is a level playing field (e.g., frustrating actions are not permitted without target shareholder approval, and due diligence information provided by a target company to one bidder must be provided to all bona fide bidders). The Rules are not concerned with the financial or commercial advantages or disadvantages of a takeover.

The Irish Takeover Panel (the Panel) is responsible for making the Rules and monitoring and supervising takeovers. It works through the office of the Director General, who deals with the general administration of the Rules and is responsible for monitoring dealings in relevant securities. The Director General is also available for consultation and to give guidance before and during takeovers. The Panel has the sole power to make rulings and give directions during the course of a takeover. It also has the right to enquire into the conduct of any person involved in a takeover, and the power to admonish or censure a person for non-compliance with the Rules.

Regulated industries

Particular industries in Ireland are subject to regulation and supervision by various regulatory bodies. Some of the key industries are set out below.

International financial services

The European Central Bank (ECB) is the lead regulator of credit institutions in the European Union, and the European Securities and Markets Authority (ESMA) is the lead regulator of non-bank financial services entities. Both the ECB and ESMA are assisted by competent national authorities in each of the EU Member States. The Central Bank is the national competent authority in Ireland for both credit institutions and non-bank financial services entities. To operate a banking business in Ireland, a licence or authorisation is required from the Central Bank or the ECB in respect of a credit institution that is a ‘significant’ institution.

Following the introduction of the ECB’s Single Supervisory Mechanism (SSM) in November 2014, the Central Bank is the regulator (home state regulator) for ‘less significant’ institutions operating within Ireland, while the ECB is the home state regulator for significant institutions and works with the Central Bank to supervise these bodies. A credit institution will be considered significant if any one of the following conditions is met:

- the total value of its assets exceeds €30 billion or — unless the total value of its assets is below €5 billion — exceeds 20 per cent of national gross domestic product;
- it is one of the three most significant credit institutions established in a Member State;
- it is a recipient of direct assistance from the European Stability Mechanism; or

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13 This refers to takeovers of Irish-registered public limited companies that are listed on a regulated market in the European Union, the ESM market of the Irish Stock Exchange, the AIM market of the London Stock Exchange, the New York Stock Exchange or NASDAQ.

14 The Central Bank Acts, as well as a number of domestic regulations transposing EU Directives (the most notable being Capital Requirements Directive IV) apply to the provision of banking services in Ireland.
the total value of its assets exceeds €5 billion and the ratio of its cross-border assets and liabilities in more than one other participating Member State to its total assets and liabilities is above 20 per cent.

Failure to fulfil these criteria notwithstanding, the SSM may declare an institution significant to ensure the consistent application of high-quality supervisory standards.

The SSM designates the licensing of significant institutions as a ‘core’ activity that is the responsibility of the ECB, though the Central Bank must confirm to the ECB that the requirements set out in Irish legislation have been met by the applicant bank before a licence will be granted.

To obtain a licence for either a significant or a less significant credit institution, the undertaking must satisfy several criteria, including capital requirements and having appropriate and proper procedures in Ireland. Entities wishing to carry on an insurance or reinsurance business also require an authorisation from the Central Bank.

The Central Bank is also the competent authority for the regulation of the securities market in Ireland. In addition, if the securities are listed on the Irish Stock Exchange, they will also be subject to regulation by the Stock Exchange.

Once authorised in Ireland, banking and other services (including investment services under MiFID and payment services under PSD2)\(^\text{15}\) can be passported throughout the European Union in reliance on the Irish authorisation. The home state regulator (i.e., the Central Bank in the case of less significant credit institutions and non-bank financial services entities) retains responsibility for the prudential supervision of the entity while the host state regulator (i.e., the regulator in the other EU Member State) will supervise the passported entity’s business conduct in that EU Member State.

**Communications**

The communications industry is governed by the Communications Regulation Act 2002 (as amended) and a number of regulations\(^\text{16}\) that implement the EU electronic communications reform package (the communications regime). Any entity intending to provide an electronic communications service or electronic communications network in Ireland must notify ComReg, the Irish telecommunications regulator, prior to commencing those services under the general authorisation regime, and be in possession of a general authorisation. Authorised entities must comply with the conditions that are part of their general authorisation, including various wholesale access obligations and consumer law requirements, and more generally with the communications regime. Wireless telegraphy licences are also required for the use of radio frequencies in Ireland.

**Broadcasting**

The broadcasting industry is primarily governed by the Broadcasting Act 2009 (as amended), and is regulated by the Broadcasting Authority of Ireland (BAI).

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Life sciences

Certain activities carried out in the life sciences sector are subject to regulation by the Health Products Regulatory Authority (HPRA). The HPRA’s role is to protect and enhance public and animal health by regulating medicines, medical devices and other health products. Manufacturers of human and veterinary medicines are required to hold a manufacturing authorisation granted by the HPRA. Manufacturing includes activities such as total and partial manufacture, dividing, packaging and repackaging, as well as importing medicinal products into Ireland from a country outside the EEA. The HPRA will only grant a manufacturing authorisation if an applicant has at its disposal suitable and sufficient premises, equipment, facilities, staff, manufacturing operations and arrangements for quality control, record-keeping, handling, storage and distribution.

Subject to some minor exceptions, all medicinal products must be authorised before being marketed in Ireland. An application for a marketing authorisation must be made to the HPRA or the European Medicines Agency, where appropriate.

The HPRA is the competent authority for general medical devices, in vitro diagnostic medical devices and active implantable medical devices. The role of the HPRA is to ensure that all medical devices placed on the Irish market meet the requirements of national and EU legislation, and to monitor the safety of medical devices in Ireland after they are placed on the market.

Export of dual-use items

The control of the export of ‘dual-use’ items and military goods is governed by the Control of Exports Act 2008 and the Control of Exports (Dual Use Items) Order 2009 (as amended), which gives effect to Council Regulation (EC) No. 428/2009 (as amended) setting up an EU regime for the control of exports, transfer, brokering and transit of dual-use items. Dual-use goods and technologies are goods and technologies (including software) that are normally used for civilian purposes but may have military applications. The legislation and requirements are complex and cover a wide range of common products produced by industries dealing with electronics, computers (including software), telecommunications and aerospace technologies. This notably includes products that have some forms of cryptographic functionality. The Export Licensing Unit is the division within the Irish Department of Business, Enterprise and Innovation that is responsible for managing controls on exports of dual-use items destined for countries to which trade sanctions apply.

III TYPICAL TRANSACTIONAL STRUCTURES

The following transactions structures are commonly used by foreign investors establishing a presence in Ireland.

i Companies

The simplest and most popular form of setting up a business in Ireland is by incorporation of an Irish company under the Companies Act 2014 (the Companies Act), which came into effect on 30 September 2015.

17 The granting of a manufacturing authorisation in Ireland is principally governed by the Medicinal Products (Control of Manufacture) Regulations 2007, as amended, which transpose into Irish law elements of a number of EU Directives.
force on 1 June 2015 (the Companies Act consolidates the 1963–2013 Companies Acts as well as introducing some innovations). There are two basic types of company in Ireland: private and public. Following the introduction of the Companies Act, there are two types of private limited company: the model private company (LTD) and the alternative Designated Activity Company (DAC). The vast majority of companies registered in Ireland are private companies limited by shares. Public limited companies are typically used where securities are listed or offered to the public.

The main advantage of the private limited company is that shareholder liability is limited to the amount paid for its shares in the relevant company. Once certain decisions are made (e.g., type of company, company name, company location, persons who will act as directors or company secretary), a company can be incorporated in Ireland within five working days. In addition, all companies must have a registered address in Ireland. An LTD must have at least one director and a separate secretary. An LTD has no objects clause and therefore has unlimited corporate capacity once acting within the law. Other company types must have a minimum of two directors and a secretary (but in this case, the latter can also be a director). Generally speaking, at least one director must be resident in the EEA unless an insurance bond is put in place. Other company types retain an objects clause, but a third party dealing in good faith with the company will not be prejudiced if the company exceeds its corporate capacity.

The procedure for establishing a public limited company is similar; however, a public limited company is subject to minimum capitalisation requirements.

All company types can be incorporated with a single shareholder.

ii Acquisition of assets and companies

A foreign investor may also acquire an existing Irish company, or acquire the business and assets of an existing Irish company.

Acquisitions can be structured as a share purchase, in which case the shares of the Irish company are acquired directly from the shareholders. All the assets and liabilities of the target company are acquired in a share purchase. The transaction is documented by a share purchase agreement that, if it includes any warranties, will typically be supplemented by a disclosure letter and an instrument of transfer of the shares.

In an asset acquisition, the purchaser can choose which assets and liabilities it wishes to acquire. The parties will typically enter into an asset transfer agreement that documents the assets to be transferred and the consideration payable. Depending on the asset profile of the business, specific additional transfer documents may be required to perfect the transfer of the assets in question. If the nature of the assets and liabilities being transferred is such that the transfer constitutes a transfer of undertakings, there will be an automatic transfer to the purchaser of the rights and obligations of the target company towards its employees by virtue of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003.

Prior to an acquisition of either the assets or shares of an existing company, an extensive due diligence exercise will typically be carried out. Third-party consents may also be required in advance of the acquisition. The acquisition of shares in a public limited company may also be subject to compliance with the Irish Takeover Rules.

In addition to the above, the European Communities (Cross-Border Mergers) Regulations 2008 (as amended) introduced a legal framework to enable cross-border mergers between public or private limited companies from different Member States of the EEA. All the assets and liabilities of one or more companies are transferred to another company by way of
universal succession and the transferor company is dissolved without going into liquidation. The merger can be effected by acquisition, by formation of a new company or by absorption (which involves the assimilation of a wholly owned subsidiary into the surviving company).

The Companies Act introduced a domestic statutory regime for Irish private companies modelled on the European Cross-Border Merger regime. At least one of the entities involved in the transaction must be an LTD. The transaction involves either a court approval process or use of the Summary Approval Procedure (requiring shareholder consent and the making of a declaration of solvency by the directors). Under the Companies Act, a private company limited by shares can also be split (by division) between two other Irish companies (one of which must be an LTD and neither of which can be a public limited company). Divisions are conducted through a court-approved process and the Summary Approval Procedure cannot be used. Mergers and divisions of public limited companies are also regulated under the Companies Act.

### iii Joint ventures

Foreign investors may establish a joint venture in Ireland. In this regard, the following three structures are commonly used:

- a corporate joint venture involving the incorporation of a limited liability company to carry out the joint venture business (potentially a DAC with a specified objects clause);
- a partnership formed under the Partnership Act 1980 or the Limited Partnerships Act 1907. The partnership may be limited or unlimited, and will be subject to one level of tax; and
- a contractual arrangement whereby the terms of the joint venture and the legal relationship between the parties will be governed by contract law. Each party will be subject to separate tax.

There may also be notification requirements if the joint venture comes within the scope of the Competition Acts 2002–2017 or the Irish Takeover Rules.

### iv Migrations and redomiciliations

Ireland also remains a potentially attractive destination for corporate groups choosing to redomicile their ultimate holding company (commonly referred to as ‘inverting’, or an ‘inversion’). Redomiciliations or inversions of US companies were prominent between 2012 and 2016, primarily driven by the US corporate tax regime. More recently, following the introduction of new regulations by the US Treasury Department, inversions have become less commonplace.

There are a number of ways in which a foreign corporate group may structure a redomiciliation into Ireland. One option is to migrate the existing holding company’s tax residence to Ireland (i.e., by the transfer of its central management and control to Ireland). This structure can present difficulties, however, as many jurisdictions impose a tax charge on a migration of tax residence. It can be a particularly unfeasible route for US companies, as the United States does not have a separate concept of tax residence as distinct from the place of incorporation. For public companies incorporated in a common law jurisdiction, a more common form of inversion structure involves the incorporation of a new Irish parent company between the existing parent company and the public stockholders that engages in a court-approved cancellation scheme of arrangement or a share-for-share exchange. Under a court-approved cancellation scheme of arrangement, the public stockholders agree to having
their shares in the existing parent company either cancelled or swapped for shares in the new Irish parent company. Reverse mergers are also used, whereby the US purchaser merges into a subsidiary of the Irish target and the Irish target issues new shares to the stockholders of the US company. For EU-incorporated public companies, an inversion may also be achieved by re-registering the existing parent company as a European public company and then transferring its place of registration to Ireland. EU parent companies can also redomicile to Ireland by merging with an Irish public company under the cross-border merger regulations; however, this option is not available to US parent companies.

Because of US anti-inversion rules, most inversion opportunities for US companies seeking to redomicile to Ireland are now arising in an acquisition context, where the US company undertakes a strategic acquisition or merger with a foreign company, with the ultimate holding company of the merged group being located in Ireland. The Irish holding company may subsequently list on a US stock exchange, such as NYSE or NASDAQ.

v Branch operations and place of business
It is usually preferable to establish a separate legal entity in Ireland; however, in some cases it may make sense from a regulatory perspective for the foreign entity to establish a branch in Ireland. Any foreign limited liability company trading in Ireland that has the appearance of permanency, an independent Irish management structure, the ability to negotiate contracts with third parties and a reasonable degree of financial independence is considered a branch under Irish law and must register the branch within one month of establishment. Under a recently introduced provision in the Companies (Accounting) Act 2017 (the Accounting Act), branch registration requirements are extended to a foreign unlimited company that is a subsidiary undertaking of a body corporate whose members have limited liability.

Under the Companies Act, ‘place of business’ registrations are no longer required or recognised in Ireland.

IV REVIEW PROCEDURE
The review procedure that will apply to a merger, acquisition or joint venture that comes within the scope of the CCPC’s jurisdiction is set out below. There is no specific review procedure in respect of public takeovers.

i Financial thresholds
Mergers, acquisitions and full-function joint ventures that meet the financial thresholds in the Competition Acts 2002–2017 must be notified to the CCPC before they are put into effect.

The financial thresholds that trigger the requirement to notify the CCPC have recently been revised pursuant to the Competition Act 2002 (Section 27) Order 2018 (S.I. No. 388 of 2018). As of 1 January 2019, the CCPC must be notified of a proposed transaction where, for the most recent financial year:

- the aggregate turnover in the state (i.e., Ireland) of the undertakings involved is not less than €60 million; and

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18 Also known as a Societas Europaea.
19 From time to time, a public takeover may involve the investor consulting with the Irish Takeover Panel to get dispensations from certain rules in the context of a particular deal.
the turnover in the state (i.e., Ireland) of each of two or more of the undertakings involved is not less than €10 million.

The new thresholds ensure that firms that fall between microenterprises and small enterprises are not required to mandatorily notify unnecessary mergers and acquisitions and bring Ireland’s financial thresholds closer to international norms.

These thresholds are disapplied for ‘media mergers’.

The CCPC also has jurisdiction under Sections 4 and 5 of the Competition Acts 2002–2017 to investigate mergers that fall below these thresholds (i.e., if it believes that the merger could have as its object or effect the prevention, restriction or distortion of competition, or involves the creation or strengthening of a dominant position).

As for the geographical allocation of turnover, for the purposes of the above-mentioned turnover thresholds, a guidance note by the CCPC provides that ‘turnover in the state’ means sales made or services supplied to customers within the state.

The substantive test for assessment of competition issues by the CCPC is whether ‘the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services’ in Ireland (referred to as the SLC test).20

ii Notification
Merging parties can notify the CCPC of a proposed merger once they can demonstrate that ‘a good faith intention to conclude an agreement or a merger or acquisition is agreed’.21 A filing fee of €8,000 is payable to the CCPC for all mergers. Under the Competition Acts 2002–2017, there is an obligation on ‘each undertaking involved’ to notify the CCPC (i.e., the seller and the purchaser).22 In practice, joint filings are submitted and the purchaser tends to lead on the drafting of the notification.

iii Timeline
The Competition Acts 2002–2017 provide for a two-phase review process. The CCPC has an initial 30 working days (Phase I) from notification to decide whether to allow the merger to be put into effect on the grounds that the merger does not trigger the SLC test or that it will not carry out a more detailed investigation. During Phase I, the CCPC may also issue a formal request for information (RFI) from the parties, in which case the 30 working days run from the time of receipt by the CCPC of the RFI (i.e., it has the effect of stopping and restarting the clock and the review period does not restart until the RFI has been complied with). If the CCPC has concerns about the likely effects of a transaction, it will initiate a more detailed second-phase investigation. In this case, it has a total of 120 working days from notification (known as Phase II) within which to decide whether the merger should be allowed unconditionally, allowed subject to conditions or prohibited. As in Phase I, the CCPC may ‘stop the clock’ on its merger review by making a formal RFI.

As noted above, media mergers are treated separately. While one notification in respect of a media merger must be submitted to the CCPC, the Competition Acts 2002–2017 require a second, separate notification to be submitted to the Minister. If the CCPC determines at

22 This contrasts with the position under the EU Merger Regulation, where the obligation to notify is generally on the purchaser or the party acquiring control.
the end of a Phase I investigation that the media merger does not trigger the SLC test, it must inform the Minister, who then has 30 working days to consider the media merger, commencing 10 days after a CCPC determination clearing the merger. If the Minister is concerned that the media merger may be contrary to public interest in protecting plurality of the media, the Minister will request the BAI to carry out a Phase II examination. Once in receipt of a BAI report, in these circumstances the Minister has 20 working days in which to make the final determination on the media merger and has the power to prohibit the merger or impose stricter conditions, again based on public interest criteria.

Of the 98 notifications received by the CCPC in 2018 (a 36 per cent increase compared to 2017), 14 (14.3 per cent of cases) required an extended Phase I review (i.e., a formal RFI was issued by the CCPC) and there were 3 Phase II reviews (compared to none in 2017). Between 1 January 2018 and 31 December 2018, the CCPC took an average of 24 working days to issue a Phase I decision. To date, only three mergers have been blocked by the CCPC: IBM/Schlumberger,23 Kingspan/Xtratherm24 and Kerry/Breeo.25

iv  Failure to notify

Failure to notify a transaction that falls within the scope of the Competition Acts 2002–2017, or to supply information requested by the CCPC within the specified time limit, can constitute a criminal offence punishable by a fine of up to €250,000, plus €25,000 per day for a continued breach. In 2019, following a year-long CCPC investigation, the first successful gun-jumping prosecutions were secured in Ireland. Both Armalou Holdings Limited and Airfield Villas Limited (formerly Lillis O’Donnell Motor Limited) plead guilty to six charges arising out of their failure to notify the CCPC of Armalou’s takeover of Lillis O’Donnell Motor Limited in December 2015. The parties were ordered, pursuant to the Probation Act 1907, to each make a charitable donation of €2,070 instead of paying criminal fines, because the District Court was satisfied there had been no wilful breach of the law as neither company had been aware of their obligation to notify the merger.

In addition, transactions that are put into effect without the approval of the CCPC are void under Irish law. To date, the CCPC has not taken legal action against any parties to a merger where a transaction has been put into effect prior to clearance, although it has publicly condemned this type of behaviour.

v  Mergers below notification thresholds

Mergers below the notification thresholds can also potentially limit competition. The Competition Acts 2002–2017 provide for a voluntary merger notification system for mergers that do not meet the thresholds but still raise antitrust issues. Once notified, voluntary notifications are dealt with in the same way as mandatory notifications.

23 Case M/04/032 IBM Ireland Limited/Schlumberger Business Continuity Services (Ireland) Limited. The Competition Authority's determination can be found by searching at https://www.ccpc.ie/business/mergers/mergers-archive/.
24 Case M/06/039 Kingspan/Xtratherm. The Competition Authority's determination can be found by searching at https://www.ccpc.ie/business/mergers/mergers-archive/.
25 Case M/08/009 Kerry/Breeo. The Competition Authority's determination can be found by searching at https://www.ccpc.ie/business/mergers/mergers-archive/.
vi Appeal
A determination by the CCPC to prohibit a merger, or permit a merger subject to conditions, can be appealed to the High Court by the parties to the transaction. Complainants and third parties do not have a right of appeal, but may apply to the High Court for judicial review of a CCPC determination.

vii Confidential information
As a public body, the CCPC is subject to the Freedom of Information Act 2014. Notwithstanding, the Act provides for exemptions for the release of commercially sensitive information by public bodies. In general, the CCPC handles commercially sensitive information in accordance with its strict confidentiality obligations. Following receipt of a merger notification, the CCPC will publish a standard notice on its website stating that the transaction has been notified to it, and detailing the parties and industry involved.

The merger notification form submitted by the parties will not be made public; however, the CCPC’s decision (which may contain information from the notification form) will be published. In practice, the CCPC will allow the parties an opportunity to request the removal or redaction of any commercially sensitive information from the determination prior to publishing a non-confidential version of the determination on its website.

viii Coordination with other jurisdictions
The Competition Acts 2002–2017 enable the CCPC to enter into arrangements with antitrust bodies in other jurisdictions in relation to the exercise of its merger control function. One of the questions on the standard notification form requires the parties to identify the other jurisdictions where the transaction has been or will be filed. In certain circumstances, the CCPC seeks the consent of the notifying parties to enable it to discuss the case with antitrust officials in other jurisdictions when a notification is made and to share information with them.

The CCPC is greatly influenced by the work of the International Competition Network and the European Competition Network, of which it is an active member. The CCPC also maintains regular contact with competition authorities in other jurisdictions, in particular the UK Competition and Markets Authority and the European Commission, as well as the antitrust bodies in the United States, regarding cases that are subject to parallel reviews in those jurisdictions that may affect Ireland.

ix Third parties
Generally, a 10-day working period is provided for by the CCPC during a Phase I review (and a 15-day working period for a Phase II review) for third parties to submit comments expressing their views on the likely effects of a proposed transaction on competition in the market.

V FOREIGN INVESTOR PROTECTION
There is no general regime per se regarding the protection of foreign investment. Investors from both within and outside the European Union receive the same treatment as domestic investors under Irish law.

However, various protections are contained within the statutory frameworks referred to above. Pursuant to the Companies Act, shareholders, directors or creditors of a company
have the legal standing to bring an action to the High Court against a company or an officer of a company for failure to remedy a breach of the Companies Act. This provision does not discriminate between foreign and domestic shareholders. In addition, under Irish law, directors of Irish companies are subject to a range of extensive duties (common law fiduciary duties having been codified in the Companies Act) and can be held personally liable for certain breaches under the Companies Act.

The Office of the Director of Corporate Enforcement (ODCE) was established under the Company Law Enforcement Act 2001 to improve the compliance environment for corporate activity in Ireland. The ODCE encourages compliance with the Companies Act and brings to account those who disregard the law. The ODCE has investigative and disciplinary powers, and can act on complaints from auditors, professional bodies and the public.

Foreign investors may also be entitled to appeal a decision taken by a regulatory body. For example, the Competition Acts 2002–2017 set out the circumstances where a right of appeal exists against a decision taken by the CCPC. In addition to a right of appeal, there is a general right26 to a judicial review by the High Court against a decision made by any person or body (usually set up by means of legislation) exercising a public function. Accordingly, judicial review will lie in respect of decisions of government departments, tribunals, regulators, or other persons or bodies making decisions by public or statutory authority.

Ireland provides strong, enforceable protection for all aspects of intellectual property (IP). The Irish Commercial Court was established as a division of the High Court in 2004 to deal with major commercial and IP cases. It offers a fast-track process to quickly and efficiently deal with IP disputes (usually within one year). In relation to interlocutory applications, costs are awarded at the interlocutory stage, which provides a very powerful tool to combat IP infringement. The Commercial Court provides investors with a strong platform for protecting their assets.


Foreign investors will benefit from Ireland’s membership of the European Union, as there are a number of bilateral trade agreements in place. Ireland also has an extensive tax treaty network to eliminate or reduce double taxation. To date, Ireland has signed 74 double tax treaties, 73 of which are in effect. Ireland’s Revenue Commissioners act as Ireland’s ‘competent authority’ under double tax treaties and as a competent authority it assists Irish taxpayers in requests for competent authority assistance, mutual agreement procedures and advance pricing agreements.

The World Bank Doing Business report for 2018 examined Ireland’s regime for protecting investors and ranked the country 17th of the 190 measured. The report measures the strength of minority shareholder protections against directors’ misuse of corporate assets for personal gain. The indicators distinguish three dimensions of investor protections: transparency of related-party transactions, liability for self-dealing and shareholders’ ability to sue officers and directors for misconduct. The data came from a survey of corporate and securities lawyers, and are based on securities regulations, company laws, civil procedure codes and court rules of evidence.

26 In certain circumstances, the right to judicial review may vary; for example, in the financial services sector.
VI OTHER STRATEGIC CONSIDERATIONS

Ireland offers investors a low corporation tax environment that does not breach harmful EU or OECD tax competition initiatives. As a member of both organisations, Ireland is actively involved in forums for discussing and reviewing international tax changes. In addition to the low corporation tax rate, Ireland has an extensive and expanding double taxation treaty network.

Once a decision has been made to invest in Ireland, it is important for each individual case to be assessed to determine the most efficient structure for the foreign investor. Investors must also consider whether any regulatory regime will apply to the investment. For example, when effecting a merger or acquisition, it is useful to engage with antitrust law issues early in the process, particularly in relation to timing considerations, which need to take account of any applicable timetable for merger review. Depending on whether there are antitrust law issues to be addressed, it may be necessary to draft an appropriate condition precedent in the purchase agreement or public offer to deal with clearance prior to closing the transaction. Similar considerations will apply when the company being acquired is subject to the Irish Takeover Rules.

VII CURRENT DEVELOPMENTS

As mentioned in Section I, Ireland was ranked as the 11th best country in the world in which to do business in a recent study carried out by Forbes and this is supported by the influx of foreign direct investment into Ireland in recent years.

Indeed, Ireland’s competitiveness has improved dramatically since the global financial crisis. Ireland has been ranked the seventh most competitive country in the world in 2019, and this international competitiveness shows no signs of slowing down. Dublin was ranked second in the fDi’s European Cities and Regions of the Future 2018/19 report, which acknowledges that the city continues to go from strength to strength as a hub for software and financial services FDI.

Brexit creates both challenges and opportunities for all industries and sectors in the Irish economy. While the focus remains on securing an orderly and agreed Brexit, the Irish government has published a Brexit Contingency Action Plan setting out its approach in the event of a no deal scenario. More specifically, the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 outlines the provisions of a variety of new laws that will be enacted in Ireland if Britain leaves the EU without a deal on 31 October 2019. The Irish government’s approach combines full participation in the overall EU framework for managing a no-deal outcome with further specific challenges and responses at national level and is consistent with the overall objectives of seeking to minimise the impact on trade and the economy, and to reinforce Ireland’s commitment to and participation in the European Union.

The General Data Protection Regulation (GDPR) and the Data Protection Acts 1988–2018 form the basis of Ireland’s data protection laws. The GDPR has been directly

27 See footnote 10.
28 IMD World Competitiveness Yearbook 2019.
effective in each EU Member State from May 2018, with the aim that the same rules will be applied uniformly within the European Union and simplify regulation through the introduction of a ‘one-stop shop mechanism’ whereby multinational organisations can structure their operations so that they largely only have to deal with a single supervisory authority located in the Member State of their main establishment for data protection purposes. This marks a shift in the approach to data protection at a European level, which previously relied on national implementing legislation in individual EU Member States. The implementation of this approach continues to evolve, as Ireland’s Data Protection Commission takes a leading role in regulating the numerous multinational technology companies that are headquartered in the state.

Ireland continues to adapt and enhance its offering to ensure that it remains a key location for FDI. The IDA’s strategic blueprint for attracting FDI into Ireland sets out key objectives for 2015–2019.31 A critical element of the IDA’s strategy is a continued strong focus on the traditional key sectors of technology, media and content, business services, biopharmaceuticals, medical devices, engineering, ingredients and financial services. The IDA plans to ‘help foster a strong mutually supporting enterprise base where multinationals partner with Irish enterprise’. Targets include winning 900 new investments for Ireland, the creation of 80,000 new jobs, €3 billion in new investments in research and development, and balanced regional growth.

The EU has recently introduced a new set of rules designed to protect its interest in strategic sectors while remaining open for investment as the world’s largest single market. Regulation (2019/452/EU) on establishing a framework for the screening of foreign direct investment into the European Union (the FDI Regulation) came into force on 11 April 2019 and will apply from 11 October 2020. The FDI Regulation coordinates the scrutiny of investments by third (non-EU) countries to ensure that those investments do not threaten security or public order and is focused on areas such as critical infrastructure and technologies, food security and free press. Ireland, like many EU Member States, does not have an FDI screening framework and will not be obliged to establish one. The Department of Business, Enterprise and Innovation is currently considering whether Ireland should introduce an investment screening mechanism. It is actively engaging with EU partners to understand existing EU screening models, bearing in mind the importance of maintaining the attractiveness of the EU as an FDI location.

Ireland’s legislative landscape is also changing. The Companies Act came into force on 1 June 2015. It was the largest piece of substantive legislation in the history of the Irish state, and consolidated and modernised Irish company law. The Companies Act introduced several positive company law reforms, which further enhanced Ireland’s competitive position as a location for business investment.

These changes made it easier and less costly to start up and run an Irish company. The entry into force of the Companies Act marked a significant development in the strategic reform of Irish company law, and represents Ireland’s strong desire to ensure that it has a modern company law regime in place that will further enhance Ireland’s attractiveness as a place to do business.

Legislation to transpose the Accounting Directive (2013/34/EU) came into force in June 2017 in the form of the Accounting Act. The legislation effectively abolishes ‘non-filing

structures’ in their current form for Irish unlimited companies. This means that certain types of unlimited company that previously avoided the public filing of financial statements at the Companies Registration Office will come within the filing regime if the ultimate shareholders of the unlimited companies have the benefit of limited liability protection. New country-by-country reporting obligations have also been introduced, which will apply to large companies and public-interest entities involved in oil and gas exploration or extraction, and logging in primary forests. In addition, smaller companies will benefit from more relaxed accounting and disclosure regimes, and a new ‘micro company’ concept has been introduced.

Most corporate and other legal entities in Ireland are required to gather information on individuals who are their underlying beneficial owners and establish and maintain a local beneficial ownership register containing such information pursuant to regulations introduced in 2016 (the 2016 Regulations). The 2016 Regulations came about as a result of the EU Fourth Anti-Money Laundering Directive which was aimed at increasing transparency in relation to the real ownership of corporate vehicles. This aim is further realised now that the new European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the 2019 Regulations), which came into force on 22 March 2019, have repealed, restated and expanded the scope of the prior regulations to introduce an additional requirement for such entities to file their beneficial ownership details on a central beneficial ownership register to be maintained by the Irish Companies Registration Office.

Ireland offers investors a stable corporation tax environment and a low corporation tax rate. Ireland is currently participating in the OECD’s ongoing work to address the tax challenges of the digitalisation of the economy and it was an active participant in the OECD’s base erosion and profit shifting (BEPS) project.

As a result of that participation, Ireland has implemented country-by-country reporting rules and a BEPS-compliant ‘knowledge development box’, which applies a lower tax rate (6.25 per cent) to income earned through commercialising certain qualifying intellectual property that is developed in Ireland. Since the final BEPS reports were issued in October 2015, Ireland has separately participated in EU negotiations with a view to implementing (EU-wide) a number of the BEPS recommendations. These changes were agreed under the Anti-Tax Avoidance Directive (2016/1164/EU) (the Tax Avoidance Directive) which requires EU member states to implement domestic legislation and measures to tackle tax avoidance practices. The Tax Avoidance Directive lays down controlled foreign company (CFC) rules, an exit tax, rules regarding anti-hybrid mismatches within the EU and with third countries, general interest limitation rules, and a general anti-abuse rule, all to be implemented over a number of years. The required exit tax rules were implemented in Ireland on 10 October 2018, while the CFC rules were introduced in the Finance Act 2018, taking effect for accounting periods beginning on or after 1 January 2019.

It is intended that Ireland will remain a highly attractive location for international business. This is reflected in a document published by the Department of Finance following Ireland’s consultation on BEPS:32 ‘Ireland now needs to place itself in the best position possible to become the country of choice for mobile foreign direct investment in a post-BEPS environment.’

32 ‘Competing in a Changing World – A Road Map for Ireland’s Tax Competitiveness’, Department of Finance, October 2014.
I INTRODUCTION

Foreign investments (mainly, although not exclusively, by non-EEA\(^2\) entities) in certain strategic sectors of the Italian economy are subject to a comprehensive investment control regime, set forth in Decree Law No. 21 of 15 March 2012, as amended (the Law).

The Law grants the government certain special powers to veto or impose conditions on the purchase of interests in the share capital of, or the implementation of certain extraordinary transactions by, Italian companies active in the fields of defence and national security (including, more recently, 5G technologies), or energy, transport, communications and high-tech.

Although in recent years Italy has ranked behind certain significantly smaller economies in terms of the value of the net inflows of foreign direct investments,\(^3\) such investments still represent an essential part of the economy (according to World Bank research, in 2018, foreign direct investment net inflows amounted to US$30.899 billion).\(^4\) After the first six years of application, it appears that foreign investors have not considered this regime to be a deterrent to their proposed investments (in fact, the number of cases submitted to the government’s scrutiny under the Law has consistently increased over the years).\(^5\) However, in recent cases, the government has relied on these powers to address issues of a seemingly more political nature underlying the relevant investments; likewise, growing security concerns, which are not peculiar to Italy but rather shared globally, have resulted in the government...

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1 Giuseppe Scassellati-Sforzolini is a partner, Francesco Iodice is an associate and Simone Marcon is a trainee attorney-at-law at Cleary Gottlieb Steen & Hamilton LLP.
2 The European Economic Area (EEA) comprises the 28 Member States of the European Union plus Iceland, Liechtenstein and Norway.
3 Defined by the World Bank as 'the sum of equity capital, reinvestment of earnings, and other capital. Direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy. Ownership of 10 per cent or more of the ordinary shares of voting stock is the criterion for determining the existence of a direct investment relationship'.
4 Data available at data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=IT&view=chart.
5 The report submitted by the government to Parliament on 11 April 2019 (the Report), regarding the application of the Law in the period between 1 July 2016 and 31 December 2018 (www.governo.it/sites/governo.it/files/GP_RelazioneParlamento_2018.pdf), shows a very significant increase in the number of notifications received by the government, as compared to the previous 3 October 2014 to 30 June 2016 period: in the fields of defence and national security, the notifications increased by 357 per cent, while in the field of energy, transport and communications, the notifications increased by 225 per cent.
seeking to extend the scope of the Law by adding further sectors to government scrutiny. The impact of the Law upon future investments will, of course, continue to depend on how the government applies its powers in practice.

Foreign investments in Italy have traditionally involved a wide set of targets, from manufacturing industries to infrastructure. Headline transactions in the past three years involving sensitive sectors under the Law include:

- the 2016 acquisition of the independent gas transmission operator Società Gasdotti Italia SpA by Sole Bidco SpA, a newly incorporated company controlled by a fund owned by Macquarie Infrastructure and Real Assets and, indirectly, by Swisslife Asset Managers;
- the 2016 acquisition of Avio SpA (the Italian space propulsion company) by Space 2 SpA (then a special acquisition company) and Leonardo SpA (formerly Finmeccanica SpA, the Italian aerospace, defence and security company);
- the acquisition of a 23.9 per cent interest in Telecom Italia SpA (the Italian telecommunications company) by Vivendi SA (the French mass-media conglomerate);
- the 2018 acquisition of an 8.8 per cent interest in Telecom Italia by Elliott Management (the investment and activist fund) and subsequent appointment of the majority of Telecom Italia’s board of directors as a result of a proxy fight with Vivendi SA (holding a 23.9 per cent interest in Telecom Italia);
- the 2018 acquisition by CK Hutchinson Holdings Limited of sole control over Wind Tre SpA (the Italian mobile operator) by acquiring the 50 per cent share interest therein held by Veon Limited (previously known as Vimpelcom Limited);
- the proposed spin-off of Telecom Italia’s fixed-access network and related infrastructure into a separate company and its possible combination with the fibre-based access network that Open Fiber SpA (a joint-venture between ENEL SpA (the Italian multinational energy company) and CDP Equity SpA, a company of the group headed by Cassa Depositi e Prestiti SpA, the Italian state-controlled investment bank) is currently building across the Italian territory;
- the 2018 acquisition and subsequent delisting of EI Towers SpA (the Italian company owning and operating a large network of broadcasting towers and mobile sites across Italy) by 2i Towers SpA (a vehicle participated by F2i – Fondi Italiani per le Infrastrutture SGR SpA (the Italian infrastructure investment fund) and Mediaset SpA (the Italian mass-media group)); and
- the 2019 announced partnership between Telecom Italia and Vodafone Italia SpA (the Italian subsidiary of the UK-based telecommunication conglomerate) regarding the joint development of their 5G networks and possible combination of their respective passive tower networks.

II FOREIGN INVESTMENT REGIME

As a general rule, investments in Italian companies active in the fields of defence and national security (including, more recently, broadband electronic communication services based on 5G technologies), energy, transport, communications, or high-tech are subject to a prior review procedure, as a result of which the government may exercise certain special powers that, depending on the target, may be more or less stringent.
The Law identifies the general categories of assets and activities with respect to which the government may exercise its special powers; however, it is for the government to determine periodically,\(^6\) in detail, which assets are subject to the investment regime set forth in the Law. The following are the categories of assets and activities contemplated by the Law:

\(\begin{align*}
a & \quad \text{activities deemed strategic for the defence and national security system (strategic security activities);} \\
b & \quad \text{networks, plants, assets and relationships deemed strategic for the national interest in the fields of energy, transportation and communications (strategic assets); and} \\
c & \quad \text{assets in the high-tech sector in respect of which there could be a danger to security and public policy (high-tech assets).}
\end{align*}\)

The government may exercise its special powers under the Law exclusively with respect to companies performing any strategic security activities or holding any strategic or high-tech assets.

Accordingly, in principle, foreign investments in any other sector are not subject to any further general limitation or prior review apart from the general reciprocity rules (see Section II.v) and any applicable antitrust clearance.\(^7\) However, certain sector-specific regulatory authorisations may be necessary (see Section II.vi).

**i. Defence and national security**

The review procedure and the government’s special powers relating to investments in a company performing a strategic security activity are particularly strict and apply to investments made by any person, regardless of nationality (including EEA persons or entities).

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\(\text{\textsuperscript{6}}\) Pursuant to Article 1, Paragraph 7 and Article 2, Paragraphs 1 and 1-\textsuperscript{ter} of the Law, the government shall review and update the list of assets at least every three years. However, since 2014 the list of strategic security activities and strategic assets set forth in the secondary regulations adopted by the government has not been subject to any change; however, more recently (see Sections II.ii and II.iv) the government has sought to extend the scope of the Law to include 5G-based technologies and high-tech assets.

\(\text{\textsuperscript{7}}\) Pursuant to Article 16 of Law No. 287 of 10 October 1990 (Italian Antitrust Act), notification of acquisitions and other concentration transactions must be made to the Italian Antitrust Authority prior to closing when the aggregate turnover produced at the domestic level by the target and acquirer exceeds €498 million and the individual turnover of at least two of the companies involved in the transaction exceeds €30 million. In any event, if the concentration meets the requirements set out in Council Regulation (EC) No. 139/2004 (the Merger Regulation (EUMR)), both in terms of thresholds and the cross-border effects of the transaction, notification of the transaction must be made instead to the European Commission.
Strategic security activities, currently identified by Prime Ministerial Decree No. 108 of 6 June 2014 (the 2014 Decree), include activities falling within the remit of the Ministry of Defence and the Ministry of Interior.

With respect to companies performing any such strategic security activity (or holding any such asset), in the event of a threat of serious prejudice to fundamental interests of national defence or security, the government may:

- impose specific conditions (relating to the security of procurement and information, the transfer of technologies and export controls) on the purchase of an interest in any such company;
- veto the purchase by any person (whether directly or indirectly, individually or jointly), other than the Italian state or state-controlled entities, of an interest in the voting share capital of any such company that, given its size, may jeopardise defence or national security interests; or
- veto the adoption of resolutions by the company’s shareholders or board of directors relating to certain extraordinary transactions (such as merger, demerger, asset disposal, ...
winding up and amendments concerning the corporate purpose or equity ownership caps in the by-laws of certain state-controlled companies, or relating to the transfer of ownership or other rights on assets or the creation of encumbrances on assets).

ii 5G technologies

As mentioned above, growing concerns on national security related to the introduction and utilisation of 5G technologies have resulted globally in an enhanced scrutiny of the governments on foreign investments (and alleged interference) in this crucial field. In the wake of this international trend, on 25 March 2019 the Italian government adopted Decree Law No. 22 (which Parliament ratified with amendments through Law No. 41 of 20 May 2019; the First 2019 Decree), which expanded the scope of the Law to include broadband electronic communication services based on 5G technologies among the strategic security activities in the fields of defence and national security. Subsequently, on 11 July 2019, the government also adopted Decree Law No. 64 (the Second 2019 Decree and, together with the First 2019 Decree, the 2019 Decrees), which further amended the Law to, among other things, enhance the procedural rules applicable to foreign investments in 5G technologies. 14

In particular, pursuant to the amendments introduced by the 2019 Decrees, the Law now requires any Italian company acquiring 5G-based assets or services to notify the government about the execution of agreements with non-EEA entities concerning:

- the purchase of assets or services regarding the design, manufacturing, maintenance and management of networks relating to broadband electronic communication services based on 5G technologies; and
- the purchase of high-tech components instrumental to the building or operation of networks relating to broadband electronic communication services based on 5G technologies.

In particular, in the event of a threat of serious prejudice to the fundamental interests of national defence or security, the Italian government may veto, or impose specific conditions

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12 Pursuant to Article 3 of Decree Law No. 332 of 31 May 1994 (as amended and ratified by Law No. 474 of 30 July 1994), the by-laws of state-controlled companies active in the fields of defence and national security may provide for ownership caps of up to 5 per cent of their share capital. Any persons holding any interest in excess of this threshold may not exercise voting rights relating to their exceeding portion of the shares. Clauses to this effect may not be amended for three years following their introduction. However, the ownership cap does not apply if the threshold is exceeded as a result of a tender offer, provided that tenders amount to at least 75 per cent of the voting share capital.

13 For instance, on 15 May 2019, the US President issued an executive order www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/) pursuant to which US companies were effectively prohibited from using information and communications technology from anyone considered a national security threat; simultaneously, Chinese group Huawei was added to a ‘black list’ of entities engagement with which requires prior approval of the US government.

14 Based on press reports, it appears that the amendments brought about by the Second 2019 Decree may not be ratified by the Parliament by the applicable deadline (under Italian constitutional law, a law decree is adopted by the government but must be ratified by Parliament within 60 days of its publication in the official journal, otherwise it lapses). It seems that the government intends to reflect the same amendments to the Law by means of a more extensive reform that apparently will be implemented through the adoption of a new law decree relating to cybersecurity.
to, the signing and performance of such agreements, substantially as provided with respect to foreign investments in strategic assets in the fields of defence and national security (of which, as mentioned, 5G technologies are deemed part). The government may also order the parties to the agreement, at their expenses, to reinstate the situation preceding the entry into and performance of the agreement.

As noted above, pursuant to the amendments brought about by the 2019 Decrees, the government may exercise its special powers only in relation to agreements entered into with non-EEA entities. This is a significant departure from the general rule applicable to the fields of defence and national security, where instead the government may exercise its powers regardless of the nationality of the investor.

As regards the notion of ‘non-EEA entity’, the Law already set forth a specific definition, although this applied only to investments regarding the energy, transport and communication sectors (Section II.iii). The original definition, however, was always deemed not entirely clear and the government has used the 2019 Decrees to introduce a new definition of ‘non-EEA entity’. In particular:

a The original definition covered any individual or entity that is not resident or domiciled and does not have its registered office, headquarters or centre of main interest in any Member State of the European Economic Area, nor is it established therein. Based on this definition, it was unclear whether the government could consider also the ultimate parent company or should limit its review to the entity making the investment.

b By contrast, the definition introduced by the 2019 Decrees expressly extends the status of ‘non-EEA entity’ to: (1) any entity whose registered office, headquarters or centre of main interest is in a Member State of the European Economic Area or however is established therein but is controlled, directly or indirectly, by any individual or entity that is not resident or domiciled or does not have its registered office, headquarters or centre of main interest in any Member State of the European Economic Area, nor is it established therein; and (2) any individual or entity that is resident or domiciled, or has its registered office, headquarters or centre of main interest in a Member State of the European Economic Area, or however is established therein, for the purpose of circumventing the application of the Law. 15

This new definition also applies to investments in the fields of energy, transport and communications.

15 This extension of the notion of ‘non-EEA entity’ is consistent with recital (10) of the EU Regulation No. 2019/452 of 19 March 2019 by the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the European Union, pursuant to which: ‘Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU’.
iii Energy, transport and communications

The investment regime relating to strategic assets in these fields is less burdensome than that applicable to defence and national security. Not only is the scope of the government’s special powers more limited and subject to more significant conditions, but, according to the Law, the overall regime applies only to investments made by non-EEA persons.

The government identified these strategic assets by means of Prime Ministerial Decree No. 85 of 25 March 2014 (the 2014 Regulation). This Regulation identifies certain energy, transport and communications infrastructures (such as the national electricity grid, the telecommunications fixed-line and gas transport networks), but not the relevant service providers (i.e., those entities authorised to provide the related services).

Transactions relating to a strategic asset are subject to prior review by the government, which as a result may:

a) veto any resolution or transaction by a company holding any strategic asset that would result in a change of ownership or control of the asset, provided that the change of ownership or control could cause an exceptional situation whereby the public interest relating to the safety and operation of any strategic asset could be materially jeopardised, and the exceptional situation is not addressed by any relevant domestic or European legal provision;

b) make the purchase by any non-EEA person of a controlling interest (whether individually or jointly) in a company holding any strategic asset conditional upon the investor undertaking certain commitments aimed at protecting the above-mentioned

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16 Pursuant to Article 2, Paragraph 5, of the Law, the purchase by a non-EEA person of a controlling interest in a company holding a strategic asset is subject to the provisions of the Law.

17 In certain fields (such as gas and electricity), however, other provisions of law require the operation of the network and provision of the related services to be carried out by the same company. It follows that, in practice, cases of acquisition of any such service providers will be subject to the government’s special powers outlined below.

18 In particular, the following strategic assets have been identified: (1) energy networks of national interest and the underlying contract relationships (the 2014 Regulation expressly refers to the national network for the transport of natural gas, the related compression and dispatching centres and gas storage facilities; the infrastructures for the supply of gas from non-EU countries and the onshore and offshore regasification plants; the national network for the transmission of electricity and the relevant control and dispatching centres; and the operations related to use of the aforementioned networks and infrastructure); (2) large transport networks and facilities of national interest, which also ensure the main trans-European connections, including ports and airports of national interest and the rail network relevant to the trans-European rail networks; and (3) dedicated telecommunications (telecom) networks and the public telecom network ensuring connection of end-users to the metropolitan area telecom network, services routers, long-distance telecom networks and the telecom facilities used to provide the universal telecom service to end users, as well as broadband and ultra-broadband services and the related contractual relationships.

19 If the company holding the strategic asset is a subsidiary of another company, the resolutions of the corporate bodies of the parent company resulting in the transfer of ownership or control over its subsidiary may also be subject to the government’s special powers under the Law.

20 The scope of this power is currently being subject to careful scrutiny by the government as a result of the recent developments in the Telecom/Vivendi case (see Section VII.iii).

21 The 2014 Regulation clarifies that government powers may be exercised only insofar as the essential interests of the state (including a suitable infrastructural development) are not sufficiently protected by a specific sector regulation (including pursuant to a contract related to a specific administrative permit).
public interests. The government may even veto such transactions in the event that the acquisition raises an exceptional threat of a material prejudice to the public interests (which cannot be addressed by commitments undertaken by the investor).

Based on government regulation No. 86 dated 25 March 2014, which governs the review process in the fields of energy, transport and communications (the Review Regulation), the government could exercise its special powers under point (a) above (i.e., in respect of a relevant resolution adopted or a transaction carried out by an Italian company holding a strategic asset) regardless of the nationality of the investor, provided that the resolution or transaction results in a change of ownership or control of the strategic asset. By contrast, an investment consisting of the acquisition of a controlling interest in the share capital of the company holding the strategic asset would be subject to the government’s special powers only when the investor is a non-EEA person.

However, the Review Regulation would appear not to be consistent with the overall regime applicable to the field of energy, transport and communications – where the government’s intervention must be more limited in light of EU law principles – and would unreasonably discriminate against an investor acquiring ownership or control of a strategic asset through a corporate resolution of the target company or a transaction carried out by an Italian company, as opposed to an investor acquiring a controlling equity interest in a company owning a strategic asset. Not surprisingly, the exercise of the government’s special powers in the context of the Vivendi/TIM case (see Section VII.iii) is currently being litigated in court on the basis of this discrepancy.

Similarly, the practice followed by investors (and the government) to date suggests that notification of the relevant transactions or resolutions in the fields of energy, transport and communications has often been made even if the investor did not qualify as a non-EEA entity. The reason for this approach perhaps may be explained by the noted inconsistency between the Law and the Review Regulation, which may have led the investors or the corporate bodies of the relevant companies to take a more cautious approach and proceed with the notification even if either the letter of the Law or the principles of EU law would justify avoiding notification.

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22 In particular, pursuant to Article 6, Paragraph 2, of the Review Regulation, ‘the proposal to exercise the special powers under Article 2, Paragraphs 3 and 4 of the Law (i.e., the powers under point (1) above – e.g., concerning a resolution of the company holding the strategic asset that results in a change of ownership or control of the same) is adopted in relation to EEA and non-EEA persons, while the proposal to exercise the special powers under Article 2, Paragraph 6 of the Law (i.e., the powers under point (2) above – e.g., the acquisition of a controlling interest in the company holding the strategic asset) is adopted only in relation to non-EEA persons’.

23 Based on the Report, it appears that, in the period between 1 July 2016 and 31 December 2018, out of 36 transactions or resolutions notified to the government in the fields of energy, transport and communications, only seven were investments made by non-EEA individuals or entities.
iv High-tech

In 2017, the government adopted Decree Law No. 148 of 16 October 2017, which Parliament ratified and amended through Law No. 172 of 4 December 2017 (the 2017 Decree), which has expanded the scope of the Law to include certain categories of high-tech assets. In particular, the 2017 Decree identified the following sectors:

- critical or sensitive infrastructures, including data storage and management and financial infrastructures;
- critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual-use applications, web security and space or nuclear technologies;
- security of critical input procurement; and
- access to, or ability to control, sensitive information.

As for the strategic security activities and strategic assets, in order for the government to exercise its special powers it would first need to identify the specific assets and activities falling within the mentioned categories, to the extent that the assets are exposed to a threat to security and public policy. The identification must be made through a government regulation that has not yet been adopted; accordingly, the government cannot yet exercise its special powers with respect to high-tech assets. Once the relevant high-tech assets are identified, the government’s special powers in this field will be subject to the same provisions, conditions and limitations outlined above with respect to strategic assets in the fields of energy, transport and communications (see Section II.iii).

v Reciprocity

Pursuant to a general principle of Italian law, foreign persons (whether individuals or entities) are allowed to exercise any civil law right exclusively insofar as the reciprocity principle is complied with. In other words, in the event that an Italian citizen is prevented from exercising a specific right in the country of origin of the relevant foreign person, Italian law in turn prevents that foreign person from exercising the same right in Italy. Although the scope of this principle is very wide, in the context of foreign investments it seems to have been applied, in practice, exclusively to the purchase of real estate or the incorporation of a company, but not to the acquisition of an equity interest in an existing company.

The reciprocity principle is specifically restated in the Law, resulting in a significant limitation of the scope of the government’s powers: the purchase by a non-EEA person of an interest in a company exercising any strategic security activity or holding any strategic asset is not subject to government regulation.

24 By contrast, the more recent changes to the Law introduced through the First 2019 Decree were immediately effective: the First 2019 Decree did not mandate the government to adopt a regulation further specifying the assets and transactions subject to the government’s special powers, but rather did so by directly amending the Law.

25 Article 16 of the General Provisions on Law, attached to the Civil Code of 1942. Among EEA Member States, however, the reciprocity principle is overridden by the Treaty on the Functioning of the European Union and the Treaty on the European Economic Area, as well as by bilateral treaties (BITs) with non-EEA countries to which Italy is a party (for instance, the BIT between Italy and the United States). The Ministry of Foreign Affairs maintains a list of the BITs in force between Italy and other countries, specifying in which cases reciprocity has been ascertained: www.esteri.it/mae/it/ministero/servizi/stranieri/elenco_paesi.html.
permitted exclusively on the basis of reciprocity conditions. This implies that, in the event that the government ascertains that there is a lack of reciprocity between Italy and the country of origin of the prospective investor, implementation of the transaction may not be permitted, regardless of any further consideration (including the economic desirability of the foreign investment and the absence of any significant prejudice to strategic interests). This provision can be contrasted with Article 25, Paragraph 2 of the Italian Antitrust Act, pursuant to which the Prime Minister, on grounds of essential national economic importance, may veto any concentration transaction notified to the Antitrust Authority by a company from a country that does not protect the independence of companies through legal provisions equivalent to the Italian Antitrust Act, or applies discriminatory rules or imposes conditions resulting in the same effects on acquisitions by Italian investors.

Finally, a reciprocity principle also applies to takeover bids on Italian companies whose voting shares are listed on an Italian regulated exchange. Generally, the passivity rule and breakthrough rule apply to prevent pre-bid or post-bid defences from undermining the success of a tender offer. However, in the event that the bidder would not be subject to equivalent limitations, the target company (or its shareholders) may apply the relevant defences. In other words, should the foreign bidder, in its capacity as target of a tender offer, be permitted by its domestic law to frustrate a tender offer, the Italian target (or its shareholders) may apply any pre-bid or post-bid defence provided under the target’s by-laws or shareholders’ agreements.

vi Sector-specific authorisations
As previously mentioned, depending on the investment target, foreign investments may be subject to specific additional review or authorisation processes conducted by sector-specific regulators.

The sectors in which such authorisations may be required include:

a banking, insurance and investment services; 29

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26 Pursuant to Article 104 of the Italian Securities Act, from the date of announcement of a takeover bid, directors of the target may not adopt any measure that could undermine the achievement of the offer’s goals, unless authorised to do so by a shareholders’ meeting or empowered to do so under the target’s by-laws.

27 Pursuant to Article 104 bis of the Italian Securities Act, during the tender offer period any transfer restriction set out in the target’s by-laws, or voting limitations set out in the target’s by-laws or in a shareholders’ agreement, are not effective in relation to the bidder.

28 Article 104 ter of the Italian Securities Act. Within 20 days of the bidder launching its tender offer, the bidder or the target company may ask the Italian securities and exchange authority (CONSOB) to determine whether the bidder would be subject to equivalent limitations.

29 Pursuant to (1) Directive 2013/36/EU, (2) Directive 2014/65/EU and (3) Directive 2009/138/EC (Solvency II) as implemented in Italy by, respectively, (1) Article 19 of Legislative Decree No. 385 of 1 September 1993, (2) Article 15 of the Italian Securities Act, and (3) Article 68 of Legislative Decree No. 209 of 7 September 2005 and implementing regulations, a notification must be made to the competent authority of any proposed acquisition of a share interest in a bank or an investment services firm that (1) is equal to at least 10 per cent of the target’s share capital; (2) would enable the acquirer to exercise a significant influence on the target; or (3) grants control over the target. The competent authority shall authorise the acquisition after assessing certain factors, including the reputation and financial soundness of the investor, and the ability of the target, following the acquisition, to comply with its obligations under the applicable supervisory regime.
Moreover, in certain fields the law sets limits on the acquisition of controlling interests by non-EU persons (for instance, as regards airline companies\textsuperscript{34} and television broadcasters).\textsuperscript{35}

### III  TYPICAL TRANSACTIONAL STRUCTURES

Although no specific requirement is set under Italian law, typically, although not exclusively, foreign investments in Italy are carried out through an Italian or EEA corporate vehicle, depending on a number of factors (including tax considerations).

In theory, investing through an Italian or EEA company might also be considered for the purposes of complying with the above-mentioned reciprocity principles or to fall outside the scope of the government’s review powers regarding strategic assets. However, in light of the recent revision of the definition of ‘non-EEA entity’ introduced by the 2019 Decrees, if the ultimate foreign investor originates from a non-EEA country, such a structure would be insufficient in case of investments regarding 5G technologies or in the fields of energy, transport and communications.\textsuperscript{36}

\textsuperscript{30} Pursuant to Article 25 of Legislative Decree No. 259 of 1 August 2003 (the Code of Electronic Communications), for instance, in the event that a company authorised to supply the network or provide electronic communication services intends to transfer the relevant authorisation to any third party (foreign or domestic), it must send prior notice to the Ministry of Economic Development, which may withdraw its authorisation if it ascertains that the prospective transferee does not meet the necessary requirements. In addition, Article 50 ter, Paragraph 4, of the Code of Electronic Communications addresses the case of an undertaking designated as having significant market power in one or more relevant markets intending to dispose of a substantial part or all its local access network assets to a third party.

\textsuperscript{31} As a general rule, under Article 1, Paragraph 6(c), No. 13 of Law No. 249 of 31 July 1997, the Communications Authority is empowered to authorise the acquisition of an undertaking performing radio-television broadcasting activities. In addition, pursuant to Article 43 of Legislative Decree No. 177 of 31 July 2005, notification of concentration transactions must be made in advance to the Communications Authority, which ascertains whether the transaction may hamper media pluralism.

\textsuperscript{32} For example, pursuant to Article 9 of Legislative Decree No. 93 of 1 June 2011 (which implements EU Directive 2009/73/EC), a gas transmission system operator (gTSO) must be certified by the Energy Authority to be compliant with one of the ownership unbundling models envisaged thereunder.

\textsuperscript{33} Pursuant to Article 36 of Legislative Decree No. 93 of 1 June 2011 (which also implements EU Directive 2009/72/EC), the electricity transmission operator (currently, Terna SpA (eTSO)) must be certified by the Energy Authority as compliant with the applicable ownership unbundling model envisaged thereunder.

\textsuperscript{34} Pursuant to Article 4(f) of EU Regulation No. 1008/2008, in order for an EU airline company to be authorised to operate, it must be owned directly or through majority ownership by EU Member States or nationals of EU Member States, or both, and must at all times be effectively controlled by such states or nationals.

\textsuperscript{35} Pursuant to Article 3 of Law No. 249 of 31 July 1997, the authorisations relating to private radio or television broadcasting may be granted exclusively to Italian or EU persons, while non-EU persons may only acquire control of such companies subject to reciprocity conditions.

\textsuperscript{36} See Section II.ii.
Foreign investments may be implemented through the acquisition of an equity interest in an Italian target, either individually or through a corporate or contractual joint venture with an Italian or other person. Provisions of Italian company law may be relevant to certain agreements between the foreign investor and other shareholders or joint venture partners, such as limitations on the term of shareholders’ agreements or the obligation to launch a tender offer in cases of acquisition effected while acting in concert.

No notable difference is established between a share purchase and an asset purchase deal by a foreign investor. With specific regard to the scope of the foreign investments review under the Law, the definition of strategic security activities or strategic assets is wide enough to trigger the application of the relevant provisions both in cases of acquisition of an equity interest and in those of ownership of a relevant asset (although, as noted, in the case of strategic assets, the regime would appear to be tighter if the investor seeks to acquire the asset, as opposed to gaining control of a company owning the asset). Likewise, the general reciprocity principle applies to both categories of transaction.

IV REVIEW PROCEDURE

Notification of foreign investments falling within the scope of the government’s special powers outlined in Section II must be made in advance to the government.

The general rules of the review procedure are set out in the Law, with implementing provisions spelled out in the Review Regulation (relating to energy, transport and communications), Government Regulation No. 35 of 19 February 2014 (relating to defence and national security) and the subsequent Prime Ministerial Decree dated 6 August 2014. As mentioned, with respect to high-tech assets, no implementing provisions have been adopted yet (although we expect that, once the relevant assets are identified in detail, the Review Regulation will apply).

i Process

The Law requires that the following be filed with the government:

- notification of any relevant resolutions adopted, or transactions carried out, by a company exercising any strategic security activity or holding any strategic or high-tech asset within 10 days and in any event prior to their implementation;

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37 As a general rule, the term of a shareholders’ agreement relating to an Italian joint stock company (Article 2341 bis of the Italian Civil Code) may not exceed five years (three in the case of a listed company or its parent, pursuant to Article 123 of the Italian Securities Act).

38 As a general rule, the acquisition of an equity interest in a listed company of more than 25 per cent of the share capital (30 per cent in the case of small and medium-sized enterprises) triggers a mandatory tender offer. The same applies in the event that the threshold is exceeded, in the aggregate, as a result of the acquisitions made by two or more persons who are parties to a shareholders’ agreement relating to the target company or its parent.

39 The notice to the government does not trigger disclosure obligations concerning material non-public information under market abuse rules.

40 The notification must include the minutes of the resolution and all documents provided to the members of the relevant corporate bodies, as well as any further information that may be necessary for the government to complete its assessment.
notification of any purchase of interests in any company exercising any strategic security activity or holding any strategic asset within 10 days of the acquisition.\textsuperscript{41} Purchases of equity interests in a company active in the fields of defence or national security trigger the notification obligation if they exceed the thresholds of 3, 5, 10, 15, 20, 25 and 50 per cent; \textsuperscript{42} and notification of any agreement relating to 5G assets or services within 10 days of signing.\textsuperscript{43}

The notification of the resolutions or transactions must be made through ad hoc forms issued by the government\textsuperscript{44} and filed by means of certified email.

The review procedure is coordinated by the Department of Administrative Coordination (a specific government office),\textsuperscript{45} which is assisted by a coordination group composed of representatives of the ministries involved in the review procedure and, where necessary, members of other bodies (including private organisations) whose competence is required for a deeper understanding of the issues and interests.

Upon receipt of the notification, a standstill period of 45 days begins,\textsuperscript{46} during which the ministry in charge of the initial assessment carries out its review of the proposed investment, resolution or agreement and, taking into account the work of the coordination

\textsuperscript{41} The notification must include the business plan pursued by the investor through the proposed acquisition, the related financial plan, a detailed description of the investor and any further information that may be necessary for the government to complete its assessment.

\textsuperscript{42} Prior to the adoption of the Second 2019 Decree, such thresholds applied only to listed companies. The Second 2019 Decree deleted such requirements, so that such thresholds apply to all companies holding strategic assets in the fields of defence and national security, whether listed or not.

\textsuperscript{43} The Second 2019 Decree clarifies that such notification shall be submitted by the recipient company of the relevant assets or services. According to the report submitted to the Italian Senate for the possible ratification of the Second 2019 Decree, the rationale underlying the obligation on the recipient to make the notification is to raise awareness on cyber security issues among domestic companies, on grounds the recipient is generally better suited to clarify not only the technical features of the agreement but also, more generally, how the notified transaction fits into the company’s business plan and how it impacts the implementation of the company’s activities that are of strategic importance for the Italian State.

\textsuperscript{44} The form was adopted by means of a Decree of the Secretary General of the Presidency of the Council of Ministers on 18 February 2015, and is available at presidenza.governo.it/DICA/6_EVIDENZA/golden_power/DSG180215%20_modulistica_golden_power.pdf.

\textsuperscript{45} The Department of Administrative Coordination, following a meeting with the coordination group, assigns the review of the notification to a corresponding office within the Ministry of Economy, if the relevant company is controlled by the Ministry; otherwise, the process is entrusted to the Ministry of Defence, the Ministry of the Interior, the Ministry of Economic Development or the Ministry of Infrastructure and Transport, depending on the specific circumstances (mainly depending on which Ministry is competent for the field in which the relevant company belongs).

\textsuperscript{46} This term was recently extended by the Second 2019 Decree (previously the Law provided for 15 days and the Review Regulation clarified that only business days would be considered). This term may be extended only once, for a period of 30 business days, if the government requests additional information or makes enquiries with third parties (e.g., public authorities). In case the initial notification is incomplete, the 45-business-day term starts only once the missing information or document is provided. With specific respect to notifications relating to 5G technologies, however, the Second 2019 Decree provides that the first 45-day term may be suspended for additional 45 days (which suspension may be extended once, for further 45 days), in case a deeper analysis is required to assess possible vulnerability factors that may undermine the integrity and safety of the networks and data transmitted through them.
group, formulates a proposal to the Presidency of the Council of Ministers (and a draft of the related government decree). To this end, the Second 2019 Decree clarified that certain sector-specific public authorities must cooperate with the coordination group to facilitate its task, including by providing the necessary information (which they may not withhold on secrecy grounds).

The subsequent decree, whereby the government exercises its special powers, must specify the conditions or requirements imposed on the investor, the criteria and mechanics for monitoring compliance with the foregoing (including by identifying the specific administration) and the penalties applying in cases of infringements.

Until completion of the review procedure, voting rights attached to the acquired interest are suspended.

Moreover, during the review, no specific procedural standing or right of the parties involved in the transaction are expressly provided for by the Law (except for limiting the application of standard transparency rules to the proceedings). However, sound cooperation between the government and the notifying party is regarded as standard practice, possibly involving preliminary discussions prior to sending the formal notification, to allow the government to conduct its review properly and to make an informed decision by the statutory deadline.

In any event, should the government elect not to (or fail to) exercise its powers by the end of the standstill period, the proposed transaction may be legitimately carried out.

47 Notably, the Central Bank (Banca d’Italia), the Securities and Exchange Commission (CONSOB), the Pension Funds Authority (COVIP), the Private Insurance Authority (IVASS), the Transport Authority (ART), the Antitrust Authority (AGCM), the Communications Authority (AGCOM) and the Energy and Environment Authority (ARERA).

48 These rights are also suspended if the purchaser does not comply with the conditions or commitments imposed by the government, and for as long as the failure to comply persists.

49 In particular, pursuant to the general rule set forth in Law No. 241 of 7 August 1990, any person who holds a qualified interest in administrative proceedings can obtain access to and make copies of the administrative documentation. However, this general right to access does not apply with respect to the information and data contained in the documents filed in the context of the review procedure instrumental to the exercise of the government’s special powers under the Law.

50 In a specific case, this approach was expressly mentioned in the measure whereby the government exercised its powers. Based on the preamble of the Prime Ministerial Decree of 6 June 2013 – whereby the government exercised its special powers in relation to the acquisition by General Electric of the Avio SpA aero-engine business – we understand that prior to the official notification by General Electric, dated 20 May 2013, the investor and the government had engaged in preliminary discussions documented by certain initial notices in which General Electric confirmed it could accept the conditions that the government would potentially impose for completion of the acquisition.

51 Likewise, no specific coordination is established between the government’s review and any other clearance process that may be required in respect of the same transaction (e.g., antitrust), therefore the parties must submit various applications for the transaction to be cleared.

52 The Law empowers the government to determine which intra-group transactions are not subject to the possible exercise of special powers. Pursuant to the 2014 Decree and 2014 Regulation, certain intra-group transactions (such as mergers, demergers, divestitures and the creation or transfer of security interests) are not subject to the special government powers. However, prior notification to the government is required. Further, the aforementioned government measures provide that the exemption does not apply if the available information indicates a threat of serious harm to the fundamental interests of defence and national security, to public interests relating to the security and functioning of the networks and facilities, or to continuity in procurements.
As previously mentioned, the government’s decisions must be adopted by a prime ministerial decree; the decree may be appealed only to the Administrative Court of Rome. In the event of non-compliance with the government’s decisions, the related transactions are null and void, and the perpetrators are subject to administrative fines equal to twice the value of the transaction.\(^\text{53}\)

\section*{Criteria}

In an attempt to address the criticism expressed by the European Court of Justice in its 2009 judgment concerning the previous ‘golden share’ regime,\(^\text{54}\) the Law establishes certain specific objective criteria that the government must take into account as a condition to exercise its special powers.

In particular, in the context of the foregoing review procedure, the government must assess, inter alia:

\begin{itemize}
  \item[a] as regards companies exercising any strategic security activity, whether the economic, financial, technical and organisational characteristics of the prospective investor (including consideration of any financing conditions), as well as its business plan, are suitable to carry on the business regularly, safeguard its technological portfolios and honour existing contractual commitments;
  \item[b] as regards companies holding any strategic or high-tech asset, whether the situation resulting from the transaction (including consideration of any financing conditions) is suitable to guarantee the security and continuity of procurement, as well as the maintenance, safety and operations of the strategic asset;
  \item[c] as regards acquisition of controlling stakes in companies holding any strategic asset or high-tech asset, whether the transaction could jeopardise security or public policy (and, in such respect, the Second 2019 Decree clarified that the government may take into account whether the foreign investor is controlled by a public administration of a non-EU country, including its armed forces, also as a result of significant public funding; whether such investor was involved in activities affecting security or public order of a Member State of the EU; or whether there is a serious risk that such investor engages in illegal or criminal activities);\(^\text{55}\) and
  \item[d] in all cases, the existence of any links between the prospective investor and third countries that do not respect democracy and the rule of law, or maintain relations with criminal or terrorist organisations.
\end{itemize}

\(^{53}\) The fine shall be at least 1 per cent of the aggregate turnover resulting from the respective latest financial statements.

\(^{54}\) Case C-326/2007, Commission v. Italy. The European Court of Justice held that the criteria (listed in the Prime Ministerial Decree of 10 June 2004) that the government was to consider prior to exercising its then ‘golden share’ powers (set out under Decree Law No. 332 of 31 May 1994) breached the EU proportionality principle, as ‘the Decree of 2004 contains no details of the actual circumstances in which the power of veto may be exercised, and the criteria it lays down are not, therefore, based on objective verifiable conditions’.

\(^{55}\) The criteria introduced by the Second 2019 Decree are largely based on those set forth in Article 4, Paragraph 2, of the regulation No. 2019/452 of 19 March 2019 by the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the European Union.
V FOREIGN INVESTOR PROTECTION

As a member of the European Union, Italy is subject to all provisions under EU law aimed at favouring the creation of a European common market, which include the four fundamental freedoms enjoyed by EU persons under the Treaty on the Functioning of the European Union (TFEU) (i.e., the free movement of goods, capital, services and persons). Any breach of these principles by Italian law or the Italian authorities may therefore result in the EU investor accessing an Italian court to seek annulment of the infringing measure, redress of damages suffered in connection therewith, or both.

Moreover, Italy is a signatory of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID). Thus, because Italy is a party to a number of bilateral investment treaties, any dispute arising thereunder may be submitted to ICSID arbitration if the agreements so provide (or to other forms of dispute settlement provided for in the relevant treaty).

Italy is also a signatory to the 1958 New York Convention, the purpose of which is to ensure that arbitration agreements are recognised in Italy (i.e., litigation before national courts is prevented if contrary to the parties’ agreement), and foreign arbitral awards are generally enforceable in Italy.

Finally, in 2013, Italy introduced a specialised section within several major courts focusing on business and corporate law matters. These specialised sections have also been assigned jurisdiction over any civil proceedings to which a foreign company is a party (whether as defendant or plaintiff). However, these specialised sections have no jurisdiction over disputes concerning application of the Law, as the Administrative Court of Rome has exclusive jurisdiction.

VI OTHER STRATEGIC CONSIDERATIONS

Situations in which (certain) foreign investments entail the involvement of the government need to be carefully considered. The interests that the Law seeks to protect are obviously other than merely commercial interests that are generally addressed in a transaction between two private parties. In elaborating the acquisition strategy, this aspect needs to be borne in mind.

The review structure originally set out under the Law envisaged a particularly tight time frame (15 business days) within which the government was required to carry out its assessment. Therefore, it could not be ruled out that the government could elect to suspend (for just 10 additional business days) the transaction in the event that, upon expiry of the review deadline, it had not completed its review or collected sufficient information to conclude that no prejudicial consequence could arise from the proposed transaction. As noted in Section IV, should the government fail to exercise its rights within the statutory time frame, the relevant investment may be legitimately implemented.

The 2019 Decrees addressed this issue by extending the review deadline to 45 days (which could be suspended for 30 days) and clarifying that, in case the initial notification is incomplete, the term starts on the date of submission of the missing information or

56 Decree Law No. 145 of 23 December 2013, as ratified and amended by Law No. 9 of 21 February 2014.
57 More precisely, these are the Courts of Bari, Cagliari, Catania, Genoa, Milan, Naples, Rome, Turin and Venice. Their jurisdiction over a specific case is established on a territorial basis.
documents; however, in consideration of standard practice, it still seems advisable to approach the government informally prior to submitting an application triggering the start of the review procedure. Prior informal talks may also help the government become acquainted with the proposed transaction and suggest possible amendments that would allow the transaction to be cleared swiftly.

Preliminary discussions may also form the context in which potential industrial commitments (regarding, for instance, maintenance of certain employment levels, location of research activities and respect for international obligations) may be defined and then proposed by the foreign investor within the framework of the proposed transaction, to preserve the interests underlying the exercise of the government's special powers and to facilitate final clearance of the investment.

VII CURRENT DEVELOPMENTS

The Law is still a relatively recent piece of legislation and, based on public records, in most cases the government has decided not to exercise its powers and stated it did not intend to take any specific action, or else it let the review term expire (thereby enabling the parties to complete the transaction). However, more recently there has been an exponential increase in the number of transactions and resolutions notified to the government, which has paid greater attention to the transactions notified to it under the Law and adopted a more proactive approach.

1 Cases in which the government has exercised its special powers

On the basis of publicly available information, to date it appears that the government has exercised its special powers almost exclusively in the field of defence and national security.

In particular, it appears that the government has vetoed a transaction only once, while in the other cases in which it exercised its powers the government did so by imposing conditions and prescriptions on the transaction or its parties.

The only case in which the government exercised its veto power is the 2017 proposed acquisition of Next Ast Srl (a subsidiary of Next Ingegneria dei Sistemi SpA, into which the latter had contributed its software and complex systems production unit) by Altran Italia SpA (the Italian subsidiary of Altran, the French innovation and engineering consulting group). Based on the Report, the government vetoed the transaction to protect the essential interests of national defence and security, given that Next Ast Srl performed services of a classified and strategic nature to the national defence and security system.

58 According to the Report, in the period between 1 July 2016 and 31 October 2018, out of 86 notifications, in 39 cases the government decided not to exercise its powers, in nine cases the notification was not due, and in 18 cases the parties notified intra-group transactions for which the Law requires a notification but, except in extreme cases, the government cannot exercise its powers.

59 The increase in notifications received may be explained precisely in light of the government's latest attitude of greater attention towards foreign investments in strategic sectors of the Italian economy. Investors arguably opt to notify the government pursuant to the Law even if not strictly required, for the purpose of avoiding the risk of being subject to fines.

60 According to the Report, from 1 July 2016 to 31 December 2018 the government exercised its special powers eleven times, but only once in the energy, transport and communications sectors.
Interestingly, in 2018 the parent company Next Ingegneria dei Sistemi SpA (a company providing IT services and products in the industrial areas of defence, space, transportation and telecommunications and a key supplier of Leonardo SpA, the state-controlled aerospace, defence and security company previously known as Finmeccanica SpA) was again involved in a transaction notified to the government under the Law, this time as a target. On this occasion, the government did not veto the transaction but imposed certain conditions and prescriptions\(^61\) in relation to the proposed acquisition by Defence Tech Holding Srl (a company active in the provision of technological solutions and innovative logistics to critical infrastructures).

As mentioned, in other cases the government exercised its powers only in the form of prescriptions and conditions.

In particular, on 6 June 2013, the government\(^62\) exercised (for the first time) its special powers in the field of defence and national security, authorising the acquisition of the aviation business unit of Avio SpA by General Electric. On this occasion, the government imposed certain conditions on the acquirer, including ensuring continuity of certain activities,\(^63\) the appointment of Italian citizens to certain sensitive positions\(^64\) and certain industrial commitments.\(^65\) The government also provided the constitution of a joint committee (whose members are designated by the government and by General Electric) entrusted with the task of verifying whether the conditions imposed by the government are complied with.\(^66\)

On 18 April 2014, the government again exercised its special powers in the field of defence and national security by authorising the acquisition of control over Piaggio Aerospace SpA (formerly Piaggio Aero Industries SpA) by Mubadala Development Company (the Abu Dhabi-based national wealth fund). This authorisation was reported to be subject to certain conditions\(^67\) relating to the protection of technological and industrial know-how, continuity in production and certain strategic activities (particularly regarding remote control aircraft).

The government also authorised the privatisation of ENAV SpA (the Italian company providing air traffic control, flight information and aeronautical information services) by

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\(^{61}\) The government’s press release did not specify what these conditions and prescriptions consist of, but only indicated that this step was taken to protect the essential interest of defence and national security.

\(^{62}\) By Prime Ministerial Decree dated 6 June 2013 and published in the Official Journal on 19 August 2013.

\(^{63}\) Mainly (1) compliance with national measures on security of procurements and information, (2) continuity of production, maintenance and support to the navy and aerospace systems supplied to the armed forces, and generally to ensure fulfilment of international cooperation programmes in which Italy participates, and (3) a prohibition against reducing or disposing of technological or industrial know-how in certain key strategic activities.

\(^{64}\) Namely, the officers holding the authority to represent GE Avio Srl (the acquisition vehicle) on matters relating to security and transfer and export of armaments. In addition, the majority of the employees active in strategic operations (including international military cooperation programmes) must be Italian citizens.

\(^{65}\) In particular relating to production and supply to the space business unit of Avio SpA of products or components for certain launchers.

\(^{66}\) Avio’s aviation business unit was subject to further scrutiny by the government in connection with four additional transactions notified to the government between 2014 and 2015, but in each case the government did not deem it necessary to exercise its special powers.

\(^{67}\) The conditions were not disclosed in detail, as the government decree was not published.
means of an initial public offering concerning up to 49 per cent of the company’s share capital, on 10 June 2016, subject, however, to certain prescriptions concerning the integrity, accessibility and confidentiality of sensitive data.68

On 15 June 2016, the government resolved to make the sale of Ingegneria dei Sistemi SpA’s ‘GeoRadar’ business unit to Hexagon Geosystems Services SpA (a subsidiary of Hexagon AB, the Swedish global technology group) conditional on the latter adopting various technical means to preserve the technological know-how, and other management and organisational solutions aimed at ensuring compliance with manufacturing, export, transport, use, tracing, registration and storing of the relevant technologies.

On 24 November 2016, the government imposed certain conditions on the previously mentioned acquisition of Avio SpA by Space 2 SpA, Leonardo SpA and In Orbit SpA, and its subsequent merger into Space 2 SpA. Among these conditions, the government particularly stipulated that, considering the strategic relevance of Avio’s activities for national defence and security systems, the company’s chief executive officer (CEO) must be an Italian citizen and may be appointed only after consultation with the government.69

Moreover, on 3 March 2017, the government authorised the transfer of the production of certain components used by the Italian armed forces from GE Avio Srl’s plant in Rivalta (Italy) to another General Electric plant, in the United States. However, the government imposed specific conditions to ensure that the transaction would not undermine the strategic interests of the Italian state and adversely affect the transferred production assets.70

On 19 October 2017, the proposed sale by Piaggio Aerospace SpA (the aerospace manufacturing company) of its ‘Evo’ (i.e., executive jet) business to PAC Investment SA (a Chinese state-backed consortium) was reported to have been subject to certain conditions and prescriptions71 imposed by the government.

According to the listing prospectus for ENAV SpA dated 8 July 2016, the government conditioned its authorisation on the company implementing governance structures, prior to the initial public offering (IPO), for the protection of the integrity of information by taking suitable internal organisational measures to safeguard access to and the confidentiality of sensitive data for the purposes of public security. By way of clarification, ENAV SpA stated in the listing prospectus that it had already established suitable structures, in particular an internal security regime governing the functioning of the company’s central security body, which had been previously approved by the Prime Minister’s Office and the National Security Authority.

According to the listing prospectus for Space 2 SpA, the government also imposed the following conditions (applicable following conclusion of the merger): (1) the company officer entrusted with the transfer and export of weapons must be an Italian citizen; (2) the company had to put in place management and organisational solutions to ensure that manufacturing and R&D operations relating to defence and national security (including know-how and patents) would be maintained in Italy; (3) the company had to put in place governance structures for the protection of the integrity of information, by taking suitable internal organisational measures to safeguard access to and the confidentiality of sensitive data for the purposes of public security; and (4) the company must ensure the continuity of the production operations necessary to guarantee that Italy complies with its obligations under international cooperation programmes.

No further details on the conditions actually imposed are available from public records.

Based on press reports, it appears that the conditions imposed by the government included an obligation on the seller to invest the proceeds of the sale in Piaggio Aerospace’s military unit. Moreover, according to the Report and further publicly available information from press reports, the government required Piaggio Aerospace SpA, among other things, to: (1) set up a fully autonomous organisation unit in charge of carrying out the company’s activities relevant for the Italian security interests, endowing it with appropriate financial and human resources to guarantee the independence of such unit; (2) adopt all suitable solutions to ensure that no technical information relevant to the production and sale of P1HH, P2HH and MPA aircraft is used or permitted to use, directly or indirectly, for the production and sale of, among other
On 7 June 2018, the government also exercised its powers by imposing certain conditions and prescriptions\(^{72}\) in relation to the resolution of the shareholders’ meeting of Rete Telematiche Italiane SpA (Retelit) (a listed company providing data and infrastructure services to the telecommunications market, operating more than 12,500 kilometres of optical fibre infrastructure) of 27 April 2018, which appointed a new board of directors on the basis of the slate submitted by a consortium of three shareholders.\(^{73}\) Retelit challenged the decree whereby the government exercised its powers, on the ground that it had notified the government of the resolution only for ‘prudential and cautionary reasons’ and that, in fact, it did not hold any strategic asset and, in any event, the resolution did not entail any change in the control of the company. The government however disagreed with the position taken by Retelit and, in particular, on the basis of an opinion issued by the Italian Communications Authority, concluded that Retelit did hold strategic assets and that the appointment of a new board of directors had resulted in a change in the availability of such assets. Based on the Report, we understand that the government also issued a fine of €140,000 to Retelit because the company had belatedly notified the resolution; interestingly, the amount of the fine was determined on the basis of the turnover of the company generated with the strategic assets only, as opposed to the overall turnover.

On 8 August 2018, the government authorised Leonardo SpA to grant to Rohde & Schwarz GmbH & Co KG (a German company specialised in the fields of electronic test equipment, broadcast and media, cybersecurity, radio monitoring, radiolocation and radio communication) a licence to develop new radio transmission technologies;\(^{74}\) on that occasion, however, the government imposed certain specific conditions and prescriptions intended to ensure that the transaction would not undermine the Italian essential and strategic interests of defence and national security.\(^{75}\)

On 18 April 2019, the government exercised its special powers in the fields of energy, transport and communications by imposing certain prescriptions\(^{76}\) in relation to the

\(^{72}\) See the company’s press release of 8 June 2018: www.retelit.it/public/CMS/Files/4792/PR-Decree-CdM.pdf.

\(^{73}\) Based on a press release issued by Retelit on 27 April 2018, the winning slate was submitted by a consortium composed of Bousval SCA (a company controlled by Lybian Post Technology Company), Axxion SA and Shareholder Value Management AG, which had also signed a shareholders’ agreement among themselves. Another candidate slate was submitted by Fiber 4.0 (which had then flagged the matter to the government) but it was not voted by the majority and therefore only appointed one director.

\(^{74}\) The licence was granted for the purpose of developing the HDR waveform WF (High Data Rate Waveform) as part of the ESSOR programme (the European secure software defined radio programme) launched by the Member States of the Organisation for Joint Armament Cooperation, which governs the cooperation activities in relation to defence equipment programmes between Italy, France, Belgium, Germany, Spain and the United Kingdom in the field of armaments.

\(^{75}\) Public disclosure and the press release issued by the government do not provide further details in relation to the conditions and prescriptions imposed on the transaction. However, the Report states that a proposal was made to condition the authorisation on the German government’s formal adherence to the ESSOR programme.

\(^{76}\) The government’s press release did not elaborate on what such prescriptions consisted of, but only indicated that the special powers were exercised for the purpose of protecting the strategic interests of the Italian
proposed acquisition of the 48.24 per cent stake held by Uniper Global Commodities SE (a German international energy company active in the business of generating, transmitting and distributing natural gas, electricity, water and district heating) in the share capital of OLT Offshore LNG Toscana SpA (the Italian company that owns and operates the floating regasification terminal located off the Italian coast between Livorno and Pisa) by First State SP Sàrl.

More recently, on 26 June 2019, the government also exercised for the first time its special powers introduced by the First 2019 Decree in relation to 5G technologies by imposing specific prescriptions\(^77\) on the agreement entered into between Fastweb SpA (the Italian provider of network telecommunications services) and Samsung Electronics Co Ltd (the South Korean multinational electronics company) for the design, supply, configuration and maintenance of software equipment relating to radio components and core networks necessary for the implementation of the 5G fixed wireless access network in the cities of Bolzano and Biella.

\(^{ii}\) Cases in which the government decided not to exercise its special powers

As noted, in most\(^78\) of the other disclosed cases in which the government was notified of a transaction under the Law it resolved not to exercise its special powers, although seldom providing sufficiently detailed reasoning for the underlying decision. We set out some examples.

On 23 October 2014, the government declared that it would not exercise its special powers in relation to the reorganisation of the infrastructure investments of Cassa Depositi e Prestiti SpA (a state-controlled holding company),\(^79\) entailing the transfer of its share interest in Terna SpA (the Italian electricity grid operator) to CDP Reti Srl (a subsidiary of Cassa Depositi e Prestiti SpA, which already held a controlling stake in Snam SpA, the gas transport infrastructure operator); nor would it exercise its special powers in the subsequent sale of a substantial minority interest in CDP Reti Srl to State Grid Europe Limited (a subsidiary of State Grid Corporation, a state-owned Chinese company). A government report submitted to Parliament on 23 December 2016,\(^80\) providing an update on the application of the Law, disclosed that the coordination group (i.e., the inter-ministerial office assisting the government State. However, based on publicly available press reports, it appears that these included: (1) the preservation of the infrastructure’s strategic role in the Italian economy; (2) the maintenance of the OLT regasification plant off the Livorno coast; and (3) an obligation to notify the government in advance of any major changes in OLT Offshore LNG Toscana SpA’s governance structure.

\(^{77}\) The press release issued by the government does not detail nor explain the prescriptions imposed. Based on press reports, it appears that the government approved the transaction on condition that, among other things, Fastweb SpA: (1) merges the corporate security function in the governance processes; (2) carries out audits for the purpose of confirming the absence of functional interactions between core and experimental networks, as well as allows monitoring actions, if deemed necessary; (3) submits to the government at the end of any testing activities the results of the audits carried out; (4) provides the government with regular updates, within 60 days as of 26 June 2019 and every six months thereafter, over compliance with certain security rules; and (5) promptly communicates any intention to expand the system architecture.

\(^{78}\) In the remaining cases, the simplified procedure envisaged for intra-group transactions (in respect of which the government may not exercise its powers except in extreme cases) was followed.


\(^{80}\) Available at www.camera.it/leg17/494?idLegislatura=17&categoria=249&tipoDoc=elenco_categoria.
in the review process) recommended that the companies involved in the overall transaction proceed carefully so as to ensure the functioning and security of energy procurement, the maintenance of network efficiency and the protection of confidentiality of sensitive data and strategic information held by CDP Reti Srl and its subsidiaries. However, the government decided not to exercise its special powers altogether, as it concluded it was not appropriate to impose restrictive measures on the transaction.

Similarly, on 29 April 2015, the government confirmed that it would not exercise its special powers under the Law in relation to the disposal of up to 40 per cent of the share capital of INWIT SpA (the company operating Telecom Italia SpA’s wireless tower network) by means of an IPO. The government explained that its analysis found there to be no material issues regarding the envisaged transaction.81

In the course of 2015, the government was also notified of several transactions concerning the proposed construction of a subterranean natural gas storage facility in Italy. In each case, the government decided not to exercise its powers, although in the first situation it provided some limited indication as to the practical application of the criteria for the exercise of its special powers. Specifically, in the first instance, the government received a notification concerning a reverse merger by incorporation of Gestioni e Partecipazioni Srl (a company that, according to the press, was controlled by the Italian bank Intesa Sanpaolo SpA), Gestioni Partecipazioni Old Srl and Petren Srl into Ital Gas Storage Srl (the licensee for the construction of the gas storage facility). Then, on 30 June 2015, the government concluded that the storage activity was subject to specific EU provisions (regardless of the shareholding structure of the relevant operator) and therefore declined to exercise its special powers. A few weeks later, the government was also notified of a share capital increase of Ital Gas Storage reserved to Sandstone Holding BV (controlled by an infrastructural investment fund managed by Morgan Stanley, which was reported to be a non-EEA person); on 6 August 2015, the

81 Other cases in which the government concluded it would not exercise its special powers under the Law include: (1) the merger of Aeroporto di Firenze SpA (which operates Florence airport) into Società Aeroporto Toscana Galileo Galilei SpA (which operates Pisa airport); (2) the acquisition of the telecommunications towers business of Wind Telecomunicazioni SpA by Abertis Infraestructuras SA; (3) the transfer of B-Max Srl’s know-how in the manufacturing of defence-related materials; (4) the partial and proportional demerger of Vitrociset SpA (a company active in mission-critical, business-critical or life-critical systems for homeland security, counterterrorism and combating crime, space applications and transport of goods and passengers) resulting in the transfer of the share interests in Salaria Real Estate Srl and Tiburtina Real Estate Srl to the demerged company’s shareholders (Ciset Srl and Finnmeccanica SpA). The demerger was reported to be integral to a corporate reorganisation of Ciset group aimed at the entry of a new controlling shareholder interested only in the group’s industrial business; (5) the partial demerger of Rete Ferrovie dello Stato SpA (which owns and operates the rail network), entailing the transfer of a business unit (consisting of the electricity grid related to the rail network) to SELF Srl and the subsequent transfer of SELF Srl to Terna SpA (the Italian electricity grid operator); (6) Terna SpA’s acquisition of certain of A2A Gencogas SpA, AIM Vicenza SpA and Dolomiti Energia Holding SpA’s high-voltage power stations; (7) the acquisition by F2I SGR SpA (an Italian infrastructure fund) of Infracom SpA (an Italian telecommunications service provider) from Serenissima SpA (the Abertis subsidiary operating a motorway in northern Italy); (8) the granting of a licence by Leonardo SpA in favour of the Ministry of Defence of the Republic of Egypt and the Egyptian Armed Forces to use intellectual property rights relating to the tool ART-CM117E Advanced, which allows reprogramming of the encryption algorithm adopted by the CM117-E devices (a multiprotocol digital voice and data crypto device for land, naval and airborne tactical applications); and (9) the acquisition by Leonardo SpA of a 98.54 per cent stake in the share capital of the aforementioned Vitrociset SpA through the exercise of a pre-emption right.
government decided not to exercise its special powers in respect of this transaction (no specific reasoning was provided). Finally, the government was notified that the construction of the gas storage facility would be carried out by means of a project financing transaction, whereby the lenders would be granted security interests upon certain (unspecified but presumably strategic) assets; in this case, on 23 December 2015, the government concluded that the public interest in the security and continuity of the functioning of the national natural gas system was adequately protected and again declined to exercise its special powers.

On 22 September 2015, the government decided not to exercise its special powers in relation to the creation of a joint venture between CK Hutchinson Holdings Limited and VimpelCom Ltd concerning their respective Italian telecommunications operations. This joint venture was followed by a merger between the parties’ respective Italian telecommunications subsidiaries, namely H3G Italia SpA and Wind Telecom SpA. Upon clearing the creation of the aforementioned joint venture, the government provided some recommendations as to the information that the parties would have to include in the notification of the merger under the Law, which to some extent may be regarded as advance notice of the conditions that the merger should meet or be subject to. Among other things, the government recommended that the parties provided specific information on the strategic planning on business and investments, with particular regard to the effects of the transaction on the national territory, technology and employment, and indicated also that the proposed strategy should not result in the transfer abroad of management and security functions that could undermine national security and continuity of services. Similarly, on 2 August 2018, the government did not exercise its special powers in relation to the subsequent acquisition by CK Hutchison Holdings Limited of the exclusive control over CKH Luxembourg Sàrl (the corporate entity whereby CK Hutchison and VimpelCom (now VEON) had established the mentioned joint-venture) and, therefore, of Wind Tre SpA (the Italian communications company resulting from the aforesaid merger between H3G Italia SpA and Wind Telecom Italia SpA). According to the Report, the government imposed the same recommendations issued in connection with the 2015 establishment of the joint venture. On 19 October 2017, the government also decided not to exercise its powers in the communications sector in relation to the project pursued by 2i Fiber SpA (a company controlled by infrastructure funds F2i SGR SpA and Marguerite) to create a communications business-to-business hub through the acquisition of Infracom SpA, MC-Link SpA and KPNPQWEST Italia SpA (which provide information and telecommunication technology services, including through their optical fibre network and data centres). Subsequently, on 8 August 2018, the government also decided not to exercise its special powers in relation to the acquisition by Irideos SpA (the company resulting from the merger of the above-mentioned entities into 2i Fiber SpA) of the entire share capital of Clouditalia Telecomunicazioni SpA (a company specialised in offering integrated telecommunications and cloud computing services).

On 10 April 2018, the government decided not to exercise its powers in relation to the acquisition by Leonardo SpA of the know-how relating to a naval transit security product owned by Orizzonte Sistemi Navali SpA (a joint venture between Leonardo and Fincantieri SpA, another state-controlled shipbuilding company), on grounds that the transaction did not raise any specific risk.

Finally, on the same day, the government decided not to exercise its special powers in relation to the proposed acquisition by 2i Towers SpA (a vehicle participated by F2i – Fondi Italiani per le Infrastrutture SGR SpA (the Italian infrastructure investment fund)
and Mediaset SpA (the Italian mass-media group)) of the exclusive control over EI Towers SpA (the Italian company owning and operating a large network of broadcasting towers and mobile sites across Italy).82

iii The Telecom/Vivendi case

A review of the developments in the relationship between Vivendi SA, the French media conglomerate, and Telecom Italia SpA, the Italian incumbent owning the fixed-line telecommunications network and controlling two subsidiaries whose activities, according to the government, are included in the security and defence sector, provides helpful indications on the approach that the government may take as regards the exercise of its special powers, including the extent to which political factors may influence government decisions.

Between 2015 and 2016, Vivendi progressively built a 23.9 per cent equity stake in Telecom Italia. In connection with the general meeting of Telecom Italia of 4 May 2017, which was convened to appoint the company’s new board of directors, the candidate slate submitted by Vivendi won by a slight margin of votes and, as a consequence, Vivendi managed to appoint 10 of the 15 members of Telecom Italia’s board of directors.83

Following the resignation of Telecom Italia’s CEO, on 27 July 2017, the board of directors of Telecom Italia temporarily granted the relevant powers to its then chairman (who was (and still is) also Vivendi’s CEO) and acknowledged that Vivendi had started to exercise powers of ‘direction and coordination’ over the company.84 This board resolution triggered significant criticism in the Italian media and among politicians, emphasising the perceived imbalance between the degree of exposure of Italian targets to potential takeovers relative to the challenges experienced by Italian companies investing abroad, particularly in France.85

In the wake of these discussions, on 2 August 2017, the government issued a press release stating that, at the request of the Ministry of Economic Development, it had opened

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82 However, the government requested the buyer to submit the industrial plan promptly after its adoption.
83 By a decision adopted on 30 May 2017, the European Commission ruled that, as a result of the shareholder vote on the appointment of the new Telecom Italia board of directors, Vivendi had acquired de facto control over Telecom Italia pursuant to the EUMR and the Commission authorised the acquisition subject to the divestiture of an asset owned by Telecom Italia.
84 ‘Direction and coordination’ as a concept is peculiar to Italian corporate law; although there is no statutory definition, it is generally maintained that an entity exercises direction and coordination powers over another company where a significant part of the management decisions of the latter is continuously and substantively taken or influenced by the management of the former, despite being formally implemented by the management of the latter. The direction and coordination regime entails the liability of the entity abusively exercising direction and coordination powers in respect of the company’s shareholders (for any prejudice caused to its profitability and the value of their investment) and in respect of the company’s creditors (for any impairment to the integrity of the company’s assets).
85 On 26 July 2017, the French Minister for the Economy and Finance announced that France would temporarily nationalise the STX France shipyard, previously owned by South Korea’s STX, which had been acquired by Fincantieri SpA (an Italian shipbuilding company controlled by the Italian Ministry of Economy and Finance) in the context of STX’s bankruptcy proceedings. The decision gave rise to strident reactions by the Italian government, which were eventually settled through an agreement between the two governments pursuant to which (1) Fincantieri would take control of STX by acquiring 50 per cent of the shares (the remaining shares being acquired by the French state (34 per cent), Naval Group (10 per cent), STX employees and local suppliers) and borrowing a 1 per cent share interest from the French state for 12 years and (2) Italy and France would also explore the possibility of combining Fincantieri and Naval Group’s respective military business.
an investigation as to whether Telecom Italia was required to notify the government of the mentioned resolution acknowledging Vivendi’s direction and coordination. In parallel, the government conducted an investigation as to whether Vivendi’s acquisition of its equity interest in Telecom Italia also required any notification to the government under the Law. Separately, on 4 August 2017, the Italian securities commission (CONSOB) requested Vivendi to clarify whether it exercised de facto control\(^\text{86}\) over Telecom Italia.\(^\text{87}\)

Pending the investigation, Vivendi notified the government on 15 September 2017, for purposes of the government powers in the defence and national security sectors, of its equity interest in Telecom Italia above the relevant threshold, which Vivendi had acquired between 2015 and 2016. On 16 October 2017, the government concluded that Vivendi’s acquisition fell within the scope of the Law, because Telecom Italia owns controlling interests in two companies performing confidential security activities on behalf of the government, namely Telecom Italia Sparkle SpA (a company operating 530,000 kilometres of optical fibre cables, including major submarine cables) and Telsy Elettronica e Telecomunicazioni SpA (an ICT security solutions and service provider). The government further found that Vivendi’s equity interest raised a threat of serious prejudice to the essential interests of defence and national security and resolved to exercise its powers. In particular, the government imposed conditions and prescriptions on the governance of Telecom Italia, Telsy and Sparkle, intended to ensure, among other things, the independence of the corporate functions related to national security,\(^\text{88}\) the appointment of qualified Italian citizens to certain sensitive positions,\(^\text{89}\) the maintenance on the Italian territory of certain activities\(^\text{90}\) and to ensure that certain activities are adequately

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\(^{86}\) Under Italian corporate law (Article 2359 Civil Code), a company is controlled by another company if the latter (1) holds the majority of the voting rights at the former’s ordinary shareholders’ meeting, (2) holds sufficient voting rights to exercise a dominant influence at the former’s ordinary shareholders’ meeting, or (3) exercises a dominant influence on the former pursuant to particular contractual provisions between them.

\(^{87}\) In its reply to CONSOB, Vivendi denied the exercise of control over Telecom Italia. However, on 13 September 2017, CONSOB found otherwise; Vivendi appealed this decision before the Administrative Court of Latium in Rome, which however confirmed CONSOB’s findings by a judgment dated 17 April 2019. Vivendi has also denied that it exercised control over Telecom Italia for accounting consolidation purposes pursuant to International Financial Reporting Standards 10, which establishes principles for presenting and preparing consolidated financial statements.

\(^{88}\) The government ordered the creation of a corporate organisation for each of Telecom Italia, Sparkle and Telsy, to which the corporate operations in the national security sector are to be entrusted, requiring that it be granted suitable financial and labour resources.

\(^{89}\) The government required that one member of the board of directors at each of Telecom Italia, Sparkle and Telsy should hold only Italian citizenship, hold a specific security certification, receive the powers to manage the corporate security business and receive government approval as to his or her suitability for the purposes of the protection of the essential interests of defence and national security.

\(^{90}\) Notably the operation and security of the networks and of the services supporting the strategic activities, as well as the security operations centre, the computer emergency response team, the data operations centre, the network operations centre, the information operations centre and the other data centres and logistics and information security devices ensuring the confidentiality and integrity of the corporate data.
developed;\(^\text{91}\) the government also imposed the creation of a monitoring committee composed of government representatives to oversee compliance with the prescriptions set forth in the decree.\(^\text{92}\) Vivendi has filed an administrative appeal against this government decision.

Similarly, on 10 October 2017, Telecom Italia notified the government of the aforementioned shareholders’ resolution of 4 May 2017, electing a new board of directors, and board resolution of 27 July 2017, which acknowledged that Vivendi had started exercising ‘direction and coordination’ powers over Telecom Italia. As a result, on 2 November 2017, the government exercised its powers under the Law, though this time in connection with the strategic assets that Telecom Italia holds in the communications sector. In particular, the government found that Vivendi had acquired control of Telecom Italia and, in light of the ‘different industrial mission’ pursued by Vivendi, this could cause changes in the organisational and strategic choices made by Telecom Italia that would be relevant to the functioning and security of the fixed-line telecommunications network and thereby could seriously undermine the public interest protected by the Law. Accordingly, the government imposed on Telecom Italia the adoption of suitable industrial commitments\(^\text{93}\) and an obligation to notify proposed transactions involving strategic assets;\(^\text{94}\) the government also provided that the same monitoring committee created in connection with Vivendi’s notification be also granted the power to monitor compliance with this additional set of prescriptions. Telecom Italia has filed an administrative appeal against this government decree.

On 8 May 2018, the government issued a €74.3 million fine to Telecom Italia for failing to timely notify the adoption of the resolutions. The government determined the amount of the fine with reference to the aggregate turnover of Vivendi and Telecom Italia relating exclusively to the relevant strategic assets in the telecommunications sector: in other words, it did not consider the entire turnover of both companies (as a literal reading of the Law could suggest) but only a portion (€74.3 million was reported to correspond to 1 per cent of the relevant turnover).\(^\text{95}\) Telecom Italia has appealed this government decision to the Administrative Court of Latium in Rome, which on 4 July 2018 and then on 23 May 2019 temporarily suspended the fine, pending a decision on the merits. Moreover, Telecom Italia

\(^{91}\) For instance, the adoption of a suitable investment and development plan for the operation, maintenance and modernisation of the network and systems (including submarine cables and internet exchange point) and the cryptographic products and solutions, to be submitted in advance to the monitoring committee established under the decree.

\(^{92}\) Although Vivendi failed to timely notify the government of the acquisition of stake in Telecom Italia for the purposes of the government special powers in the fields of defence and national security, at the time Vivendi notified the transaction to the government, the Law did not expressly provide that in event of failure to notify a transaction or resolution, the investor or the company could receive a fine (creating a misalignment with the sector of energy, transportation and communications). The government sought to address this discrepancy through the 2017 Decree but did not apply this retroactively; therefore, Vivendi could not be sanctioned.

\(^{93}\) Notably, the adoption of development, investment and maintenance plans intended to ensure the functioning and integrity of the network, the continuity of the universal service provision and the satisfaction of the general interest needs in the medium and long term.

\(^{94}\) In particular, the government required Telecom Italia to notify it of any change in the corporate governance of the company and the proposed sale of any asset that could affect the control and functioning of the network and the continuity of the universal service.

\(^{95}\) This is consistent with the criteria followed to determine the amount of the fine issued to Retelit SpA (see Section VII.i, above), where the government only considered the turnover generated with the strategic assets held by the company.
Italy also challenged the government’s decision imposing the mentioned prescriptions on the company, by means of an appeal in front of the Council of State (Italy’s supreme administrative court), before which the matter is currently pending.

In a press release Telecom Italia issued on 8 May 2018, it argued that the qualification of the relationship between Vivendi and Telecom Italia was irrelevant for the purposes of Telecom Italia’s notification obligations under the Law and that these are governed by a provision that is different from that referred to in the government’s decision. This line of argument would seem to suggest that Telecom Italia agreed with the argument made in Section II.ii (i.e., that the Review Regulation appears inconsistent with the Law and that the government’s approach appears to lead to discriminatory results regarding transactions involving the acquisition of a strategic asset implemented through the acquisition of shares (which plainly falls outside the scope of the Review Regulation) as opposed to resolutions adopted by companies holding the same strategic asset).

Moreover, this enforcement approach, to the extent that it is applied outside the security and defence sectors, would be likely to infringe the TFEU.

iv Expected future developments

Before the Telecom/Vivendi case, the government’s special powers under the Law had, according to public opinion, been perceived as somewhat insufficient to protect the national interests underlying foreign investments in key sectors of the Italian economy.

A first formal step towards a possible revision of the Law had come with a report by the Ministry for Parliamentary Relations, dated 22 December 2016, in which the government provided its annual update on the exercise of its special powers. The report stated that the toolkit provided under the Law belatedly becomes available to the government, when all key decisions have already either been defined or made by the relevant players. Accordingly, the report suggested the pursuit of a unified and consistent government approach, to be implemented by following and addressing the most significant decisions of the relevant companies from an earlier stage, so that the exercise of the government’s special powers would only constitute the final step of a more structured process.

In addition, during the first months of 2017, the Ministry of Economic Development called repeatedly for the introduction of statutory ‘anti-raid’ provisions, including by reforming the special powers under the Law, mostly as a reaction to the perceived weakness of the Italian economic system in the face of aggressive takeovers attempted or completed by foreign investors.

These announcements were followed by the approval on 16 May 2017 of two motions by the lower house of Parliament, requesting the government to revise and enhance its

96 Both motions particularly stressed the imbalance between the value of acquisitions of Italian companies by foreign investors and the acquisitions of foreign companies by Italian investors; they also suggested that foreign investments often pursue national strategic assets through hostile takeovers that deprive the targets of control over technologies and industrial and commercial know-how essential to the Italian economic system. These parliamentary motions, therefore, urged the government to revise and enhance the existing set of special powers under the Law, including (1) the extension of the government’s special powers to further fields (banks and financial services); (2) the introduction of more stringent disclosure and notification obligations for foreign investors, possibly preceded by an effective negotiation with the foreign investor to discuss its investment plan, with a view to ensuring the permanence in Italy of strategic assets, know-how and related jobs; and (3) the submission of a proposal to the European Union to coordinate national legislation on special powers.
powers to control investments by foreign companies. Such motions first resulted in the adoption of the 2017 Decree, which, however, as noted above, remains largely not applicable, at least as regards investments in high-tech assets because the government has not yet adopted the necessary implementing regulation.

On the other hand, the adoption of the 2019 Decrees, which expanded the scope of the government’s powers to investments in 5G technologies, may be regarded as a more meaningful attempt of Italy to address growing concerns on the threat that certain foreign investments pose in the fields of defence and national security. In particular, the changes to the Law introduced by the 2019 Decrees may be explained as an initiative intended to address the strong concerns expressed by certain institutions and member states of the European Union, as well as US officials, in relation to Italy’s signing up in March 2019 to China’s ‘Belt and Road Initiative’. The First 2019 Decree is a very recent piece of legislation and its impact still needs to be assessed. To date, the government powers relating to 5G technologies have been exercised only once; however, in the near future, given the expected expansion and impact of 5G technologies in a number of contexts, the new government powers and their practical application are likely to be duly tested.

More generally, following the general elections held in March 2018, the new cabinet, in addition to adopting the 2019 Decrees, seems to have taken (or at least shown) a stronger attitude towards the protection of strategic assets for the Italian national interests. Indeed, during the first 12 months the new cabinet has been in office, it exercised its powers more frequently compared to previous governments.

Finally, whether the incumbent government will seek to further enhance the existing set of powers, just apply them on more vigorous terms or leave the current regime as it currently stands, it will need to take into account the adoption of regulation No. 2019/452 of 19 March 2019 by the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the European Union, which regulation will enter into force on 11 October 2020.97 Pursuant to this regulation, although Member States would be entitled to maintain their existing foreign investment control regimes,98 the European Commission would also become empowered to screen foreign investments that are ‘likely to affect projects or programmes of Union interest on grounds of security or public order’ and would be entitled to ‘issue an opinion addressed to the Member State where the foreign direct investment is planned or has been completed’, which would have to ‘take utmost account’ of that opinion and, if the notifying Member State disregards it, provide an explanation.99 Accordingly, the European Commission envisages a framework whereby the domestic and European regime would coexist, subject to a cooperation mechanism: in particular, each Member State screening a foreign direct investment under its domestic regime should notify the European Commission and the other Member States by providing certain information.

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97 Available at: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN.
98 Pursuant to Article 3.1 of the regulation, ‘Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order’.
99 Pursuant to Article 8.3 of the regulation, ‘projects or programmes of Union interest shall include those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order’. A list of such programmes and project is provided for in an annex to the regulation.
as soon as possible. If any Member State considers that such foreign direct investment is likely to affect its own security or public order, or has information relevant for the purpose of carrying out the screening procedure, within 35 calendar days of receipt of the notice it may provide comments to the notifying Member State, which shall duly consider such comments. The Member State proving such comments is also required to simultaneously send those comments to the European Commission. If the European Commission believes that the notified foreign direct investment is likely to affect security or public order in more than one Member State, or is in possession of relevant information concerning such foreign direct investment, it would be entitled to issue an opinion to the notifying Member State within 35 calendar days of receipt of the notice, which would have to duly consider that opinion.

Pursuant to Articles 6.1 and 9.2 of the regulation, such information include: ‘(a) the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital; (b) the approximate value of the foreign direct investment; (c) the products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed; (d) the Member States in which the foreign investor and the undertaking in which the foreign direct investment is planned or has been completed conduct relevant business operations; (e) the funding of the investment and its source, on the basis of the best information available to the Member State; and (f) the date when the foreign direct investment is planned to be completed or has been completed’.
Chapter 10

MEXICO

Juan Francisco Torres-Landa Ruffo, Federico De Noriega Olea and Pablo Corcuera Bain

I INTRODUCTION

As one of the largest trading partner of the United States\(^2\) (sharing one of the top three spots with Canada and China, and ahead of countries such as Japan and Germany), accounting for approximately 15 per cent of total trade with said country as of April 2019,\(^3\) and a member of the 1994 North America Free Trade Agreement (NAFTA) and the new United States-Mexico-Canada Agreement (USMCA) which, when ratified will supersede the NAFTA accord, Mexico has become a huge host for foreign investment in most sectors of its economy, from manufacturing to the import and export of goods. By way of example, Mexico is now seventh of the car manufacturing countries in the world (ranking third in commercial vehicle manufacturing countries and fourth in terms of exported vehicles), an achievement that would not be possible without the participation of foreign automotive manufacturers in Mexico.\(^4\)

During the 2012–2018 administration, Mexico embarked on an ambitious programme of legal and structural reforms directed at overhauling its economic appeal and in an attempt, among other things, to encourage an increase in the flow of foreign investment into the country through the liberalisation of its foreign investments framework. Although Mexico has historically been open to foreign investment, and indeed is one of the top recipients of foreign direct investment in Latin America,\(^5\) the structural reforms focused mainly on the energy and telecommunications sectors, which had lagged behind significantly on account of previous foreign investment restrictions. In 2014, the Mexican Congress enacted a series of reforms to promote and kick start economic growth in those sectors. Among these reforms were a significant deregulation of the energy sector and the elimination of foreign investment restrictions within the financial and telecommunications sectors.

Given the outcome of the 2018 elections, a new administration took office on 1 December of that year. The new government is known for its desire to revisit many of the legal developments of the past. The main thrust of change is the fight against corruption and

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1 Juan Francisco Torres-Landa Ruffo and Federico De Noriega Olea are partners, and Pablo Corcuera Bain is an associate at Hogan Lovells BSTL, SC.
2 Latest figures (April 2019) show Mexico being the largest trading partner to the United States.
impunity. However, some of the initial policy changes have been disconcerting and have
generated a number of question marks about their soundness to enhance economic growth.
In any event there have been no restrictions on foreign investment or any other changes to
the main rules on the subject matter.

Generally speaking, foreign investment is regulated by the 1993 Foreign Investments
Law and its Regulations (as amended) (jointly, FIL), which together provide and describe the
main framework for the topic; the FIL is discussed further in the following sections.

In addition to establishing the framework for foreign investments, the FIL gives a brief
description of each relevant business sector, any remaining restrictions with respect to foreign
investments, and the extent of those restrictions. Regardless, as a general rule, all foreign
investments must be reported to the Foreign Investments National Registry (RNIE), which
is dependent on the Ministry of Economy.

II FOREIGN INVESTMENT REGIME

As previously mentioned, the FIL is the main legal instrument regulating foreign investment
in Mexico. It defines ‘foreign investment’ as the participation, in any percentage, by foreign
investors in the corporate capital of Mexican entities, investments in Mexican companies
where the majority interest is composed of foreign capital, or the participation by foreign
investors in the activities and sectors contemplated in the FIL. A ‘foreign investor’ is defined
as any individual or entity of any nationality, other than Mexican, and foreign entities with
no legal independent existence.

While in general foreign investors may participate in Mexican projects without major
restrictions (such as being allowed to participate directly in the corporate capital of Mexican
legal entities, purchase and sell assets, manufacture, import and export products, open and
operate establishments or businesses of any legal nature), some limitations apply to certain
economically ‘strategic’ activities in which foreign investment is restricted or, in some specific
cases, not permitted at all.

The Mexican Constitution actually provides for certain strategic activities that are
expressly reserved for the state to undertake exclusively, either in whole or in part. The
strategic activities reserved for the state are:

a the postal service, telegraphy and radio-telegraphy;
b radioactive minerals and nuclear energy;
c the control of the national electricity system along with the transmission and
distribution of electricity;
d the printing of money and coinage;
e hydrocarbons;
f basic petrochemicals; and
g control, supervision and oversight of airports, ports and heliports.

As part of the aforementioned reforms, the transmission of electricity and the exploration
and extraction of hydrocarbons were significantly deregulated and, although still restricted,
private entities, both foreign and domestic, are now allowed to participate to a certain extent
in these activities, using a type of profit or production sharing mechanism with the state oil
company Pemex.

There are some other economic sectors in which foreign investment is allowed but also
restricted (i.e., capped); these are discussed further in Section IV.
Regarding real estate, there are no restrictions for Mexican commercial companies seeking to acquire urban real property, even if non-Mexican equity holders participate in the capital stock, whether as minority or majority stakeholders. However, companies may only acquire rural property to the extent that it is necessary for the fulfilment of their corporate purpose. In no event may these corporations acquire real property dedicated to agricultural, cattle or forestry activities of an area larger than the thresholds established for these activities.

Further, acquiring property in a restricted zone (which covers an area creating a belt around the country, 100 kilometres wide in the border regions and 50 kilometres wide along the coast) requires, inter alia, Mexican companies to include a Calvo Clause in their corporate by-laws. A Calvo Clause is a requirement for foreign shareholders to consider themselves as Mexican nationals in respect of the company's property, and includes an express agreement not to invoke the protection of a foreign government, under penalty of forfeiting their property in benefit of the nation.

Mexican companies with a Calvo Clause included in their by-laws are authorised to acquire real estate located in the restricted zone for non-residential purposes, and have beneficiary rights over real estate located within the restricted zone for residential purposes. If acquiring real estate for non-residential purposes, a corporation is required to register the acquisition with the Ministry of Foreign Affairs.

Foreign citizens cannot acquire real estate within the restricted zone by any means, regardless of the purpose for which the property would be acquired; however, they can hold beneficiary rights in trusts established for the purpose of holding ownership of the relevant real estate, subject to securing a prior authorisation from the Ministry of Foreign Affairs.

III  TYPICAL TRANSACTIONAL STRUCTURES

Investors seeking to establish a presence in Mexico have a variety of options to achieve that goal. They can do so directly, by means of a representative office or a branch office, or by choosing to establish a local corporate entity.

Representative offices are an easy and inexpensive way of exploring the Mexican market. This type of vehicle allows an interested investor to test the waters and lay the groundwork for a more substantive incursion into business activities in the country. Through a representative office, the interested party may distribute information about its business, as well as advertising materials, but is not allowed to perform business transactions (understood to be income-generating activities).

Because the condition precedent to establishing a representative office is that the activities performed by the entity do not generate income, such offices are not subject to significant tax obligations and liabilities (except withholding taxes if the entity employs local people).

For certain industry sectors, such as banking and insurance, establishing a representative office in Mexico requires prior approval from the agencies regulating those sectors (the National Securities and Banking Commission, for example), and in some cases will also require authorisation from the National Commission of Foreign Investments (CNIE).

Branch offices, like representative offices, do not require the foreign investor to incorporate a new legal entity in Mexico. They allow for the investors to act in Mexico and conduct business transactions directly through their corporate entities incorporated abroad.
Investors must first obtain authorisation from the Ministry of Economy and subsequent registration in the Public Registry of Commerce. Once authorised, a branch office may perform any business activity that is not otherwise limited to the Mexican state, to Mexican nationals or to Mexican companies.

Of course, it is significant that without a separate corporate presence in Mexico, liability is directly attributable to the foreign corporation, as there is no ‘buffer’ or corporate veil between it and the local business operations.

As an alternative to representative and branch offices, investors may choose to incorporate a new commercial entity in the country, existing independently from the original foreign corporation. In most cases, this will shield the investor from direct liability for operations carried out in Mexico by the new local vehicle.

There are two principal commercial structures that shield the foreign investor from liability: the corporation (SA) and the limited liability company (SRL).

Both the SA and the SRL are allowed to enter into the same business activities and markets, and are treated equally for tax purposes. In terms of protecting investors from liability, both corporate vehicles are limited liability entities, in which stakeholders are only liable up to the value of their respective contributions to the company, and not for the operations of the company itself (for which the company is liable). This protection, of course, has certain limits, as illegal activities may pierce the corporate veil.

### Guiding principles of SAs and SRLs

A few general principles of law govern the liability of the directors and officers of both types of companies, except in the case of publicly held corporations, for which more detailed regulations exist. Generally, directors must act reasonably, in the best interests of their principals, and must recuse themselves from the discussion of and approval of transactions when they are faced with a potential conflict of interest.

Minority investors in an SA have more statutory rights than those in an SRL. For instance, equity holders in an SA representing 25 per cent or more of the capital stock may challenge and suspend the adoption of any resolution, and have a statutory right to postpone a shareholders’ meeting for a legal term of three days if they need additional information about the subject matter to be discussed at the meeting.

Equity holders in both an SRL and a SA may be subject to involuntary separation on certain specific and limited grounds. The grounds for separation in an SRL are provided for in the General Law of Commercial Companies, and include scenarios such as an equity holder using the company for its own private business, infringing the by-laws or applicable laws, fraud against the company or insolvency. In the case of SAs, the grounds for separation may be set forth in the by-laws, on the understanding that the General Law of Commercial Companies does not provide a set list of scenarios.

Capital calls, capital redemption, transformation, spin-offs and mergers, and capital contributions, both in kind and in cash, follow the same principles in both companies. One difference is that the by-laws of an SRL may require additional contributions from its partners. In both cases, the by-laws may provide for negative controls and special provisions for the adoption of decisions.

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6 Refer to your local counsel to discuss any tax effects in your local jurisdiction.
In SRLs, any partner in the company has a statutory right to withdraw from the company when management is conferred upon a person who is not a partner or whenever management is delegated to a non-partner. In practice, this statutory right is difficult to enforce as it is unclear how the equity should be redeemed by the company and at what value. The shareholders of an SA and the SAPI (see below) are not granted separation rights in this instance.

The rules for the SA were amended in 2014 to make it a more interesting vehicle for private equity investors and for joint ventures. In general, the shareholders of an SA may agree upon (1) the rights and obligations of purchase and sale options, (2) stock sales and all other acts related to first refusal rights, (3) agreements to exercise voting rights (i.e., shareholders’ agreements) and (4) agreements for the sale of their shares in a public offer. Notwithstanding the foregoing, the provisions regarding minority rights must always be taken into consideration.

There is also a sub-type of the SA, called investment promotion corporation (SAPI), which is a corporate vehicle created to foster the establishment of joint ventures and private equity investments. Although it is regulated in the Securities Exchange Law, it is not a publicly traded entity, and is not subject to the governance rules of publicly traded entities. However, the shareholders of a SAPI may choose to apply the directors’ liability regime that applies to listed companies.

Currently, the differences between the regulation of an SA and a SAPI are not really relevant. However, unlike the SAPI, an SA is not allowed to include restrictions stripping shareholders’ of the right to receive dividends or otherwise limiting their economic rights, and it is not allowed to purchase its own shares, so from this perspective SAPIs are more flexible than traditional SAs. SAPIs, on the other hand, may not be governed by a sole director, whereas SAs may choose to have a sole director instead of a board.

**ii Asset purchases and share purchases**

Before we enter into substantive discussions of the main differences, advantages and disadvantages between asset purchases and shares purchases, note that there are no restrictions on transferring capital or profits into or out of Mexico. Additionally, there are no currency restrictions in Mexico, and repatriation of funds is unlimited. As such, foreign investors are allowed to purchase directly assets or ownership interests in Mexican entities, subject only to restrictions as described in Section II.

From a business perspective, the easiest and most common method used to acquire an existing business in Mexico is through the purchase of all, or a controlling interest in the equity representing the corporate capital of the target entity, on the understanding that SAs, SAPIs and SRLs must at all times have at least two partners or shareholders, but one of these may have a nominal participation.

The transfer of the equity is usually done by a simple endorsement of the stock certificates representing the corporate capital, in the case of an SA, or through the transfer, by means of an assignment agreement, of the equity quotas representing the corporate capital of an SRL (the General Law for Commercial Companies provides that the partners holding the majority of the equity interest of an SRL must approve the transaction, and this threshold may be set higher in the corresponding by-laws of the target entity). The business terms (e.g., purchase price, representations and warranties, conditions precedent) are usually documented through a US-style stock purchase agreement, which will contain customary terms and conditions, as well as representations and warranties concerning the underlying business being purchased.
Some of the main advantages of acquiring an existing business through a stock purchase are that: (1) the business suffers no discernible changes to its operations as of the moment of the acquisition, notwithstanding that the new owners may at a later point make any adjustments they find convenient; (2) the transaction is fairly simple and straightforward, with minimum corporate requirements besides the endorsement or assignment of the share certificates or quotas representing ownership of the entity; and (3) apart from any sector-specific requirements, there is no need for further action once the transfer of the ownership interest is effected, as the assets, operating permits, employees, tax benefits, etc. are not subject to transfer.

One of the downsides of effecting a stock purchase is that all liabilities accrued by the company prior to the purchase remain with the acquired entity (including tax and employment liabilities). Although these liabilities may be covered and transferred to the seller in the stock purchase agreement, claims can result in a judicial process that could prove costly and burdensome to the buyer.

The purchase of assets, on the other hand, is a safe choice when a buyer wants to limit liability resulting from accrued obligations generated by the target entity prior to purchase.

By its very nature, the purchase of assets is a more burdensome and complicated transaction, and thus more expensive than a ‘traditional’ stock purchase, as the buyer and seller must agree on exactly what assets and liabilities (e.g., accounts payable, debts, current employees) are to be transferred to the purchasing entity. Both from a business perspective and as a tax obligation, each transferred item must be identified in the asset purchase agreement, with the price allocation for each item.

Additionally, when purchasing assets, there is an actual transfer of ownership of each asset. As such, the acquiring entity may need to obtain permits to operate or use the assets, may have to hire or transfer employees into the purchasing entity, and so on. Further, the transfer of certain assets may be subject to certain formalities, or specific government authorisations (e.g., registrations on machinery) may be required to identify the elements dealing with the transfer (e.g., notarial deeds, government authorisations and consents from third parties). If these assets are subject to lien, security or collateral, or an attachment, or the selling entity is a depository for such items, there could be restrictions on their transfer.

Some of the main advantages of pursuing an asset purchase over a stock purchase are that the purchaser will have certainty that it is not acquiring contingent liabilities or undisclosed liabilities from the selling entity. However, parties should consider that if the authorities find that the purchaser acquired an ongoing concern, the purchaser could be jointly liable for unpaid taxes and, in the event of a finding that the employees who were transferred form part of the deal, also liable for employment obligations.

The primary disadvantage of an asset purchase is the tax cost for the parties (depending on whether the assets were already highly depreciated or not) and the labour implications. From a labour standpoint, the seller may be required to transfer personnel to the entity designated by the purchaser, which might involve severance costs for the selling entity, with immediate hiring by the buyer. However, it is not unheard of for the parties to agree that the purchaser will assume all the corresponding obligations of the seller, as a ‘substitute employer’, subrogating in all the seller’s obligations with respect to seniority, benefits, amounts owed on account of salaries, and similar labour-related obligations.

There are certain delays in implementing an asset transfer insofar as it might be necessary to obtain new registrations and authorisations for the activity, product or service
(e.g., environmental authorisations, official standards and registrations for imports). Not only may all this represent a delay, but it could also entail costs that would need to be properly evaluated.

iii Taxation

In brief, a company’s tax obligations depend on whether it is considered a Mexican resident for tax purposes or whether a foreign company is considered to have a permanent establishment in Mexico. For a legal entity to be considered a Mexican resident for tax purposes, its main office or effective management must be established within the country.

Non-resident companies are considered to have a permanent establishment in Mexico when their businesses are carried out completely or partially in Mexico. This is done either through any offices, branches or agencies located in Mexico, or through an agent (of dependent or independent status in some cases) with the power to enter into agreements on the company’s behalf. However, this does not apply in the case of truly independent agents.

Tax laws and treaties further regulate the status of non-residents, when they may be deemed to be doing business in Mexico, and the creation of permanent establishments.

IV REVIEW PROCEDURE

As briefly mentioned in Section II, certain economic activities are capped at a certain percentage of foreign investment participation. These restrictions are found in the FIL and include the following:

a. a limit of up to 10 per cent foreign investment in the case of cooperative companies for production; and

b. a limit of up to 49 per cent foreign investment in:
   - explosives and firearm-related industries;
   - printing and publishing of national-circulation newspapers;
   - equity representing land for agriculture or cattle use;
   - freshwater fishing, and fishing within the coast and economic exclusive zone;
   - port administration;
   - port piloting services of vessels to perform inland navigation transactions;
   - shipping companies dedicated to the commercial exploitation of vessels for inland navigation and coastal shipping, except for cruises;
   - supply of fuels and lubricants for vessels, aircraft and railway equipment;
   - broadcasting; and
   - domestic air transportation and specialised air transportation.

The limits on foreign investment participation in the above-mentioned economic activities may not be surpassed directly or through trusts, contracts, partnership or by-law agreements, pyramid schemes or other mechanisms granting any control or higher participation than that established. However, neutral investment, which is a sort of preferred non-participatory financial investment equity that is not characterised as foreign investment for the purposes of the limitations provided by the FIL, has made it possible to have equity participation in spite of these restrictions.

Neutral investment allows economic rights but very limited corporate rights and it will not grant the foreign investor control over the corresponding company or trust. Therefore,
foreign investors may participate in Mexican companies or in trusts through a special class of stock that the Ministry of Economy authorises and that is not taken into account in determining the percentage of foreign investment in the company’s capital stock.

Moreover, a foreign investor must obtain approval from the CNIE for participation higher than 49 per cent in:

a. port services of vessels to perform inland navigation transactions;
b. navigation companies dedicated to the exploitation of vessels;
c. entities that are concessionaires or holders of permits of public-service airports;
d. private education services;
e. legal services; and
f. construction, operation and exploitation of railways.

Further to the above, foreign investors require authorisation from the CNIE whenever they acquire, directly or indirectly, equity of a company whose assets are above the amount fixed each year by the CNIE (currently, around 19.5 billion Mexican pesos or US$1 billion).\(^7\) The time taken by the CNIE to authorise such transactions may vary but is not usually considered to be a relevant obstacle. The CNIE may demand certain undertakings of a foreign investor related to employment, technology transfer or investment, as conditions of granting authorisation; however, 95 per cent of all foreign investment transactions in Mexico do not require government approval and it is considered as one of the most open and competitive in the world.\(^8\)

As further discussed in Section V, in general terms and subject to the restrictions discussed in Section II, foreign investors receive the same treatment as domestic investors when acquiring or becoming involved in restricted areas, including in matters such as antitrust approvals, where the focus would be on the nature of the transaction and not necessarily on the nationality of the parties involved. The only difference for foreign investors is the percentage of ownership interest that they can hold, either directly or indirectly.

For information purposes, the Mexican government relies on statistics provided by the RNIE, which monitors foreign investment, collects statistics and carries out surveys relating to foreign investment in the country. Specific information about investors and investments is not generally available to the public, except for the statistical data available through general publications or aggregate data available on the RNIE website.\(^9\) Some recent modifications to the General Law of Commercial Companies require information about equity structure to be made available to the federal government.

All foreign investors and Mexican companies with foreign participation in their ownership are subject to registration. Upon registration before the RNIE, periodic reporting obligations arise; failure to comply with these obligations may trigger the imposition of fines.

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\(^7\) As updated by the CNIE on 31 May 2019.

\(^8\) Source: https://www.export.gov/article?series=a0prt0000000PAuRAW&type=Country_Commercial__kav.

FOREIGN INVESTOR PROTECTION

The first protection is the standard of treatment afforded to foreign investment. There are three major standards: minimum, national and ‘most-favoured nation’.

The minimum standard requires Mexico to provide foreign investors with fair and equitable treatment in accordance with international standards, including full protection. The national standard implies the absence of discrimination based on nationality. Thus, foreign investors must enjoy treatment no less favourable than that afforded to Mexican investors in similar circumstances. Finally, the most-favoured nation standard implies that Mexico must grant at least the same treatment to the investor as that provided to other investors in similar circumstances.

An additional protection relates to specific rules safeguarding against expropriation or equivalent measures. Expropriation, nationalisation and equivalent measures (e.g., regulatory seizures) should only take place when they are required for reasons of public purpose, on a non-discriminatory basis, observing due process and through fair market-value indemnification related to the foreign investment.

Another fundamental protection is the prohibition of performance requirements. Mexico may not condition the receipt or continued receipt of an advantage or incentive on the meeting of any requirements. There is also the principle of free transfer of currency, which has already been briefly mentioned. Foreign investors may freely transfer, without delay and in hard currency, profits, dividends and any type of cash stemming from or involving their investment.

Finally, bilateral investment treaties (BITs) usually prohibit a requirement that Mexican nationals occupy senior management positions.

Mexico has entered into an substantial network of 32 BITs, with Argentina, Australia, Bahrain, Belarus, China, Cuba, Iceland, India, Kuwait, Panama, Slovakia, South Korea, Switzerland, Trinidad and Tobago, Uruguay, the United Arab Emirates, 16 EU Member States (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Slovakia, Spain, Sweden and the United Kingdom). Mexico has also signed BITs with Brazil and with Haiti, which are currently not in force.10

Mexico is currently negotiating BITs with the Dominican Republic, Malaysia, Russia, Saudi Arabia and Singapore.

Although certain differences may exist in BITs depending on specific negotiated terms, the content of these treaties is by and large homogeneous. The BITs generally include two sections: investment protection principles and dispute resolution mechanisms.

Most relevant for the business environment in Mexico is NAFTA, which includes provisions regulating investment between Mexico, Canada and the United States. The NAFTA treaty created the largest free trade region in the world in terms of volume of trade11 and grants most-favoured-nation treatment to US and Canadian investors. The NAFTA structure was modernised, overhauled, and legally speaking, will be superseded by the USMCA, a new agreement that was negotiated by the three countries during 2018 and 2019 (based on a request by the United States) and having been approved by the Mexican Senate in mid-June 2019, it is currently pending ratification from the US and Canadian congresses.

The USMCA will, upon ratification, include activities and sectors that were not relevant or in existence when the agreement came into force (1 January 1994), such as telecommunications, internet commerce and minimum labour standards.

In addition to NAFTA, Mexico currently has several free trade agreements (FTAs) with investment clauses, with countries such as Bolivia, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Japan and Nicaragua; further FTAs with Peru and the nations of Central America are pending ratification by the parties thereto, and is the country with the most FTAs.\(^\text{12}\) Mexico also became the first country to ratify the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), which was signed by Australia, Brunei Darussalam, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore and Vietnam, on 8 March 2018, which creates unprecedented access by the signatory countries to the economies of the rest. This agreement came into full effect on 30 December 2018, with the ratification from Canada, Japan, Mexico, New Zealand, Singapore and Australia.

Both the BITs and the FTAs generally grant foreign investors the right to bring an action against the Mexican state in the event of a breach or a supposed breach of the specified disciplines.

The dispute resolution mechanism in the BITs and the FTAs is arbitration, usually preceded by negotiation. The investors will usually select a three-member arbitration tribunal. The goal is to ensure equal, impartial and non-discriminatory treatment for the foreign investor and the host state, which would be difficult to ensure by resorting to the courts of either country. Although the new USMCA by and large retained certain dispute resolutions mechanisms from NAFTA, it is expected that Canada–Mexico disputes will be governed by the TPP-11 rather than the USMCA.

VI OTHER STRATEGIC CONSIDERATIONS

As part of the high-level analysis to be undertaken before investing in Mexico, investors should consider the well-known social and economic circumstances.

Although most investors should not expect to face overly cumbersome regulatory hurdles when investing in the more traditional aspects of the Mexican economy, there are several hot-button issues that may be a headache for even the most well-intentioned and seasoned foreign investor.

Because government corruption is notorious, particularly in the infrastructure sector, entities involved in this area of business should exercise additional caution (e.g., strict compliance with their domestic anti-corruption laws, and strict local compliance and anti-money laundering standards) should they wish to avoid being faced with judicial review and sanctioning procedures. Nonetheless, businesses engaged in activities that require constant and close work with the government should be careful about independence and fair dealing with government officials. While maintaining good relationships with government officials is important, there are strict guidelines prohibiting gifts or ‘privileges’ to an official.

Finally, because of anti-corruption regulations, and the possibility of accidentally getting involved in illegal activities, it is important for foreign investors to be careful when choosing local counsel for any and all business undertakings.

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VII CURRENT DEVELOPMENTS

Although the new López Obrador-led administration has initially adopted certain decisions at a federal level that have created shockwaves throughout the Mexican economy (such as cancelling the multi-billion new Mexico City International Airport), the markets at large have so far responded with a sensible level of scepticism to any potential long-term damage to the economy and to Mexico’s place as one of the leading foreign investment host countries in the region.

Further, the Trans-Pacific Partnership Agreement just recently came into effect. After a period of ‘easing-in’ and upon the expected ratification of more signatory states, we can expect a substantial expansion of foreign investment into Mexico, and the opening of new markets.

On a final note, the revamped Mexico–European Union FTA was successfully renegotiated this year and is currently undergoing translation and is pending signature and ratification. Expected to come into force during early 2020, this new FTA includes standards that will make our country a more attractive place in which to invest and work, as Mexico and the more industrialised nations become increasingly homogeneous, the most relevant of which are cutting-edge anti-corruption provisions and a conflict resolution process explicitly tailored to cases of corruption.
I INTRODUCTION

Portugal’s legal environment encourages foreign investment. The country has no foreign capital entry restrictions and Portuguese law prohibits any discrimination between investments based on nationality. Currently, Portugal is still ranked first in the trading across borders ranking, an indicator that captures the time and cost for document preparation and compliance with border procedures to export and import goods.  

Portugal has a liberal economy, which has led to significant development and diversification of the Portuguese market. Non-EU trade partners have continued to maintain their importance (25.6 per cent of total exports in 2018 and 24.8 per cent in the first four months of 2019), despite the key role assumed by EU Member States (74.4 per cent in 2018 and 75.8 per cent in the first four months of 2019).  

According to findings by the World Bank, Portugal is the 34th easiest country in the world in which to do business, and 13th within the European Union (a better classification than the Netherlands, the Czech Republic or Italy). 

Also, according to the European Economic Forecast Summer 2019, the growth of Portugal’s gross domestic product (GDP) slowed to 1.8 per cent in the first quarter of 2019, mainly because of weaker net exports. Overall, real GDP growth is expected to decrease by 1.7 per cent in 2019 and to remain stable throughout the year 2020. 

According to the World Economic Forum, Portugal was ranked 19th in the infrastructure competitiveness index 2018 and 27th in terms of business dynamism. 

In April 2016, the Portuguese government initiated a national reform programme for the period 2016–2020. This programme is essential for setting up structural reforms in the Portuguese market, notably by promoting foreign investment and contributing to public finances. The programme is built on qualification, promotion of economic innovation, territorial enhancement, modernisation of the Portuguese state, capitalisation of companies

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1 Joaquim Caimoto Duarte is a counsel, Miguel Stokes is a senior associate and Inês Drago is a trainee at Uría Menéndez – Proença de Carvalho. 
3 Source: Agência para o Investimento e Comércio Externo de Portugal, EPE (aicep Portugal Global – Trade and Investment Agency), www.portugalglobal.pt. 
and social cohesion and equality. Moreover, an extensive privatisation programme has been successfully implemented and has provided revenues of around €9 billion, exceeding initial expectations of €5 billion. The programme focused particularly on the aviation, electricity, healthcare and financial sectors. For additional information regarding the programme, see Section VII.

II FOREIGN INVESTMENT REGIME

Most foreign investment in Portugal is unregulated. Nevertheless, authorisation is required for investment in sensitive areas, in particular defence and other regulated areas such as banking, media and financial services; however, the majority of requirements apply both to national and foreign investors. Foreign investors in Portugal must also take into consideration EU and national competition rules and other EU policies.

1 Corporate

Legal environment

As a general rule, Portuguese law does not impose any specific restrictions on foreigners or foreign investment in corporate matters.

Notably, regulations on the incorporation of companies, mergers and acquisitions, the day-to-day business activities, duties and liability of shareholders and directors, merger control and antitrust apply irrespective of nationality.

Notwithstanding the above, some differences in the treatment of Portuguese and foreign entities do exist under Portuguese law (although exceptional), such as the approach taken in connection with groups of companies.

Regulation on affiliated companies and groups

The Portuguese framework on corporate groups is based on the central concept of an ‘affiliated company’, which is deemed to exist upon the occurrence of legally defined types of relationships between companies.

Holding companies are legally authorised to direct the management of their subsidiaries if a company is wholly controlled by another company, or a company agrees to subject its management to the direction of another company (which may or may not be its parent company). Holding companies may also issue binding orders to the board of directors of subsidiaries. The orders may be disadvantageous to the controlled company if they serve the corporate group’s interests or those of the holding company (despite the existence of specific limits).

This potential power is nevertheless counterbalanced by the requirement that the holding company comply with several duties in relation to the subsidiary’s financial undertakings. The holding company is liable for all obligations of the subsidiary arising before or after the occurrence of the change in control, and the subsidiary may request that the holding company assume responsibility for its annual losses.
It is important to take into consideration that some of the aspects of the legal framework on groups and, in particular, the possibility of issuing binding orders and the liability of the holding company, are only applicable if the registered offices of both companies are located in Portugal.6

ii Regulated sectors

Banking and other financial institutions

Summary of supervisory system

Under Portuguese law, the provision of banking services is a regulated activity that may only be carried out professionally by authorised credit institutions or financial companies, and remains subject to the supervisory powers of the regulatory authority of the Member State of origin.

Supervision of the Portuguese banking system is governed by the Portuguese Credit Institutions and Financial Companies Legal Framework, approved by Decree-Law 298/92 of 31 December, as amended and the notices, instructions and circulars issued by the Bank of Portugal. The supervision of credit institutions, and in particular their prudent supervision, including monitoring activities carried out abroad, is entrusted to the Bank of Portugal under its basic law enacted by Law 5/98 of 31 January, as amended, and Decree-Law 298/92.

Insurance

Summary of supervisory system

Under Portuguese law, insurance services are a regulated activity and may only be carried out professionally by authorised insurance companies and are subject to the supervisory powers of the regulatory authority of the Member State of origin.

Supervision of the Portuguese insurance system is governed pursuant to Decree-Law 94-B/98 of 17 April, as amended, which establishes the legal framework and requirements for taking up and pursuing insurance and reinsurance activities, and the regulations and circulars issued by the Portuguese Insurance and Pension Funds Supervisory Authority (ASF).

Energy

Summary of the supervisory system

The supervision of energy production, transport, distribution and trade is regulated by Decree-Law 97/2002 of 12 April, as amended. Article 1 thereof establishes the Energy Sector Regulatory Authority as the domestic regulatory authority for the gas and electricity sectors.

Production, transport, distribution and trade of electricity

The legal framework for the production, transport, distribution and trade of electricity is regulated under Decree-Law 29/2006 of 15 February, as amended, which establishes the

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6 Nevertheless, the Constitutional Court has already held that the holding company’s liability, at least in connection with labour matters, cannot be excluded solely on the basis that its registered office is located abroad. Although these decisions have no general effect (because Portuguese law requires that the Constitutional Court issue at least three decisions to have such an effect), they may trigger a change in the framework.
general grounds for the organisation and functioning of the national electricity system, and under Decree-Law 172/2006 of 23 August, as amended, which specifically regulates the production, transport, distribution and trade of electricity in Portugal.

**Production**

Decree-Law 172/2006 establishes that energy production activities under the ordinary regime are free, subject to the granting of a production licence following a request by the licensing entity.

**Transport and distribution**

Both the transporting and distribution of electricity will be carried out under a public service concession agreement awarded through a public tender, unless the concession is granted directly to a state-controlled entity. The concession is performed under a public service framework on the basis of its classification as a public utility.

**Trading**

Decree-Law 172/2006 states that trade in electricity is free, subject to a licence granted by the licensing entity. The licence must be requested by a company that is registered in an EU Member State.

**Telecommunications**

The legal framework governing the telecommunications sector is regulated under Law 5/2004 of 10 February, as amended (the Electronic Communications Law).

Pursuant to the Electronic Communications Law, the provision of electronic communications networks or services requires a general authorisation. Companies that intend to offer networks and services of electronic communications must submit a short description to the regulator, ANACOM, of the network or service they wish to initiate, and give notice of the date on which the activity is expected to commence, further submitting any details necessary for their full identification under terms to be defined by ANACOM. Once that notification is made, undertakings may immediately commence the activity, subject to the limitations resulting from the allocation of rights to use frequencies and numbers.

**Television broadcasting**

The legal framework on television broadcasting is based on the Television Act, which governs access to and the exercise of television activity (Law 27/2007 of 30 July, implementing Council Directive 89/552/EEC – Television without frontiers, as amended). The main regulatory authority for such activity is the Portuguese Regulatory Authority for the Media.

The Television Act establishes that channel licences are granted through a public tender, and lays down restrictions regarding minimum capital requirements and the ownership of capital (in particular regarding political associations, trade unions, etc.).

**Air transport**

Portuguese law does not impose any specific restrictions on foreigners or foreign investments in air transport matters. Most mandatory requirements and procedures are established in Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 28 September 2008 on common rules for the operation of air services in the Community.
an undertaking to be granted an operating licence by the competent licensing authority (in Portugal, the ANAC, according to Decree-Law 40/2015 of 16 March), EU Member States or nationals of EU Member States must own more than 50 per cent of the undertaking and effectively control it, directly or indirectly, through one or more intermediate undertakings, except as otherwise established in an agreement with a third country to which the European Union is a party.

**Restricted activities**

In general, foreign and domestic companies are free to invest in any industry. However, there may be specific requirements when performing activities for the public administration sector, such as winning a bid for a concession contract.

Therefore, private firms, except when licensed by a public entity through an administrative contract, are prohibited from directly carrying out the following economic activities:

- **a** collection, treatment and distribution of drinking water and disposal of urban wastewater, both through fixed networks; and solid waste collection and treatment in the case of municipal and multi-municipal systems;
- **b** rail transportation operated for public service;
- **c** operation of seaports; and
- **d** exploitation of natural resources of the subsoil or that may be considered part of the public domain.

Likewise, foreign investment projects must be compatible with specific legal requirements if they could in any way potentially affect public policy, or safety or health matters.

Projects of this nature require an assessment of compliance with statutory requirements and preconditions established under Portuguese law.

Included in this category are activities concerning the production of weapons, munitions and war materials, or those that involve the exercise of public authority. Such activities must comply with legally mandatory conditions and requirements, and thus require specific licences. Access conditions and the pursuit of commerce and industry of goods and military technology are regulated by Law 49/2009 of 5 August, namely the conditions of access to trading activities (in addition to the purchase, sale and lease activities of any of its contractual forms, import, export, re-export activities or flows of military goods and technologies, as well as broker-related business) and industry (research, planning, testing, manufacturing, assembly, repair, modification, maintenance and demilitarisation of military goods or technology) of military goods and technologies, as well as military activities themselves, either by enterprises and individuals based in Portugal, or qualified entities in other EU Member States.

Non-European investment in national strategic assets – those in connection with the main infrastructures and assets related to defence and national security, or to the basic energy, transportation and communication services – may have to comply with the Strategic Assets Special Framework (Decree-Law 138/2014, of 15 September).

The Strategic Assets Special Framework sets out some restrictions that specifically apply to entities from outside the European Union and the European Economic Area (Foreign Investors) that intend to acquire direct or indirect control (Control) over assets in specific sectors of the economy: main infrastructures and assets related to defence, national security, energy, transportation and communication services (Strategic Assets).
According to the framework set out in the Strategic Assets Special Framework, the Portuguese Council of Ministers, following a proposal by the Minister overseeing the sector to which the relevant Strategic Asset pertains (the Sector Minister), may oppose the conclusion of a transaction in relation to a Strategic Asset in the event that it results in the direct or indirect acquisition of control of that Strategic Asset by a foreign investor and that circumstance poses a real and severe threat to national security or the provision of basic services considered fundamental to the country. The procedure *ex officio* for clearing the acquisition of Control by a Foreign Investor over a Strategic Asset is outlined below.

a. Within 30 calendar days of the execution date of the relevant agreement (or other legal instrument, as applicable) pursuant to which the foreign investor will directly or indirectly acquire Control over a Strategic Asset, or of the date the transaction became public knowledge, if later, the Sector Minister may open an assessment procedure to determine the risk that the acquisition may pose to national security or the provision of basic services considered fundamental to the country.

b. When the procedure referred to in point a is opened, the Foreign Investor is legally obliged to provide all information and documentation requested by the Sector Minister. The Minister in charge of foreign affairs and the Minister in charge of national and homeland security are immediately notified of the opening of the procedure.

c. Within 60 calendar days of delivery by the Foreign Investor of the information or documentation requested by the Sector Minister, the Council of Ministers may oppose completion of the transaction envisaged by the Foreign Investor.

d. If the Council of Ministers opposes completion of the transaction envisaged by the Foreign Investor, the legal instruments underlying the transaction, and any subsequent acts related thereto, including transfer of ownership of the Strategic Asset, are null and void.

e. The decision by the Council of Ministers to oppose completion of the transaction is subject to appeal by the Foreign Investor.

In addition to the procedure *ex officio* described above, which is triggered by the Sector Minister, the foreign investor may, on its own initiative, request confirmation from the Sector Minister that the envisaged transaction will not be opposed by the Council of Ministers. If the request for confirmation is not answered within 30 days, the Strategic Assets Special Framework sets out that tacit confirmation is given. The request for confirmation must be accompanied by a description, by the Foreign Investor, of the terms and conditions of the intended transaction involving the acquisition of Control over the Strategic Asset.

The real and severe threat to national security or the provision of basic services considered fundamental to the country is asserted exclusively by the following criteria:

a. the physical security and the integrity of the relevant Strategic Asset;

b. the permanent availability and operability of the relevant Strategic Asset, as well as its ability to fully comply with its obligations, in particular the functions of public service that are the responsibility of the entities that control them, in the terms prescribed by law;

c. the continuity, regularity and quality of the services of public interest to be provided by the person or company who controls the relevant Strategic Asset; and

d. conservation of the confidentiality, imposed by law or public contract, of the data obtained during the course of activity by those who control the relevant Strategic Asset and of the technological resources required for management of the relevant Strategic Asset.
Moreover, the acquisition by a Foreign Investor of Control of a Strategic Asset is considered to be potentially capable of representing a threat to national and homeland security or to the provision of basic services considered to be fundamental for the country, whenever:

- there is serious evidence, based on objective factors, of the existence of a connection between the purchaser and third countries that:
  - does not observe the principles of the rule of law;
  - represents a risk to the international community as a result of the nature of its alliances;
  - maintains relations with criminal or terrorist organisations or with persons associated with such organisations, taking into account the official positions of the European Union in these matters, if any;
  - where the purchaser has used, in the past, a controlling shareholding held over other assets with the purpose of creating serious difficulties in the regular provision of essential public services in the country where it was located or in neighbouring countries; or
  - does not ensure that neither the allocation of the assets to its main function, nor their reversion at termination of the corresponding concession agreements, if applicable, in particular considering the absence of appropriate contractual provisions for said purpose; or

- the relevant transaction alters the function of the relevant Strategic Asset, threatening the permanent availability and operability of the Strategic Asset to comply with its applicable obligations, in particular the functions of public service, in the terms prescribed by law.

III  TYPICAL TRANSACTIONAL STRUCTURES

i  General environment

In view of the prohibition against discrimination based on nationality, when setting up a transactional structure in Portugal, there is no need to involve a domestic partner and there are no specific obligations for foreign investors; the treatment of foreign and domestic investment in Portugal is identical.

In addition to enjoying the same conditions and rights as domestic companies, foreign companies are liable for the same taxes and must also satisfy social security payment deadlines.

Regarding exchange control and currency regulations, the Treaty on the Function of the European Union establishes the free movement of capital within the European Union and therefore, as a rule, all restrictions on capital movements and payments between EU Member States are prohibited. There are no exchange controls or currency regulations affecting inbound or outbound investment, the repatriation of income, capital or dividends, the holding of currency accounts or the settlement of currency trading transactions. However, there are separate restrictions relating to the provision of funds or dealing with the assets of certain individuals and entities (e.g., entities linked to terrorism and recognised terrorist organisations).
ii Setting up a business in Portugal

Foreign investors typically choose a transaction structure that allows them to directly invest in Portugal. The two most important structures involve the incorporation or acquisition of a subsidiary or the establishment of a branch. The choice between the two options is determined primarily on the basis of commercial reasons, given that the opening and registration costs involved, as well as the tax and accounting duties, are generally similar.

A subsidiary is an independent legal entity that may be incorporated under any of the structures established under Portuguese law.

The most frequently used structures are limited liability companies and public limited companies. Both limit the shareholders’ liability for the company's obligations to the amount invested as share capital. A foreign investor’s choice between a limited liability company and a public limited company primarily depends on the simplicity of the corporate and management structure, the investment to be made as share capital and any confidentiality issues surrounding shareholdings in the company.

The process of incorporating a company in Portugal was recently amended to simplify the process. A company may be set up by means of a private document signed by the shareholders whose signatures are certified by a notary or a lawyer, unless a more formal instrument is required to transfer the assets brought into the company (in which event a notarial deed must be executed). Registration with the Commercial Registry takes only a few days.

Establishing a branch

Any foreign corporation seeking to carry out activities in Portugal for a period longer than one year must arrange permanent representation in Portugal. If the activity has minimum material substance, that representation may be carried out through a branch. The branch is not deemed an autonomous legal entity and, consequently, the foreign company will be liable for all actions carried out by its local branch. The branch must have a representative with general managerial powers and be registered with the Commercial Registry.

iii Corporate law residency requirements

Under Portuguese law, a tax identification number is mandatory for both natural and legal persons, whether domestic or foreign, who hold obligations or intend to exercise their rights in relation to the tax authorities pursuant to Decree-Law 14/2013 of 28 January. A tax identification number is obtained by filing specific documentation with the tax authorities regarding residency in the country of origin and, in certain cases, by appointing a representative.

No tax issue should arise from a non-Portuguese resident’s application for a Portuguese taxpayer number. In particular, obtaining a Portuguese taxpayer number does not imply that the non-resident individual will be taxed in Portugal as a Portuguese resident taxpayer, or that the individuals will be subject to Portuguese income tax as a non-resident on income obtained abroad; they will only be taxed in Portugal on income considered to have been obtained within Portuguese territory, if and when applicable.

IV REVIEW PROCEDURE

According to Portuguese law, there are thresholds for notification and review, and special situations regarding the regimes governing banking and other financial institutions, insurance and television broadcasting.
i Banking and other financial institutions

Change of control and takeover bids

The acquisition of a qualified holding in a Portuguese credit institution triggers disclosure duties whenever legally established thresholds are reached.7

Under Portuguese law, any natural or legal person (whether domestic or foreign) who intends to directly or indirectly hold or increase a qualified holding in a Portuguese credit institution must give prior notice to the Bank of Portugal of that intention.

A qualified holding in a Portuguese credit institution is any direct or indirect holding (as defined by law) of at least 10 per cent of the share capital or voting rights of the entity in which the stake is held, or a stake that allows the holder to exercise significant influence over the management of that entity.

Prior notice must also be given to the Bank of Portugal regarding actions that involve an increase in a qualified holding whenever the proportion of the voting rights or share capital held would reach or exceed any of the statutory limits (10 per cent, 20 per cent, one-third or 50 per cent), or when the credit institution becomes a subsidiary of the acquiring company.

If the action involves an increase in a qualified holding to above the 50 per cent limit, the Bank of Portugal shall forward the notification and a proposal for a decision to oppose, or not to oppose, the acquisition to the European Central Bank, at least 10 working days before the expiry of the relevant assessment period. The European Central Bank shall then decide whether to oppose or not to oppose to the acquisition.

Actions or events that result in the acquisition or increase of a holding representing at least 5 per cent of the share capital or the voting rights of a credit institution must also be notified to the Bank of Portugal within 15 days of their occurrence. The Bank of Portugal is obliged to inform the party concerned if the holding is to be deemed a qualified holding.

Notifications and approvals

The incorporation of a Portuguese credit institution is subject to authorisation granted by the Bank of Portugal.

Authorisation will be granted by the Ministry of Finance if the matter involves establishing a branch within Portuguese territory of a credit institution with its registered office located in a non-EU Member State (although that power may be delegated to the Bank of Portugal).

ii Insurance

Change of control and takeover bids

The acquisition of a qualified holding in a Portuguese insurance undertaking triggers disclosure duties whenever the established thresholds are reached.8

Any natural or legal person (whether domestic or foreign) who intends to hold or increase, directly or indirectly (as defined by law), a qualified holding in a Portuguese insurance undertaking must give prior notice to the ASF of its intention.

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7 Applicable merger control rules must also be observed.
8 Applicable merger control rules must also be observed.
A qualified holding in a Portuguese insurance undertaking is a direct or indirect holding (as defined by law) of at least 10 per cent of the share capital or voting rights of the entity in which a stake is held, or a stake that allows the holder to exercise significant influence over the management of that entity.

Prior notice must also be given to the ASF regarding actions that involve an increase in a qualified holding whenever the proportion of the voting rights or share capital held would reach, exceed or fall below any of the thresholds (20 per cent, one-third or 50 per cent), or when the insurance undertaking becomes a subsidiary of the acquiring company. Whenever the proportion of the voting rights or share capital reaches, exceeds or falls below 10 per cent, notice must be provided to the ASF within 15 days of the triggering event.

Notifications and approvals
The incorporation of a Portuguese insurance undertaking is subject to the ASF’s authorisation. The authorisation covers the entire EU territory.

In the event of establishing a branch in Portuguese territory of an insurance undertaking that has a registered office in a non-EU Member State, the Ministry of Finance will grant the authorisation (or that power will be delegated to the ASF). An authorised agent must be appointed.

iii Television broadcasting
The Television Act sets forth the obligation of transparency of broadcasters’ property and management by requiring that the shareholders of a broadcaster, the composition of members of a broadcaster’s administration and management, and identification of the people in charge of the orientation and supervision of a broadcaster’s contents, be published on the broadcaster’s website and updated during the seven days following the occurrence of the corresponding relevant fact; that is, whenever:

- a shareholder reaches or exceeds 5, 10, 20, 30, 40 or 50 per cent of its share capital or voting rights;
- a shareholder reduces its shareholding to a value that is less than each of the above percentages;
- a change of control of the broadcaster occurs; or
- a modification occurs in the composition of the members of administration or management, or in the structure of the orientation and supervision of its contents.

V FOREIGN INVESTOR PROTECTION
Concerning the protection of foreign investors, arrangements for the reciprocal protection and promotion of investments, which are bilateral instruments containing binding measures to create more favourable conditions for investments by investors of one signatory state in the territory of another, ensure more favourable treatment of investors, and guarantee complete security and protection of investments already made, on a reciprocal basis.

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9 Special rules apply to the establishment in Portugal of a branch of an insurance undertaking that has its registered offices in Switzerland.

10 Similar rules also exist for radio and written press activities.

11 Applicable merger control rules must also be observed.
According to the agency for investment and external commerce (AICEP Portugal Global – Trade and Investment Agency), the arrangements cover four major areas:

- entry of investments;
- treatment of investments;
- expropriation and losses realised on investments; and
- conflict resolution.

Investment in Portugal and the globalisation of the Portuguese economy are supported by a set of tools offered through the National Strategic Reference Framework (QREN) for the next planning period of EU-level economic and social cohesion funds.

In general, incentive mechanisms usually comprise a set of repayable incentives (fixed-term interest-free loans). A repayable incentive may be replaced by interest-rate benefits, provided that they are stipulated in a call for tenders, or converted into a non-repayable incentive, depending on the performance evaluation of a project, as set out in applicable incentive rules, up to a maximum of a certain percentage of incentives to be granted. In certain cases, or for certain expense categories, incentives may be allocated directly in the form of non-repayable incentives (grants).

Incentives are set out in investment agreements with the government in return for making investments and achieving specific contractually stipulated targets.

Securing incentives is generally subject to a process of submitting offers in competitive bids, in which projects are evaluated and selected in decreasing order of merit up to a budget limit set in the call for tenders, according to a set of selection criteria and based on a calculation method defined in the call for tenders.

Certain projects, in view of their strategic importance (including the size of the investment), may bypass the bidding process. Thus, for example, special-regime projects are exempt from a competitive bid. Special-regime projects may also benefit from a more flexible system for investment-contract negotiations, either in terms of setting goals or, in respect of specific limits, setting the amount and type of incentives to be granted.

VI OTHER STRATEGIC CONSIDERATIONS

i Securities law

Companies operating in Portugal or planning to enter the Portuguese market must take into consideration that the acquisition of a stake in a Portuguese company is subject to specific rules regarding disclosure of the stake held or, to some extent, to the duty to launch a mandatory takeover.

12 More information about Portugal’s Agreements for the Reciprocal Protection and Promotion of Investments can be found at www.portugalglobal.pt/EN/InvestInPortugal/internationalagreements/Paginas/InternationalAgreementsAgreementsfortheReciprocalProtectionandPromotionofInvestments.aspx.
13 Incentive mechanisms promoted by the state should also comply with the applicable EU state aid rules.
14 As previously mentioned, applicable merger control rules must also be observed.
Securities code

Disclosure duties

Any legal or natural person who acquires a direct or indirect holding that, in aggregate or with the shares already held, reaches, exceeds or falls below 2 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, 50 per cent, two-thirds or 90 per cent of the voting rights attached to the shares of a public company\(^{15}\) is required to notify the Portuguese Securities Exchange Commission (CMVM) and the issuer of that fact.

The 2 per cent, 5 per cent, 15 per cent and 25 per cent thresholds apply only to qualified holdings in public companies that have their shares or other equity securities listed in regulated markets located or operating in Portugal.

The Securities Code requires the aggregation of voting rights attached to shares held directly by a shareholder and those held by certain related parties. The shareholder’s notification to the CMVM and the issuer must include details of the voting rights held by third parties that have been attributed to that shareholder.

Mandatory takeovers

A legal or natural person who acquires more than one-third or half of the share capital with voting rights of a Portuguese public company must make an offer to acquire all the remaining shares and other securities issued by that company that grant rights to subscribe for or acquire shares (e.g., subscription rights issued in the context of a share capital increase). The launch of an offer is not required when, despite exceeding the one-third threshold, the holder proves to the CMVM that it neither has control of the target company nor is involved with it in a group relationship. In addition, the obligation to make an offer may be waived by the CMVM if the thresholds are reached in the context of:

\(\begin{align*}
\text{a} & \quad \text{a takeover bid for all the shares of the relevant company, as long as the rules relating to the consideration to be exchanged for the shares are satisfied;} \\
\text{b} & \quad \text{a financial restructuring plan within the scope of statutory reorganisation measures; or} \\
\text{c} & \quad \text{a merger.}
\end{align*}\)

Antitrust: merger control rules

Companies operating in Portugal or planning to enter the Portuguese market should take into consideration that the acquisition or merger of companies active in Portugal may be subject to mandatory merger control review by the corresponding competition authorities, which may entail an obligation to notify the Portuguese Competition Authority, and therefore may also be subject to a suspension obligation (‘standstill obligation’)\(^{16}\) until the operation is authorised. For that reason, merger control has a very significant role in defining

\(^{15}\) Under Portuguese law, the following qualify as public companies: (1) companies incorporated through an initial public offer specifically made to individuals or entities resident or established in Portugal; (2) companies that have publicly offered issued shares or other equity securities to individuals or entities resident or established in Portugal; (3) companies that have issued shares or other equity securities that are or have been listed in a regulated market located or operating in Portugal; (4) companies that have issued shares sold or exchanged, in excess of 10 per cent of their share capital, via a public offer to individuals or entities resident or established in Portugal; and (5) companies incorporated as the result of a split or merger of a public company.

\(^{16}\) Significant fines could be imposed – up to 10 per cent of the worldwide turnover of the company, and even the validity of the agreement challenged, if the suspension obligation is not met.
the timetable for an expected transaction and, from a contractual perspective, requires the inclusion of specific provisions regarding the possibility that the transaction may be subject to prior authorisation from the competition authorities.

For merger control purposes, both EU and domestic rules define a concentration as a transaction that implies modification of the control structure of the company on a long-term basis through:

- the merger of two independent companies;
- the acquisition of partial or sole control over a company or various companies, by any legal means or legal contract; or
- the creation of a joint venture and, in general, the acquisition of joint control over a company if the latter performs all the functions of an autonomous economic entity.

From a practical perspective, the competition authorities have considered a wide range of transactions as mergers. Most of these transactions involve acquisitions of stakes or traditional mergers. However, the concept of concentration also applies to other operations, such as the acquisition of assets (e.g., factories, commercial divisions and even intellectual property), including agreements that do not involve a change of ownership.

The authorities confirm that the merger control system relies on the concept of ‘control’. Only transactions that entail a change in the structure of control of an undertaking will constitute a concentration subject to merger control rules.

In this regard, it is important to take into account that the veto rights conferred to minority shareholders may grant them control under the applicable merger control regulations. For instance, this will occur if they refer to:

- approval of the company’s budget;
- approval of the business plan;
- appointment of managers and directors;
- appointment of the majority of the members of the board; or
- decisions on strategic investments.

Nevertheless, the issue must be analysed in each case depending on the market affected by the transaction.

If a transaction has an EU dimension, the European Commission will have exclusive jurisdiction over the merger and the Portuguese merger control procedure will in principle not apply. In this regard, the EU Merger Regulation17 establishes the thresholds18 that trigger the obligation to notify before the European Commission.

If the transaction does not reach the EU thresholds, Portuguese merger control legislation may apply.19

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18 A concentration has an EU dimension if the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion, and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
19 Concentrations must be notified to the Portuguese Competition Authority before their implementation if either of the following thresholds is satisfied: (1) turnover threshold – the total combined turnover in Portugal of all the ‘undertakings concerned’ during the most recently concluded fiscal year exceeds €100 million, to the extent that at least two of those undertakings have turnover above €5 million in
iii Anti-commercial bribery law

Various acts are criminalised by the Portuguese Criminal Code to prevent corruption in both the public and private sectors.

The concepts of ‘corruption’ and ‘bribery’ can have different connotations in different countries and are often used interchangeably. For the purposes of this summary, the concept of ‘corruption’ is used to describe the broader phenomenon of dishonest conduct. As such, it includes the narrower concept of ‘bribery’, understood as the act of providing (or receiving) an advantage to obtain (or perform) a favoured treatment.

The Penal Code distinguishes between acts of passive bribery (generally, the act of receiving an advantage in exchange for a certain action) and active bribery (providing an advantage to someone to receive favourable treatment) committed in both the public and private sectors.

VII CURRENT DEVELOPMENTS

The Legal Framework of Credit Institutions and Financial Companies has been amended by Decree-Law 20/2016 of 20 April, which determined that it is the duty of credit institutions whose by-laws include voting caps, to vote on their maintenance or removal every five years to avoid the relevant voting cap being removed ope legis. In the event that removal of the voting cap is proposed by the board of directors, the relevant resolution of the shareholders’ meeting is subject neither to the voting cap nor to special quorum requirements set forth in the by-laws for removal of the voting cap.

In addition, an extensive privatisation programme was put in place in 2011. To date, and according to publicly available information, the state has sold:

a 21.35 per cent stake in EDP to China Three Gorges for €2.7 billion and a 4.14 per cent remaining stake in EDP through an accelerated book-building procedure directed to institutional investors for a total of €356 million;
b a 25 per cent stake in REN to China’s State Grid and a 15 per cent stake to Oman Oil for a total of €592 million;
c the healthcare arm of the state-owned bank Caixa Geral de Depósitos to Brazil’s Amil for €86 million;
d local airport operator ANA to France’s Vinci for €3 billion;
e 80 per cent of the insurance arm of the state-owned bank Caixa Geral de Depósitos (Caixa Seguros) to Fosun for €1 billion;
f 100 per cent of the national postal service (CTT) through an initial public offering, earning €910 million;
g 100 per cent of EGF, the entity responsible for solid waste management, to SUMA for €149.9 million;
h 45 per cent of Portugal’s flagship airline carrier TAP to Gateway (a company held by David Neeleman and Humberto Pedrosa (the owner of Barraqueiro); and
100 per cent of CP Carga, the company responsible for the freight and logistics business of national train operator, Comboios de Portugal, to MSC Rail for €53 million.

The Portuguese government has launched the procedure for privatisation of the 11 per cent shareholding still held in REN – through Parpública (9.9 per cent) and CGD (1.1 per cent) – which was performed through a direct offer to institutional investors and through which around €80 million were raised.

In March 2017, the Bank of Portugal selected Lone Star to complete the sale of Novo Banco. Novo Banco is a Portuguese bank introduced on August 2014 by the Bank of Portugal to rescue the assets and liabilities of Banco Espírito Santo, whose shares are held by a special public resolution fund. Lone Star will inject a total of €1 trillion in Novo Banco, whereby it will hold 75 per cent of the share capital of Novo Banco. The completion of this sale is conditional on the customary regulatory approvals and, subject to acceptance by bondholders, on a liability management exercise to cover the senior bonds of Novo Banco by creating Common Equity Tier 1 capital of at least €500 million.
INTRODUCTION

Attracting foreign investment has been a priority for the Russian government since the country took its first steps towards developing a market economy in 1991. During the past few decades, consistent legislative and administrative measures have been taken to improve the investment climate and provide guarantees and protection for foreign companies undertaking business in Russia. This trend remains effective and has been maintained by the government within the period of mutual economic sanctions, since investment in Russia is encouraged and supported despite the political alienation between Russia and European countries.

After the economic crisis in 2008, when investment dropped to US$81 billion, the amount of investment had almost doubled by 2012, up to US$154 billion. The statistics for 2013 showed a rapid growth in foreign investment – up to US$170 billion.\(^2\) After a period of moderate growth, Russia’s economy slowed again in 2014 following the introduction of sanctions against Russia and a drop in oil prices, which significantly affected the investment climate, although the overall macroeconomic situation remained favourable. In the first half of 2015, the Russian economy continued to founder, but starting from the second half of 2015 and 2016, there was a steady growth in the number of foreign investments. Thus, despite the imposition of sanctions and other politics-related issues, Russia remains one of the most attractive fields for investment and will continue its course of attracting foreign investment in the Russian market.

In 2018, European Union countries, in particular the Netherlands, France, Austria and Switzerland, remain the main investors in the Russian economy and its industry. Other major investors actively operating in the Russian market include the United Kingdom, British Virgin Islands, the Bahamas and Bermuda.\(^3\) Furthermore, the flow of investments from Asian countries – in particular, Singapore, the Republic of Korea and Japan – is currently increasing significantly year on year, and Russia considers Asian countries as promising business partners in the field of mutual investments.

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1 Vassily Rudomino is a senior partner, Ksenia Tarkhova and Ruslana Karimova are senior associates, Roman Vedernikov is an associate and Anastasia Kayukova is a senior attorney at ALRUD.
The development of Russian legislation on foreign investments began in 1991, when the first law on foreign investments was enacted. This was replaced in 1999 by the currently effective Federal Law ‘On foreign investments in the Russian Federation’ (the Foreign Investments Law).\textsuperscript{4} The Foreign Investments Law defines the status of a foreign investor, the legal regimes for foreign investments, and guarantees and benefits provided to foreign investors active in Russia. It contains provisions regulating the establishment and operation of companies with foreign investments and branch offices of foreign companies.

With the increase in foreign investment in Russia, it became clear that the process of investment in strategically important sectors of the economy required stricter control by the state authorities. For this purpose, the Federal Law ‘On procedures for foreign investments in companies having strategic importance for national security and defence’ (the Strategic Investments Law)\textsuperscript{5} was enacted, and a special government commission, the Government Commission on Monitoring Foreign Investment (the Government Commission), was formed, which is chaired by the Russian Prime Minister and has control over foreign investments.

Normative acts adopted by the Russian government also constitute a substantial part of the country’s foreign investment legislation and usually contain guidelines on implementation of the foreign investment control rules.\textsuperscript{6}

The legal regime governing foreign investment is still developing. For example, some important provisions were adopted and entered into force on 1 July 2017.\textsuperscript{7} The aim of these amendments was to implement the de-offshorisation policy in the Russian economy, and considerably limit the range of entities that have the right to establish control over strategic companies. For example, transactions resulting in the establishment of control over strategic companies – not only by foreign states and international organisations and the organisations under their control, but also by offshore companies and companies under their control – were prohibited. A second set of amendments was adopted shortly afterwards, which came into force on 30 July 2017.\textsuperscript{8} This second set of amendments not only expanded the list of transactions requiring strategic investment clearance, but also provided some major changes in relation to the powers of the Government Commission.

\textsuperscript{5} The Federal Law ‘On procedures for foreign investments in companies having strategic importance for the national security and defence’ No. 57-FZ, dated 29 April 2008.
\textsuperscript{6} For instance, the Decree of the Government of the Russian Federation ‘On approval of rules for preliminary approval of the transactions and coordination of establishment of control of foreign investors or a group of persons, including a foreign investor, over the business entities of strategic importance for the national security and defence’ No. 838 dated 17 October 2009 and the Decree of the Government of the Russian Federation ‘On approval of rules of submitting by a foreign investor or a group of persons, including a foreign investor, of information on transactions with shares (participatory shares) constituting the authorised capitals of the business entities of strategic importance for national security and defence’ No. 795, dated 27 October 2008.
The trend on de-offshorisation has continued in 2018 and the last set of amendments to the Strategic Investments Law entered into force on 12 June 2018. However, in comparison to the previous ones, these provisions are, in general, aimed at liberalisation of access of foreign investments to strategic sectors of the Russian economy and at making the strategic clearance process clearer and more comfortable.

This law has superseded the special regulation of offshore companies introduced in 2017 and provided for a new concept of ‘companies, which do not disclose information on their beneficiaries, beneficiary owners and controlling persons’ (non-disclosing companies) instead. According to the amendments, the legal status of non-disclosing companies is similar to that of public investors (foreign states and international organisations), which are subject to stricter regulation and lower thresholds under the Strategic Investments Law than private investors. Thus, this concept seems to be more investor-friendly as compared to the concept of offshore companies as of 2017, as application of a stricter regime can now potentially be avoided by providing the required information regarding:

a the beneficiaries: persons, for the benefit of whom companies are operating, including on the basis of agency agreement, mandate agreement, commission agreement and trust agreement, when conducting transactions;

b the beneficiary owners: individuals ultimately possessing more than 25 per cent of shares of companies, directly or indirectly (through third parties), or having the option of controlling activities of companies; and

c controlling person: persons exercising control over other controlled persons (i.e., having a right, directly or indirectly, to dispose of more than 50 per cent, and the right to determine the decisions made by the controlled person, as enshrined in the Strategic Investments Law) of a foreign investor (including those registered in offshore jurisdictions).

For clarification of the disclosure procedure, in December 2018, the Russian government issued the Decree, which details the information to be provided, as well as the procedure of the providing and registration of such information.

In addition to the foregoing, these amendments expressly envisage a right for the Federal Antimonopoly Service of Russia (FAS Russia) to issue official clarifications as to the nature and application of the Strategic Investments Law that may facilitate the law enforcement process. Development of cooperation with foreign partners and the integration of Russia into the world economy was always one of the priorities of Russia’s development.

In 2019, the foreign investment legislation is continuing to develop. Thus, FAS Russia currently develops the new draft law to implement amendments to the Strategic Investment Law. The new draft law provides the possibility of establishing an aggregate control over a strategic company by certain private foreign investors, as well as special procedure for receiving the strategic licences.

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9 The Federal Law No. 122-FZ ‘On amendment of some laws of the Russian Federation changing the definition of the “foreign investor”’.

10 The Decree of the Government of the Russian Federation ‘On approval of rules for providing by foreign legal entities, foreign organisations, which are not legal entities, and organisations, which are under their control, to the federal executive body responsible for implementation of the functions on control over foreign investments in the Russian Federation, of the information on its beneficiaries, beneficiary owners and controlling persons’ No. 1456, dated 1 December 2018.
One of the main changes in Russia’s position on the international scene is related to the creation of the Eurasian Economic Union (the EEU). A treaty establishing the EEU was signed on 29 May 2014 by the leaders of Belarus, Kazakhstan and Russia, and came into force on 1 January 2015. Treaties aiming at Armenia’s and Kyrgyzstan’s accession to the EEU were signed on 10 October 2014 and 23 December 2014, respectively. Armenia’s accession treaty came into force on 2 January 2015. Kyrgyzstan’s accession treaty came into effect on 12 August 2015 and it participated in the EEU from the day of its establishment as an acceding state.

Based on official statistics, the EEU represents the political and economic union based on the Customs Union of Belarus, Russia and Kazakhstan, which has an integrated single market of more than 184 million people and a gross domestic product of over US$1.9 trillion. The EEU is considered to be a major player in the world’s energy sector, raw materials, the arms industry and agricultural production.

The EEU is a new stage of integration, which introduces the free movement of goods, capital, services and people, and provides for common transport, agriculture and energy policies, with provisions for a single currency and greater integration in the future. The union operates through supranational and intergovernmental institutions. The Supreme Eurasian Economic Council is the Supreme Body of the Union, consisting of the heads of the Member States. The other supranational institutions are the Eurasian Commission (the executive body), the Eurasian Intergovernmental Council (consisting of the prime ministers of Member States) and the Court of the EEU (the judicial body).

Another initiative was suggested last year by the Head of FAS Russia, Igor Artemiev, that is aimed at cooperation and building up a dialogue between the competition authorities of countries all over the world – establishment of the Expert Centre for cooperation between the competition authorities of the BRICS countries, based at the Russian National Research University Higher School of Economics in Moscow. The Expert Centre will monitor major M&A transactions and elaborate common approaches to their assessment. Moreover, the Expert Centre shall support an information exchange between the competition authorities while considering multinational transactions. The special attention of the Expert Centre shall be dedicated to transactions implemented in IT markets. The competition authorities of BRICS countries will be able to decide independently whether or not to participate in the project and hold a joint assessment of the transactions.

The proposal to establish the Expert Centre is not the first attempt to enhance cooperation related to competition policy within the BRICS countries. There already exists a coordinating committee on competition policy and a number of working groups studying different markets, such as IT and automotive, pharmaceuticals, food and agro-industrial markets, within the framework of BRICS. However, contrary to the previous forms of cooperation, the Expert Centre is going to be a permanent mechanism.

The first results of the work by the Expert Centre will be one of the topics for discussion at the BRICS International Competition Conference, due to be held in Moscow in 2019. Representatives of the BRICS countries will analyse the experience gained by the Expert Centre and decide on the necessity of its continuing existence.

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12 BRICS is made up of Brazil, Russia, India, China and South Africa.
The establishment of the Expert Centre reflects the willingness of the BRICS countries to harmonise approaches and to expand analytical capabilities. Because BRICS covers around 46 per cent of the global market, hardly any multinational transaction could avoid notification in at least one of the BRICS jurisdictions. In this regard, the approaches to be elaborated and used by the Expert Centre could significantly affect not only the national competition regulation, but a global merger control and foreign investments environment.

Moreover, to facilitate the maintenance of conditions for attracting investment for the development of product markets and the Russian economy (and thus implementing the Decree of the President of the Russian Federation dated 21 December 2017, No. 618, ‘On state competition policy guidelines’), the Foreign Investments Expert Centre was established within FAS Russia in July 2018.

Experts and representatives from the business community are expected to become members of the Foreign Investments Expert Centre, and contribute to its main purpose, which is to get ‘feedback’ for the government, reflecting the actual needs of business and investors.

In addition, priority areas of activity in investment analytics, identification and the elimination of legal and administrative barriers for investors for the Department for Control over Foreign Investments have been approved by the Head of FAS Russia.

II FOREIGN INVESTMENT REGIME

The legislation regulating foreign investments can be divided into two groups. The first includes general rules that apply to both Russian and foreign investments. These are contained in the Civil Code of the Russian Federation (the Civil Code),13 the Federal Law ‘On limited liability companies’,14 the Federal Law ‘On joint-stock companies’,15 the Federal Law ‘On the state registration of legal entities and sole proprietors’,16 the Federal Law ‘On the securities market’17 and others. These federal laws regulate, inter alia, general procedures for the establishment of legal entities, the purchasing of shares (participatory shares) constituting the authorised capital of legal entities, questions of corporate governance and state registration of legal entities. The first group also includes the antitrust rules contained in the Federal Law ‘On protection of competition’ (the Competition Law).18

The second group of rules solely regulates foreign investments. The principal laws in this group are the Foreign Investments Law and the Strategic Investments Law.

The Foreign Investments Law determines state guarantees of an investor’s right to invest, gain income and profit, and the conditions for the commercial activities of foreign investors within Russian territory. This law is not applicable to making investments of foreign capital into banks and other credit organisations, insurance companies and non-commercial organisations. These areas are subject to regulation under the Federal Law ‘On banks

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The second principal law is the Strategic Investments Law, which determines the procedures for foreign investments in strategic sectors of the Russian economy. A strategic clearance according to the Strategic Investments Law is required if the target company is incorporated in Russia and is active in one of the specified types of activities listed therein (such as activities in nuclear and radioactive materials, devices and waste; aviation and space; the natural resources sector; exploration and production of minerals on subsoil plots of federal value, and use of subsoil plots of federal value (the oil and gas sector); coding and cryptographic equipment; mass media and telecommunications; use of agents of infectious diseases (except by companies engaged in food production); or with a licence for conducting such an activity (a strategic company). Herewith, holding a licence is not a mandatory condition for a company to be deemed strategic. It is now enough that there are ‘other permitting documents’ enabling the company to engage in that type of activity.

As a general rule, the list of activities stipulated by the Strategic Investments Law is exhaustive, therefore a foreign investor can check whether a potential target can be considered a strategic company. However, there is a special right of the chair of the Government Commission, at his or her own discretion, to present to the Government Commission for consideration transactions conducted by foreign investors with respect to practically any Russian business entity, not just a strategic one. First, transactions that might be of interest to the Russian Prime Minister and might be considered by the Government Commission, are transactions in respect of Russian companies not involved in implementing strategic activities, but in implementing activities that might be directly connected with the 47 types of activities of strategic importance. Second, the authorities’ spheres of potential interest are large trans-border transactions, involving the transfer of assets or subsidiaries located in Russia, on which the economic defence of Russia might depend (for example, food, the pharmaceutical industry and the defence sector). Finally, the third category of transactions, which might potentially result in the heightened interest of the Russian Prime Minister and might be considered by the Government Commission, are transactions with public investors usually operating in different cultural and legal environments. In accordance with the Decree of the Government of the Russian Federation ‘On the Government Commission executing control over foreign investment in the Russian Federation’, the state body responsible for monitoring the foreign investments sector is FAS Russia. The Government Commission considers submitted notifications of transactions and decides whether there is a threat to national security and defence.

In the banking sector, the acquisition of 10 per cent or more of the shares in a Russian credit organisation is subject to prior approval by the Central Bank of Russia, and acquisition of more than 1 per cent but less than 10 per cent requires a post-transaction notification.

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In the insurance sector, a Russian insurance organisation must receive prior approval to increase its authorised capital by means of foreign funds and to assign its shares to a foreign investor. Its shareholders must receive prior approval for the assignment of their shares to foreign investors.

In the mass media sector, foreign investors cannot own more than 20 per cent of shares (participatory interests) in the Russian mass media. Moreover, foreign investors and foreign legal entities, Russian citizens with dual citizenship and stateless persons cannot be founders of mass media entities.

In the natural monopolies sector, acquisition of more than 10 per cent of fixed assets of a legal entity operating in the sphere of natural monopolies requires clearance by FAS Russia.  

### III TYPICAL TRANSACTIONAL STRUCTURES

Generally, there are three legal forms of foreign investment in Russia: (1) legal entities (limited liability companies (LLCs), joint-stock companies or partnerships) including joint ventures (JVs); (2) branches and representative offices; and (3) legal investment contracts.

In recent years, it has become quite common for foreign investors to conduct business in Russia by forming a JV with a Russian partner who is more familiar with the local rules and customary business practices, and has significant business experience in the Russian market. Until recently, the prevailing tendency has been to use offshore structures for the creation of JVs, and to govern shareholders’ agreements by a foreign law (mostly English) because foreign law provides for a wide range of protection mechanisms and remedies. Nevertheless, Russian law has lately become more widely used for JV creation, owing to certain positive legislative and law enforcement changes, including the fact that it now allows the conclusion of shareholders’ agreements governed by Russian law, and it is now possible to limit the right of participants in Russian LLCs to withdraw from the company, which makes the LLC a more stable and convenient form for establishing a JV.

The Competition Law includes several areas of particular interest to foreign investors. Thus, provided the filing thresholds described in Section IV are met, transactions and other actions (including the establishment of companies) that involve acquisition of the following will fall under the merger control requirement:

- **a** fixed productive assets, intangible assets, or both, located or registered in the territory of Russia;
- **b** shares, participatory shares or rights in respect of Russian companies and non-commercial organisations;
- **c** shares, participatory shares or rights in respect of foreign companies or organisations that supplied goods to Russia in an amount exceeding 1 billion roubles during the calendar year of the date of execution of the transaction or other action subject to state control; or
- **d** conclusion of JV agreements.

Thus, since 5 January 2016, all JV agreements concluded between competitors (including actual or potential competitors) that have combined assets of more than 7 billion roubles or combined revenues of more than 10 billion roubles have been subject to pre-completion

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clearance with FAS Russia if the agreement is concluded in relation to the territory of the Russian Federation. In this regard, three possible situations regarding the pre-transaction clearance of JV agreements might be considered.

i **Entering into a JV agreement that supposes formation of a new legal entity**

If the assets or turnover thresholds are met, the transaction will require a merger filing if the authorised capital of the newly formed JV will be composed of or contributed to by:

- fixed productive assets or intangible assets located or registered in the territory of the Russian Federation, which are held by any of the JV’s founders (or by the companies from their groups) and the balance sheet value of which exceeds 20 per cent of all fixed productive assets and intangible assets of the transferring company;
- more than 25 per cent of a Russian joint-stock company (or one-third participatory share of a Russian LLC); or
- more than 50 per cent of the shares of a foreign company supplying products (or services) to Russia in an amount exceeding 1 billion roubles during the calendar year preceding the date of execution of the transaction.

ii **Entering into a JV agreement that supposes participation in an existing legal entity**

If the assets or turnover thresholds are met, the transaction will require a merger filing if the existing legal entity:

- has assets or subsidiaries in Russia; or
- supplied products (or services) to Russia in an amount exceeding 1 billion roubles during the year preceding the transaction.

iii **Entering into a JV agreement irrespective of formation of a new legal entity**

As a general rule, all JV agreements that may influence the state of competition in Russia are subject to obligatory merger clearance if the assets or turnover thresholds are met. That said, conclusion of a JV agreement with the formation of a new entity, with participation in an existing one or without formation of a new entity might trigger the filing obligation if the JV is supposed to have activities in Russia.

If JV agreements concluded between competitors do not formally require pre-completion clearance by FAS Russia, parties to the JV have a right to submit a voluntary application to FAS Russia to verify that the JV is compliant with Russian anti-monopoly legislation, and to mitigate the risk of its qualification as an anticompetitive agreement.

In accordance with the Clarifications ‘On procedure and methods of analysis of JV agreements’ issued by FAS Russia on 8 August 2013, a JV agreement cannot be recognised as admissible if the purpose of the agreement is a restriction of competition. The Clarifications provide a rebuttable presumption that JV agreements envisaging a refusal of competition on the same or related markets are potentially anticompetitive and may lead to a restriction of competition.

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25 Clarifications of the Federal Antimonopoly Service (FAS Russia), dated 8 August 2013.
IV REVIEW PROCEDURE

As previously mentioned, the Competition Law provides for merger control in the form of a pre-transaction clearance. The thresholds for the pre-transaction filing are as follows:

- the worldwide value of assets of the acquirer (with its group) and the target company (with its group), according to the latest accounts, exceeds 7 billion roubles; and the worldwide value of assets of the target company (with its group), according to the latest accounts, exceeds 400 million roubles; or
- the worldwide aggregate turnover of the acquirer (with its group) and the target company (with its group) in the previous business year exceeds 10 billion roubles; and the worldwide value of assets of the target company (with its group), according to the latest accounts, exceeds 400 million roubles.

Post-transaction notification may still apply in a very limited number of cases; for example, to certain intra-group transactions, provided that the company discloses its group on the official competition authority website.

As mentioned above, the acquisition of strategically important businesses in Russia requires separate clearance by the state authorities. Thus, in accordance with the Strategic Investments Law, the following types of transactions are subject to receiving the consent of the Government Commission:

- transactions (except those concerning a subsoil plot of federal value) as a result of which the foreign investor (or its group) receives:
  - the right to dispose of more than 50 per cent of shares (interests) in a strategic company; and
  - the right to appoint an individual executive body and (or) more than 50 per cent of a collegial executive body or board of directors (or supervisory board) of a strategic company.

- transactions related to shares (interests) in a strategic company that is making use of a subsoil plot of federal value, as a result of which the foreign investor (or its group) receives:
  - the right to dispose of more than 25 per cent of shares (interests) in the strategic company; and
  - the right to appoint an individual executive body and (or) more than 25 per cent of a collegial executive body or board of directors (supervisory board) of the strategic company.

- acquisition of shares (interest) in respect of a strategic company using a subsoil plot of federal value, if a foreign investor (or its group) of persons has the right to dispose of not less than 25 per cent and not more than 75 per cent of shares (interests) in this company;

- contracts on the implementation of the functions of the managing director (or managing organisation) of a strategic company;

- transactions aimed at the acquisition by a foreign state, international organisation or organisation that does not disclose information, or by an organisation under its

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27 ibid.
control of the right, directly or indirectly, to dispose of more than 25 per cent of shares (interests) in a strategic company, or other opportunity to block decisions of a strategic company or acquisition of more than 5 per cent of shares (interests) in a strategic company that is making use of a subsoil plot of federal value;

f other transactions or agreements aimed at the transfer of the right to determine the decisions of the managerial bodies of a strategic company, including conditions of implementation of its business activity, to the foreign investor or a group of persons; and

g acquisition of fixed productive assets of strategic companies, the balance sheet value of which exceeds 25 per cent of all fixed productive assets of the transferring company.

Subsequent control is maintained through notification on possession of 5 per cent or more of the shares (participatory shares) constituting the authorised capital of the strategic company.

Regarding the post-transaction notification, this should be submitted to the authority within 45 calendar days of the date of the transaction closing. Post-transaction notification should be considered within 30 days of the date of submission of the relevant documents.

Once the results of the notification have been submitted to FAS Russia, a special notice is granted, acknowledging that notification of the transaction has been taken into account.

Additionally, foreign investors or groups of persons are obliged to submit post-completion notification to the authority and inform the authority of implementation of the transaction or other actions for which preliminary consent was granted.

Under the Foreign Investments Law, transactions made by foreign states, international organisations or by organisations controlled by them are subject to pre-transaction clearance if the transaction results in:

a the acquisition of the right to dispose directly or indirectly of more than 25 per cent of the total number of the voting shares or participatory shares constituting the authorised capital of any Russian commercial organisation; or

b other abilities to block the decisions made by managerial bodies of the commercial organisations.

In practice, however, the notifications made under the Foreign Investments Law are not reviewed by the Government Commission, unless the target is a strategic company (and therefore, subject to separate filing under the Strategic Investments Law).

Generally, prior to implementation of the transaction leading to establishment of direct or indirect control over a strategic company, a foreign investor should obtain the approval of the Government Commission. Preliminary proceedings are held by FAS Russia and other state bodies.

Furthermore, the Strategic Investments Law provides the option to recognise a transaction as strategic if the chair of the Government Commission (i.e., the Russian Prime Minister), at his or her own discretion, believes that this transaction might influence national security and the defence of Russia.

According to this option, within five business days of the date the Russian competition authority becomes aware of a transaction by a foreign investor with respect to a Russian entity, it shall send requests to provide information about the forthcoming transaction to the Russian Prime Minister, the federal authorities, or other organisations responsible for the implementation of national policy and statutory regulation in the sphere in which the Russian entity is involved. Within the next 15 business days, addressees shall submit their
suggestions to FAS Russia as to whether the transaction shall be considered under the specific procedure, requires strategic clearance and is of strategic importance for Russia. If the Russian Prime Minister makes a decision about the necessity of securing preliminary clearance of the transaction, FAS Russia shall inform the foreign investor of that decision within three business days.

Moreover, the law sets forth the Government Commission’s powers to determine any obligations to be imposed on foreign investors as conditions for prior approval of a transaction that it considers necessary to safeguard national defence and state security. Although the list of these obligations in the previous version of the Strategic Investments Law was exhaustive, foreign investors themselves could nonetheless propose to the Government Commission obligations that were not on the list and state that they were prepared to undertake to complete a transaction and could include them in the agreement concluded with FAS Russia. In accordance with the latest amendments, however, as introduced in 2018, the Government Commission may now impose any obligations, even those not listed in the Strategic Investments Law, fulfilment of which is related to maintaining national security and defence. In other words, the list of obligations is not exhaustive.

An application is submitted to FAS Russia, which works as a ‘secretary’, checking all the documents, coordinating agencies and preparing a draft of the decision for the Government Commission. Altogether, the compliance procedure takes between three and six months from the moment of submitting the application.

As to the procedure of consideration of the application, since 2 February 2016 the Government Commission has had the right to adopt decisions on applications filed by foreign investors in the absence of Commission members, without convening a meeting (absentee vote). Decisions as to whether an absentee vote might be held or not are made by the chair of the Commission. If the Commission members cannot reach a unanimous position, a vote should be held again in the presence of all Commission members.28

In the event of failure to observe the legal rules with respect to clearance of the transactions and notification of the authorities of the transactions implemented, civil and administrative liabilities will apply.

Violation of the filing obligations (failure to notify within the required time limits, such as by submitting misleading information to FAS Russia, failure to provide required information, or failure to comply with the FAS Russia ruling), as well as closing the transaction without clearance by FAS Russia, may result in the imposition of an administrative fine of up to 500,000 roubles on the acquirer. Administrative liability in the form of a fine of up to 20,000 roubles may be also imposed on the chief executive officer of the acquirer.

If a transaction implemented without clearance by FAS Russia could, or does, result in the restriction of competition in Russia (including, without limitation, the strengthening of a dominant position), FAS Russia may file a lawsuit. A competent state court may declare the transaction invalid and, as a result, reverse the transaction. Transactions executed in breach of the Strategic Investments Law are null and void. If it is not possible to apply the consequences of invalidity on a void transaction, the state court may, upon a lawsuit brought by FAS Russia, adopt a decision to deprive the foreign investor of its right to vote at a meeting of the shareholders’ (participants’) of the strategic company, or to invalidate those

decisions of the management bodies of the strategic company adopted after the establishment of control in breach of the Strategic Investments Law. A foreign investor might also face an administrative fine of up to 1 million roubles for failure to obtain preliminary approval or notify the transaction in accordance with the Strategic Investments Law.

The following case is a recent example of the courts voiding transactions concluded without obtaining clearance under the Strategic Investments Law. In April 2017, FAS Russia initiated judicial proceedings to invalidate transactions that had established control of Perm Port joint-stock company by UK national Charles Batler.29 However, the courts rejected the claim based on the fact that FAS Russia missed the limitation period to file a lawsuit.

The amendments, as of 2017, to the Strategic Investments Law also made special provision in relation to the Republic of Crimea and the federal city of Sevastopol: foreign investors are required to disclose information about any holding of five per cent or more of shares (interests) constituting authorised capital of strategic companies incorporated in the Republic of Crimea or the federal city of Sevastopol within 90 days of the amendments coming into force.

In addition to the existing fines for failure to comply with the requirement for foreign investors to file post-transaction notification of: (1) their acquisition of 5 per cent or more of votes in the authorised capital of strategic companies; (2) the completion of pre-approved transactions; and (3) holding 5 per cent or more of shares (interests) in strategic companies incorporated in Crimea or Sevastopol, the Strategic Investments Law will provide for the foreign investor to be deprived, through a court further to a claim by FAS Russia, of the right to vote at a general meeting of the company until the foreign investor properly fulfils the obligation to file a notification for consideration by the authority.

The statutory period for consideration of the pre-transaction merger control application by FAS Russia is 30 calendar days from the date of receipt of the application and the full set of documents attached thereto. The above term may be extended by an FAS Russia decision for up to two months for the submission of additionally requested documents. As such, the period for obtaining approval under the Strategic Investments Law is between two-and-a-half and three months from the moment of submission of the application, and can be extended for up to three more months (which often occurs in practice). It should be noted, though, that FAS Russia introduced a bill to amend the Fifth Antimonopoly Package, which provides for several initiatives regarding the possibility of extending the review period under the merger control procedure in certain cases (which is currently proposed to be quite significant in terms of time). These initiatives are described in more detail in Section VII.

The Competition Law provides for an extension of the period to consider whether an application is to be approved in advance, in accordance with the Strategic Investments Law, prior to adoption of the decision with respect to the transaction in accordance with the Competition Law. Moreover, FAS Russia will refuse to clear a transaction in accordance with the Competition Law if the transaction is not approved in accordance with the Strategic Investments Law.

The parties may also apply to FAS Russia to provide notice of a forthcoming transaction before submission of an application or subsequent notification (the pre-notification process). The parties may provide FAS Russia with the documents and information about the transaction and participate in developing remedies with a view to ensuring competition. The same provisions concerning remedies apply to strategic companies.

Under the Strategic Investments Law, the Government Commission is entitled to initiate an expert assessment of the data, which are accessible by the applicant, as regards their pertinence to data constituting a state secret. In addition, for the purposes of establishing the fact of institution of control by a foreign investor or a group of persons over a company of strategic importance, as well as the fact that there is an agreement made by a foreign investor and third persons (concerted actions) aimed at instituting control over a company of strategic importance, operational units of the federal security service agencies are entitled to undertake operational search measures. The results of these operational search activities may be used for substantiation of claims made in court.

V FOREIGN INVESTOR PROTECTION

According to the Foreign Investments Law, the legal regime for foreign investments is generally equal to that for the investment activities of national (local) investors to the extent particularly indicated in the federal laws. Restrictive exceptions to the foreign investments regime may be introduced only for protection of the constitutional fundamentals of morality, health and other rights of persons, or to ensure state security and defence.

Foreign investors are fully protected against nationalisation or expropriation, unless such an action is mandated by the federal laws. In such cases, foreign investors are entitled to receive compensation for any investment and other losses. However, any affiliated and dependent companies of a commercial organisation with foreign investments shall not enjoy the legal protection, guarantees and privileges established by the Foreign Investments Law.

The Foreign Investments Law provides several guarantees for foreign investors; inter alia, it guarantees the right of foreign investors to:

a. make investments in any forms permitted by the law;

b. acquire private and government securities;

c. take part in privatisations; and

d. acquire land plots, subsoil resources, buildings and other immovable property.

VI OTHER STRATEGIC CONSIDERATIONS

When considering making an investment in Russia, a foreign investor should also consider the benefits and preferences of setting up a new business in a special economic zone (SEZ), which is a territory within the Russian Federation defined by the Russian government where a special business activity regime is introduced and a free customs area may be applied. According to recent statistics provided by the Ministry of Economic Development of the Russian Federation, the volume of investments of the SEZ’s residents exceeded 260 billion roubles. As at 31 December 2018, 131 residents with participation of foreign investors were registered in the SEZ among shareholders and residents executed agreements on

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implementation of the activities. Currently, 25 SEZs exist, of which nine are industrial production, six are technology innovative, nine are tourism and recreational SEZs and one is a port SEZ.

The reasons for creating an SEZ range from development of manufacturing and high-technology industries to facilitation of tourism, creation of sanatorium resort areas, and improvement of port and transport infrastructure. For instance, the SEZ in Lipetsk is designated for the attraction of foreign investment in the production of finished metal products, machinery and equipment, vehicles, machines and components, and construction materials, while the SEZ in Alabuga stimulates foreign investment in motor vehicles and components, petrochemicals and construction materials production.

The majority of SEZs were created under government decrees. However, they may also be formed in accordance with federal laws. The free economic zone in the territory of Crimea and Sevastopol, which has been created with a term extending until 31 December 2039, is an example of such a zone.

Regional development zones (RDZs) may also be created in the territory of the Russian Federation. An RDZ is the part of the territory of the region of the Russian Federation where special measures of state support are granted to its residents with the aim of socio-economic development of the region by way of attracting investment. The measures of state support are related to tax benefits and financing of different projects. RDZs may be formed only on the territory of definite regions within the Russian Federation, the list of which is established by government decree.

Another of the Russian Federation’s main aims in investment policy is currently increasing the investment appeal of the Russian Far East region. On 29 December 2014, the Federal Law ‘On the territories of priority socio-economic development and other measures of state support for regions of the far east’ was adopted. Under this law, the ‘territories of priority socio-economic development’ (Accelerated Zones) are the parts of the territories of the regions of the Russian Federation in which the special regime of carrying out business activity is established with the aim of attracting investment. This law became effective on 30 March 2015 and for three years from that date, Accelerated Zones could be created only in the territory of the Russian Far East, and in the territories of the ‘monotowns’ (those where the economy is dominated by a single industry or company), the list of which is established by order of the government. Now that this term has expired, Accelerated Zones may be created in the territories of all regions of the Russian Federation.

36 The Decree of the Government ‘On establishment of the list of the regions of the Russian Federation on the territories of which creation of regional development zones is authorised’, No. 326, dated 10 April 2013.
There are a number of practical measures for the creation of bodies whose purpose is the development of the investment climate; for example:

\(a\) The Foreign Investment Advisory Council (FIAC): FIAC was established in 1994 as a result of the combined efforts of the Russian government and foreign businesses to improve the investment climate in Russia.
- The key task of FIAC is to assist in forging and promoting a favourable investment climate based on global expertise and the experience of international companies operating in Russia, with a focus on the crucial aspects of fostering a healthy investment climate.
- FIAC is chaired by the Russian prime minister and includes 53 international companies and banks, among them 3M Company, ABB Ltd, Abbott Laboratories, AstraZeneca, BASF SE, Bayer AG, BP, BAT, Cargill, Inc, Carlsberg Breweries AS, Deutsche Bank AG, the Coca-Cola Company, Total SA, UniCredit, Unilever and the World Bank.\(^{38}\)

\(b\) Agency for Strategic Initiatives: an autonomous non-profit organisation founded by the Russian government for the realisation of a package of measures in economic and social spheres, in particular for the promotion of priority projects, realisation of actions for improvement of the enterprise environment in Russia, and the development of professional personnel.\(^{39}\)

\(c\) Investment portal of the Russian regions: the aim of the investment portal is to acquaint Russian and foreign business men and women with investment opportunities in the Russian regions and to help choose locations for establishing businesses.\(^{40}\)

VII CURRENT DEVELOPMENTS

Within the defined form and structure of foreign investments legislation in Russia, which has been in existence for more than two decades, the legislators’ priority now is specification of the rules and compliance with global best practices. The main aims are to make foreign investment easier, to limit administrative barriers and to guarantee a comprehensive and non-discriminatory approach to foreign investor initiatives.

According to FAS Russia and the Government Commission, the number of applications on strategic clearance is constantly increasing. In 2014, 34 applications were considered by the Government Commission – the number grew to 44 in 2015,\(^{41}\) and during 2016, FAS Russia and the Government Commission considered 54 applications.\(^{42}\) In 2018, foreign investors submitted 85 applications with a total sum of more than 1 trillion roubles to the Government Commission.\(^{43}\) The majority of applications were received from investors in Japan, the United States, Norway and Cyprus. By the end of the first quarter of 2018 (i.e., in the 10 years of enforcement of the Strategic Investments Law), the total number of

\(^{38}\) www.fiac.ru/members.php.
\(^{39}\) www.asi.ru/.
applications that had been considered by the Government Commission was 229. Moreover, the Government Commission has approved the transactions in the total amount of more than 400 billion roubles (approximately US$5.8 billion) for 2018.  

The most important transactions recently approved by the Government Commission include clearance of the acquisition by Fortum of a minimum of 47 per cent of shares in Unipro, and the Siemens/Alstom transaction, which, however, has not been implemented since the European Commission blocked the merger. In general, natural monopolies and natural resources, companies providing services in Russian seaports and those carrying out activities in the nuclear industry have been the most popular strategic businesses for foreign investors seeking to become established in Russia in recent years.

FAS Russia has recently addressed the need to adapt existing market analysis and merger control procedures to the new market reality. This was triggered by a number of global transactions in innovative digital markets. FAS Russia concluded that the effects of big data and networks should also be regarded as a factor affecting market power. As a result, FAS Russia has introduced special remedies to prevent restriction of competition in that area.

For example, in the Bayer/Monsanto case, FAS Russia applied a new method for analysing the effects of the transaction on the market, having stressed several times that the transaction had nothing to do with the markets where the parties had overlaps in Russia (as in ‘traditional’ approach) and even on a global scale, but that it was about knowledge, innovations, platforms, algorithms and technologies possessed by both companies, enabling them to influence the market conditions, create entry barriers to other participants and dictate terms for further development of the agro-industrial sector for future decades. To mitigate the identified concerns, FAS Russia decided to use a set of entirely new legal mechanisms, such as (1) transferring technologies instead of traditional behavioural or structural remedies and (2) instituting independent trustees to monitor the transfer of technologies and obligations imposed on the parties.

Another example is the Uber/Yandex case, in which FAS Russia considered a transaction between two of the main taxi aggregators in Russia and issued a conditional decision. Although taxi aggregators do not provide transport services as such, they organise trips by connecting drivers with passengers, and have significant market power, owing to the number of drivers and users of their apps. Therefore, FAS Russia considered network effects as a market power factor relating to the two parties.

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44 Article ‘The total amount of transactions with foreign investments equalled 400 billion roubles in 2018’ published at Pravo.ru as at 23 January 2019, pravo.ru/news/208453.
47 It is proposed to define network effects as ‘dependence of customer value of the product on (i) a number of network users (direct network effects), or (ii) increase of customer value for one network group, in the case of increase of a number of network users of another network group and vice versa (indirect network effects/network externalities)’. 

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To address the practical challenges of enforcement practice, a number of initiatives for merger control regulation within the Fifth Antimonopoly Package have been put forward:

a. transaction volume exceeding 7 billion roubles as an additional threshold triggering merger control clearance. This would allow FAS Russia to control transactions by small market players with significant digital assets and intellectual property rights that may affect competition;

b. new powers for FAS Russia to prolong the review period for up to the term established by the Russian government for complicated transactions, subject to government consent, and to suspend the review period to allow for an expert opinion, to be provided;

c. an opportunity for parties to a transaction to suggest commitments for consideration by FAS Russia;

d. the introduction of ‘trustees’ (analogous to the European ‘trustees’) as authorised third-party monitors to ensure efficient implementation of FAS Russia’s preliminary conditions, prescriptions or remedies; and

e. the introduction of a ‘finding of fact’ initiative and hearings for merger control cases (currently used only in cases of competition law violations).

Professional community and government officials are now actively debating the proposed amendments. There are no guarantees that they will all be adopted exactly in this form; however, it is presumed that the fundamentals will be preserved.

It is also important to emphasise that FAS Russia intends to improve the quality of its decisions by conducting market analysis and more in-depth reviews of almost all transactions. This is only an internal initiative by FAS Russia, but it has already been observed in practice and could potentially affect the length of time taken for consideration of some transactions.

48 Only in the case of an extraordinary prolongation of the review period with the consent of the government.
49 The concept has already been tested by FAS Russia when considering the Bayer/Monsanto transaction, in which the National Research University Higher School of Economics was appointed to monitor implementation of the remedies imposed by FAS Russia.
I INTRODUCTION

According to the UN Conference on Trade and Development Global Investment Trends Monitor, South Africa has successfully managed to turn around the sharp decline in foreign direct investment since 2014. The country attracted US$7.1 billion in foreign direct investment (FDI) in 2018, representing an increase of 446 per cent on the 2017 FDI number.

This increase was largely attributed to President Cyril Ramaphosa’s calls for investment in South Africa, which culminated in the South Africa Investment Conference at the end of 2018. The conference formed part of President Ramaphosa’s plan to attract some US$100 billion in new investments in South Africa over the next five years to kick-start the country’s lagging economy. The foreign direct investment in the country was predominantly in the mining, petroleum refinery, food processing, information and communications technologies and renewable energy sectors. Some of the headline foreign investments and investment pledges in 2018 included: (1) the US$750 million joint venture between Chinese car manufacturer, BAIC International and state-owned corporation, Industrial Development Corporation of South Africa for the establishment of an automotive assembly plant; (2) Daimler AG’s Mercedes Benz unit pledging to invest US$20 billion in South Africa; and (3) Saudi Arabia pledging to invest US$10 billion into South Africa’s troubled energy sector.

The more significant legal and policy developments impacting foreign investment in 2018 included the passing of the Protection of Investment Act of 2015 (the Investment Act) and the introduction of the Competition Amendment Bill. The Investment Act is intended to provide holistically for the protection of foreign investors and their investments, and thus obviate the South African government entering into Bilateral Investment Treaties (BITs) individually with its trading partners. The Competition Amendment Bill sought to amend the Competition Act of 1998 by, *inter alia*, obliging the President of South Africa to establish a committee to consider, and where appropriate, block proposed acquisitions by foreign acquiring firms of South African businesses if, in the view of this committee, the implementation of such mergers may have an adverse effect on the national security interests of the country. The Bill defines a ‘foreign acquiring firm’ as an acquiring firm, which was incorporated, established or formed under the laws of a country other than South Africa, or whose place of effective management is outside of South Africa.
II FOREIGN INVESTMENT REGIME

The South African government encourages foreign direct investment, and has acknowledged that such investment is necessary to support the country’s growth and development objectives. However, the South African government requires that the benefits of foreign direct investment be balanced against its costs to the South African economy.

For this reason, public interest considerations, which are generally embedded in licences and state tenders, are increasingly serving as criteria for the approval or rejection of foreign investment in the country. Public interest considerations are varied, including the need to protect jobs, promote localisation and enhance the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive. ‘Historically disadvantaged persons’ refers to black South African citizens, by virtue of their disenfranchisement during apartheid South Africa, as well as female and disabled South African citizens. The advancement of historically disadvantaged persons is often facilitated through the promotion of Broad-based Black Economic Empowerment (B-BBEE). B-BBEE is a socio-economic programme endorsed by the Constitution of the Republic of South Africa. It is designed to redress the inequalities of apartheid through transformative measures that enhance participation by black people (and certain other designated groups of South Africans) in the South African economy.

The principal law governing foreign investment in South Africa is the Investment Act. That Act defines ‘investment’ within the context of foreign direct investments widely, as: (1) any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic of South Africa, committing resources of economic value over a reasonable period of time, in anticipation of profit; (2) the holding or acquisition of shares, debentures or other ownership instruments of such an enterprise; or (3) the holding, acquisition or merger by such an enterprise with another enterprise outside the Republic to the extent that such holding, acquisition or merger with another enterprise outside the Republic has an effect on an investment contemplated by (1) and (2) in the Republic.

The Investment Act does not compel a review of inbound foreign investment, irrespective of the nature of the investment proposed. However, as noted above, the Competition Amendment Bill (which was passed early in 2019) permits the blocking of a merger involving a foreign acquiring firm if, in the view of a President-appointed committee, its implementation poses national security concerns for the country. While the President is yet to identify and publish a list of national security interests such committee must consider, the Competition Amendment Act provides that the President must, when determining what constitutes national security interests for purposes of this Act, take into account all relevant factors, including the potential impact of a merger transaction:

1 on the country’s defence capabilities and interests;
2 on the use or transfer of sensitive technology or know-how outside the Republic of South Africa;
3 on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;
4 on the supply of critical goods or services to citizens, or the supply of goods or services to government;
5 to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;
6 on the Republic’s international interests, including foreign relationships;
to enable or facilitate the activities of illicit actors, such as terrorists, terrorist
organisations or organised crime; and

on the economic and social stability of the Republic.

Unlike mergers and acquisitions, there is no review of new businesses established, or joint
ventures formed, by foreign investors.

III TYPICAL TRANSACTIONAL STRUCTURES

Foreign investors seeking to establish a physical presence in South Africa for the purpose of
setting up new facilities or engaging in merger and acquisition activity typically establish a
company to serve as a subsidiary. There are no restrictions on foreign investors incorporating
a company as a subsidiary (or otherwise) in South Africa under the Companies Act of 2008
(the Companies Act). Most foreign investors incorporate a private company, which must have
at least one director and shareholder. The directors of a private company need not be South
African. However, a private company may not have more than 50 members (shareholders).
Should the foreign investor require an entity that may have more than 50 members, a public
company may be its optimal corporate vehicle. Public companies are generally used where
the founders anticipate offering securities to the public through IPOs, for instance. Both
private and public companies attract limited liability, meaning that a shareholder's liability
is restricted to its investment in the company. These companies are categorised as profit
companies; other profit companies include personal liability companies, which are used by
professional services providers, such as law firms. The Companies Act also makes provision
for non-profit companies, which are obliged to apply its income and assets exclusively towards
the promotion of its main objects.

The Companies Act also permits foreign investors to set up an external or domesticated
company. An external company is a foreign company conducting business activities in
South Africa through a branch office (referenced in the discussion of foreign banks above).
The Companies Act requires that external companies submit their annual returns to the
Companies and Intellectual Property Commission Office. The Companies Act also provides
for the domestication of foreign companies. A foreign company may make application for the
transfer of its registration in a foreign jurisdiction to South Africa, and upon approval of that
application the foreign company will ‘exist’ as a company in terms of the Companies Act (as
if it had originally been incorporated and registered as such). Save as set out in the discussion
in Section II, there are no requirements for the shareholders or directors of any of these
companies to be South African. Where a foreign investor incorporates a local subsidiary, that
subsidiary is treated as a local company for all intents and purposes. South African Exchange
Control regulations apply to that subsidiary, including (without limitation) the requirement
that the local subsidiary's transfer of intellectual property to an offshore affiliate be licensed to
such affiliate and made subject to a taxable royalty payable to the local subsidiary.

Where foreign investors enter into joint ventures with or without South African
investors, such joint ventures are treated as partnerships under South African law. Where
the partnership is unincorporated (i.e., not folded into a company), each partner attracts
unlimited liability for the debt and other obligations of the partnership and of each
other partner. Where the partnership is incorporated into a limited liability company, the
Companies Act applies to that partnership, and liabilities of the shareholders are limited to their respective investments in the company. Under South Africa law, although permissible, trusts are seldom used as vehicles for the operation of businesses. Save for the security interest rules under the Competition Act (discussed above), there are no rules under South Africa law pertaining to takeover bids by foreign companies. Where a foreign investor's transaction in South Africa is limited to the purchase of movable property, that investor's obligations are limited to settling tax and import duty liabilities accruing to that purchase. While there are no restrictions on a foreign investor's acquisition of immovable property (such as land and buildings), the purchase of immovable property by a non-resident foreign investor must be undertaken through a locally established company, in respect of which the foreign investor must appoint a South African resident public officer. Although a discussion on taxes relating to specific transactions falls outside of the scope of this review, we point out that if the foreign investor subsequently sells the shares in this company at a time when 80 per cent or more of the market value of those shares is attributable directly or indirectly to the immovable property, the sale will attract capital gains tax liability for the investor. The foreign investor may, however, get relief from double taxation under an applicable Double Taxation Agreement.

Where a foreign investor purchases securities, the foreign investor is obliged to notify an authorised dealer (generally banks) of the purchase and have the securities endorsed 'non-resident'. This allows the foreign investor to repatriate dividends and other distributions paid in respect of these securities, as well as the capital realised from the ultimate sale of the securities. Authorised dealers are obliged to assess documentary evidence from the investor to ensure that the securities purchase transaction concluded with the foreign investor is at arm's length, at fair market related prices and is financed in an approved manner. Such financing must be in the form of the introduction of foreign currency or rand from a non-resident rand account.

IV REVIEW PROCEDURE

i Overview

Although the South African government has identified the need for a uniform policy for the assessment of foreign direct investment in the country, South Africa is yet to adopt laws giving effect to this policy. Consequently, there is no uniform oversight and review of foreign investments in the country. However, the country does regulate foreign investment in, ownership and control of, its strategic industries through sectoral regulation, including the banking, insurance, and broadcasting and telecommunications sectors. The foreign investment restrictions in respective of each of these sectors are briefly discussed hereunder.

Banking sector

The Banks Act of 1990 (the Banks Act) permits a foreign bank to apply to the Prudential Authority (operating within the administration of the South African Reserve Bank) for consent for the establishment of a representative office or a local branch of that foreign bank in South Africa. The Prudential Authority may grant such application, either unconditionally or subject to such conditions as the Prudential Authority may determine. A representative office has authority to promote and assist the business of a foreign bank, while a branch is authorised by the Prudential Authority to conduct the business of a bank. Consent to operate a branch of a foreign bank is subject to, inter alia, the relevant foreign bank fulfilling capital
adequacy, risk management and other operational requirements. The Prudential Authority will not grant an application for the establishment of a branch office, unless it is satisfied that the responsible supervisory authority of the foreign bank’s country of domicile will exercise proper supervision over the foreign bank.

*Insurance sector*

The Insurance Act of 2017 prohibits persons from conducting insurance business in South Africa without being appropriately licensed by the Prudential Authority under that Act. The provision of reinsurance services directly, or through agents or intermediaries, in South Africa is considered to be the conduct of insurance business in the country. However, in instances where a South Africa-based customer secures insurance with a foreign insurer or reinsurer, the actions of the foreign insurer or reinsurer would not qualify as conducting insurance business in South Africa. The Insurance Act permits a foreign reinsurer to conduct insurance business in South Africa, subject to that foreign reinsurer being granted a licence, and establishing both a trust (for the purposes of holding the prescribed security) and representative office in South Africa. The requirements for a Lloyd’s underwriter conducting insurance business in South Africa are similar to those applicable to a foreign reinsurer, save that a Lloyd’s underwriter is not required to establish a representative office in South Africa. In addition, to qualify for a licence as a branch of a foreign reinsurer or a Lloyd’s underwriter, an applicant’s proposed licensing must not be contrary to the interests of prospective policyholders or the public interest. Public interest is not defined in the Insurance Act.

*Broadcasting and telecommunications sector*

The Electronic Communications Act of 2005 (ECA) imposes limitations on foreign control of commercial broadcasting services. The ECA provides that a foreign investor may not, whether directly or indirectly (1) exercise control over a commercial broadcasting licensee; or (2) have a financial interest or an interest in voting shares or paid-up capital in a commercial broadcasting licensee exceeding 20 per cent. The ECA further caps the percentage of foreigners serving as directors of a commercial broadcasting licensee at 20 per cent. In terms of the regulations issued under the ECA, the Independent Communications Authority of South Africa (the electronic communications regulator) may refuse to transfer a licence where the transferee’s ownership and control by historically disadvantaged persons is less than 30 per cent. The ECA further regulates cryptography. In terms of that Act, a foreign cryptographer must be registered with the Department of Communications as such prior to rendering cryptography services and supplying cryptography products in (or to persons in) South Africa. This registration obligation applies to foreign cryptography providers rendering their services, or selling their products, in South Africa irrespective of whether they have a physical presence in the country.

**Additional information**

There are restrictions on foreign investors rendering business services (such as legal and investment brokerage services) without due authorisation. There are no explicit prohibitions against foreign state-owned enterprises making foreign investments in South Africa. However, such transactions could be blocked in terms of the Competition Act or public interest considerations embedded in various legislation, some of which has been discussed above.
V FOREIGN INVESTOR PROTECTION

The South Africa government has resolved not to enter into any new BITs. Further, the country will not renew any BITs that come up for renewal. Instead, the Investment Act will serve as a uniform position for investor protection and a substitute for all of the country’s BITs. The Investment Act provides for foreign investors and their respective investments to be treated no less favourably than South African investors in like circumstances. The expression ‘like circumstances’ is defined as meaning the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including a host of factors specific to South Africa and not the investor. Factors cited include the (1) effect of the foreign investment on the Republic, and the cumulative effects of all investments; (2) sector that the foreign investments are in; (3) effect on third persons and the local community; (4) effect on employment; and (5) direct and indirect effect on the environment.

The Investment Act further provides for qualified physical security and legal protections for the foreign investor. Foreign investors and their respective investments will receive a level of physical security, ‘as may be generally provided to domestic investors in accordance with minimum standards of customary international law, subject to available resources and capacity’. Such investors will also receive legal protection of investments in accordance with the right to property in terms of the South African Constitution. The Constitution qualifies the right to property, by permitting expropriation for a public purpose or in the public interest, subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. The South African government is considering amending the Constitutional right to property to allow for expropriation without compensation in certain circumstances. The Investment Act empowers foreign investors to repatriate funds, subject to complying with taxation and other applicable laws.

The Act clarifies that the South African government or any organ of state may take measures to, inter alia, (1) redress historical, social and economic inequalities and injustices, presumably through the promotion of B-BBEE; (2) promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; (3) foster economic development, industrialisation and beneficiation; and (4) protect the environment and the conservation and sustainable use of natural resources. These measures could potentially have the impact of unilaterally eroding foreign investors’ rights under the Investment Act.

With regard to investment disputes, the Investment Act provides that the foreign investor may request that the Department of Trade and Industry facilitate a mediation within six months of the investor becoming aware of the dispute. The Department of Trade and Industry has issued regulations spelling out the rules of the mediation, meaning that there is no room to negotiate amendments to those rules. Further, the Investment Act provides that the government may consent to international arbitration in respect of the relevant investment, but only subject to the exhaustion of domestic remedies (being either local arbitration or courts).

South Africa recently adopted the International Arbitration Act of 2017, incorporating the UNCITRAL Model Law on International Commercial Arbitrations (2006 version) into South African law. This Act may only apply to foreign investors’ disputes with non-governmental South African entities. As indicated above, the Investment Act applies to foreign investors’ disputes with the South African government relating to investments to the local courts, or to arbitration. South Africa is yet to accede to the International Centre for
South Africa

Settlement of Investment Disputes Convention, and having regard to the dispute resolution provisions of the Protection of Investment Act of 2015, the South African government is unlikely to accede that Convention in the near future.

VI OTHER STRATEGIC CONSIDERATIONS

Foreign investors planning to enter the market will be well placed if they understand the public interest considerations that the South African government is advancing in the industries or sectors in which they propose investing, particularly if their proposed market entry will be pursuant to a state-issued licence, public private partnership or other state procurement. As noted above, the promotion of B-BBEE initiatives generally features prominently as a criterion for the award of licences and state procurement. Accordingly, the foreign investor may be required to enter into agreements with historically disadvantaged persons relating to, *inter alia*, ownership and management of its bid entity, and possibly propose the adoption of additional B-BBEE measures into its proposal to shore up its chances of success. In the minerals sector, for instance, a new mining right holder is obliged to have a minimum B-BBEE shareholding of 30 per cent.
I INTRODUCTION

Spain has been a global player in foreign investment since the mid 2000s, thanks to its investment policy measures being predominantly geared towards investment liberalisation, promotion and facilitation. Spain is considered the eleventh economy most open to foreign direct investment (FDI), according to the FDI Regulatory Restrictiveness Index prepared by the Organisation for Economic Co-operation and Development.\(^1\)

Foreign investment in Spain is fostered by, among other things, the fact that a number of Spanish multinational companies are global leaders in a variety of sectors; Spanish reforms to strengthen competitiveness and entrepreneurship; Spain’s membership of the European Union, which enables duty-free transactions and free movement of goods, services, capital and persons; and strong economic and business ties, and good communications, with Latin America, all of which have led to Spain becoming the location for the headquarters of multinational companies for their Latin American or European activities.

Foreign investment in Spain increased significantly from 2015 to 2018 (gross and net foreign investment increased from €25.3 billion to €52.8 billion and from €19.3 billion to €43.7 billion, respectively).\(^3\) The main sectors towards which this investment was addressed are energy, real estate, financial services, telecommunications and wholesale trade. After years of recession, foreign investment started to recover in 2014, just as the Spanish economy showed signs of improvement. However, there are still some concerns regarding the political spectrum (mainly arising from the national government’s fragmentation) along with international geopolitical uncertainties relating to, among others, the Brexit outcome and US external-trade policies, which may influence foreign investors’ perception of the country.

II FOREIGN INVESTMENT REGIME

Spain has a favourable legal framework for foreign investors. Spanish law has adapted its foreign investment rules to a system of general liberalisation, without distinguishing between European Union (EU) residents and non-EU residents.

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\(^{1}\) Edurne Navarro and Alfonso Ventoso are partners at Uría Menéndez.

\(^{2}\) data.oecd.org/fdi/fdi-restrictiveness.htm.

\(^{3}\) Source: Spanish Ministry of Economy, Industry and Competitiveness.
In addition to the general regime described below, Law 18/1992 of 1 July, establishing rules on foreign investments in Spain, provides a specific regime for non-EU persons investing in certain sectors: national defence-related activities, gambling, television, radio and air transportation.

For EU residents, the only sectors with a specific regime are the manufacture and trade of weapons or national defence-related activities.

i  General regime for foreign investments

Royal Decree 664/1999 of 23 April on external investments (RD 664/1999) established a liberalised system for foreign investments in Spain that provides two declaration regimes to inform the Investments Registry of the Ministry of Economy, Industry and Competitiveness:

a  an ex ante declaration regime that applies only to:
   • investments made from a country or territory identified as a tax haven in Royal Decree 1080/1991 of 5 July. No ex ante declaration is required if the investment is made in listed shares or investment funds registered with the Spanish Securities Market Commission (CNMV) or involves less than 50 per cent of the Spanish company’s share capital; or
   • investments made in Spain by non-EU Member States acquiring property to be used as diplomatic or consular offices, except in cases where there is an agreement providing for deregulation under reciprocity rules in compliance with Additional Provision No. 3 of RD 664/1999. The ex ante declaration is not equivalent to a verification, non-objection or clearance requirement and, once the investment has been declared, the investor may carry out the investment; and

b  an ex post declaration regime, which applies to all foreign investors, including those subject to an ex ante declaration, for administrative, statistical and economic purposes only.

The Council of Ministers can suspend this liberalised system on an ad hoc basis if investments affect, or may affect, public powers, public order, security or public health-related activities. If the liberalisation regime for foreign investments is suspended regarding a specific area or activity, that investment would first require administrative clearance by the Council of Ministers.

ii  National defence-related activities

RD 664/1999 suspended the general liberalisation regime relating to foreign investments made in activities directly related to national defence, such as the manufacture or trade of weapons, ammunition, explosives and military equipment.

Therefore, any investment in any of these activities will require an authorisation from the Council of Ministers, except if the investment (1) is made in listed companies that render activities in this sector, (2) is equal to or below 3 per cent of the share capital, and (3) does not allow the foreign investor to directly or indirectly become part of the managing bodies.

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4 Royal Decree 137/1993 of 29 January, on the regulation of weapons, and Royal Decree 130/2017 of 24 February, on the regulation of explosives, also establish the requirement of a special authorisation from the Council of Ministers for direct or indirect foreign investments in the firearm production and trade sector and the explosives production and trade sector.
iii Gambling
Law 13/2011 of 27 May on the gambling sector, which regulates gambling activities (including online gambling) carried out within a country, provides that direct and indirect non-EU investments in Spanish entities operating in the gambling sector are subject to the provisions of RD 664/1999; therefore, they are liberalised.

However, a Spanish licence must be obtained to operate gambling activities in Spain. Moreover, to operate in-person gambling (and all other gambling carried out at an autonomous regional level), an additional authorisation must be obtained from each autonomous region where gambling is to be carried out.

The regulation, inspection and control of gambling activities in Spain is carried out by the General Directorate of Gambling Planning of the Ministry of Finance and Civil Service.

iv Television and radio (audiovisual sector)
As a general rule, under Law 7/2010 of 31 March, on audiovisual communication, there are no restrictions on the acquisition of holdings in Spanish companies belonging to the audiovisual communication services sector.

However, investors who are citizens or residents in a country that is not a member of the European Economic Area (EEA) can only hold stakes and voting rights in a Spanish audiovisual communication services company that uses spectrum in accordance with the principle of reciprocity.

Additionally, the shareholding held, directly or indirectly, by a non-EEA person in these operators may not exceed 25 per cent of the share capital of the Spanish audiovisual communication services licence holder, and the total shareholding in a Spanish audiovisual communication licence holder by non-EEA persons must not exceed 50 per cent on aggregate.

Certain restrictions also exist regarding simultaneous shareholdings in Spanish licence holders that use spectrum.

The restrictions referred to in the two preceding paragraphs are supervised by the Ministry for Ecological Transition.

v Air transportation
Law 48/1960 of 21 July on air navigation, with Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September on common rules for the operation of air services in the European Community, together provide that holders of operating licences for air transportation of passengers, cargo or mail, or both, for remuneration must be majority owned and effectively controlled by EU nationals, except as provided for in an agreement with a third country to which the European Union is a party. The airline in question shall at all times be able, on request from the competent licensing authority, to provide evidence that it meets these requirements.

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5 Gambling carried out in an autonomous region range (including all in-person gambling) is governed by the regulations of the relevant autonomous region.

6 For this purpose, shares representing the share capital of Spanish airlines shall be in registered form and the nationality of the relevant shareholders shall be expressly stated.
In this context, EU airlines shall also notify the competent licensing authority in advance of any intended mergers or acquisitions and within 14 days of any change in the ownership of any single shareholding that represents 10 per cent or more of the total shareholding of the airline or of its parent or ultimate holding company.

In addition, when an airline becomes aware that the maintenance of operating licences or the exercise of traffic rights derived from air traffic bilateral treaties are at risk, it must make the circumstances public and notify, inter alia, the State Agency for Aviation Safety, which will in turn notify the Ministry of Public Works. From the moment of notification, no acquisition or transfer of shares may be made by foreign individuals or legal entities, unless the acquisition or transfer is accompanied by certification issued by the airline showing that the said acquisition or transfer does not exceed the limits required by the applicable laws or the bilateral air traffic treaties signed by Spain regarding air transport.

Finally, if the airline is aware of any acquisition or transfer of shares that, in breach of the provisions described above, may jeopardise the requirements laid down in the laws and agreements mentioned above, the board of directors of the airline may acquire the shares in question for subsequent cancellation. In such cases, and until such time as the shares are physically transferred to the airline, the board of directors may resolve to suspend the voting rights attached to the shares.

vi Other sectors

Telecommunications

The acquisition of holdings in Spanish companies in the telecommunications sector is liberalised, but certain restrictions exist on the simultaneous holding of telecommunications operators in Spain (see below regarding the acquisition of simultaneous holdings in principal operators).

Moreover, in accordance with Law 9/2014 of 9 May on the regulation of telecommunications, activities can be rendered by EU companies and by non-EU companies provided that, in the latter case, there is an international treaty signed between Spain and the country of the relevant company. However, the Spanish government can authorise exceptions to this regime.

Certain restrictions also exist to prevent anticompetitive hoarding, particularly by restricting the total number of frequencies to be used by the same operator or group of operators, or by providing time limits for the utilisation of the titleholder’s rights of use.

The rendering of telecommunications services is subject only to prior communication, except in cases where the use of spectrum is required. In the latter case, a prior concession granted by the Ministry of Energy, Tourism and Digital Agenda for the use of spectrum is required.
Energy

Under Law 3/2013 of 4 June, creating the National Commission on Markets and Competition (NCMC), the Ministry for Ecological Transition may supervise acquisitions of shares of (or by) companies undertaking regulated energy activities (regulated gas activities include regasification, primary storage, transportation and distribution of natural gas) or owners of certain types of key energy assets, as such supervision may lead to a post-closing notification of the relevant transaction or potentially, in some cases, even to the imposition of conditions on the acquirer or the target company.

The most notable feature of this supervision is that it is made following an ex post communication regime (i.e., there is no authorisation but rather a communication). Furthermore, in the event of acquisitions made by regulated companies or in the scenario in which the acquisition is made by a regulated energy company or a non-EU or non-EEA resident company, the Ministry for Ecological Transition would be entitled to impose conditions, provided that the NCMC believes there is a real and sufficiently serious threat to the security of the supply of electricity, gas or hydrocarbons within the scope of the activities undertaken by the acquirer.

Apart from this, the acquisition of holdings in the market operators (i.e., Operador del Mercado Ibérico de Energía, Polo Español, Red Eléctrica de España, Enagás GTS and Compañía Logística de Hidrocarburos CLH) beyond a certain threshold is restricted, regardless of the nationality of the acquirer.

Finally, Spanish regulations provide that individuals or entities that participate, directly or indirectly, in more than 3 per cent of the share capital of more than one principal operator (a utility company that is one of the five companies with higher market value in the relevant sector) in the same energy market or industry among those specified in the above-mentioned provision (including power generation and electricity supply, and natural gas production and supply), may not exercise their voting rights in excess of the 3 per cent threshold or appoint any directors, without prior authorisation from the NCMC.

Financial

Investments carried out by either local or foreign investors in certain financial entities, such as credit entities, insurance or reinsurance companies and investment services entities, must follow an authorisation or non-opposition process before the European Central Bank (through the Bank of Spain), the General Directorate of Insurance and Pension Funds or the CNMV respectively.

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7 The NCMC, which has been operational since 6 October 2013, replaced the Spanish National Energy Commission. This new authority merged the previous competition authority, the National Competition Commission, with several sector regulators responsible for telecommunications, energy, postal services, audiovisual communication, railways and airports.

8 The share acquisition should confer a ‘significant influence’ over the acquired company (Law 3/2013 does not provide any threshold above which a significant influence should be presumed).

9 Key energy assets include nuclear power stations, coal-fired power stations, oil refineries, oil pipelines and oil-bearing storage areas.

10 Red Eléctrica de España and Enagás GTS have additional restrictions in terms of the exercise of voting rights.

11 Law 10/2014 of 26 June on discipline, supervision and solvency of credit entities; Law 20/2015 of 14 July on management, supervision and solvency of insurers and reinsurers; and the Law on the Securities Market (approved by Royal Decree Law 4/2015 of 23 October).
The general threshold requiring the prior authorisation of these public regulators is 10 per cent or more of the voting rights, or a percentage that, although lower than 10 per cent, allows the exertion of a significant influence in the relevant entity.\textsuperscript{12}

Finally, the CNMV must also authorise the acquisition of a direct or indirect holding in Bolsas y Mercados Españoles (the holding of the Spanish stock exchanges) representing 1, 5, 10, 15, 20, 25, 33, 40 or 50 per cent of the voting rights, or a percentage that, despite being lower than 1 per cent, allows the exertion of a significant influence in the company.

III  TYPICAL TRANSACTIONAL STRUCTURES

i  Setting up a business in Spain

Investments in Spain may be carried out directly. There are two main structures available for conducting business operations in Spain: incorporating a subsidiary company (or acquiring an existing subsidiary company) or establishing a branch.

In practice, there are no operational differences between the two structures, and there are no business restrictions deriving from the type of structure. The creation of branches and subsidiaries requires the execution of a public deed before a Spanish notary public, and they must be registered at the Commercial Registry. Both types of entities must comply with certain tax and accounting registrations and current obligations.

Subsidiary

A subsidiary is a company (i.e., an independent legal entity) that may conform to any of the corporate structures provided for under Spanish law. A subsidiary enjoys full legal standing and decision-making autonomy. It has its own share capital, articles of association, management bodies and governing policies.

The investment corporate vehicles most frequently used in Spain are the public limited company and the private limited company. Both exclude shareholders’ liability for the company’s obligations or liabilities. Spanish law also regulates other types of entities, in some of which shareholders have liability for the company’s obligations if they are not settled.

Branch

A branch has no legal personality separate from the company to which it pertains. The head office and all its branches share the same legal personality (that is, they are all the same legal entity).

The establishment of a branch does not require compliance with all the requirements set out in Spanish law for the incorporation of a new company, but it is still necessary for a resolution to be passed by the head office of the company, a notarial deed to be executed in Spain and for at least two managers to be appointed and authorised to act in Spain on behalf of the branch. The branch must also comply with certain reporting obligations.

As regards the liability of the branch, because a branch has no separate legal personality, the foreign head company operating in Spain through a branch will be liable for the obligations of the branch.

\textsuperscript{12} Prior approval must also be obtained when crossing thresholds of 20, 30 and 50 per cent, or whenever control of the entity could be obtained by means of an acquisition.
ii Corporate law residency requirements

Under Spanish law, non-Spanish entities or individuals that carry out any activity with potential tax implications in Spain must obtain a tax identification number (tax ID) in Spain. Tax ID identifies individuals, legal entities and entities without legal personality pursuant to Law 58/2003 of 17 December on general tax. Likewise, foreign individuals must request a foreign identification number.

iii Takeover bids by foreign companies

Under Royal Decree 1066/2007 of 27 July on takeover bids, the obligation to make a mandatory takeover bid would be triggered, irrespective of the nationality or residence of the bidders, if:

a a percentage of voting rights in the listed company equal to or more than 30 per cent of its voting rights is acquired, direct or indirectly; or

b upon an acquisition, the relevant company holds an interest carrying less than 30 per cent of the voting rights of the listed company, but within the 24-month period following the acquisition appoints a number of directors who, with those already appointed, represent at least one half plus one of the members of the board of directors of the listed company.

However, there are certain rules whose application may vary depending on the nationality of the bidder, such as the possibility of releasing the directors of the affected company from their duty of passivity if the applicable law of the country of origin of the foreign bidder does not provide for the duty of passivity as a general duty, and the bidder has not submitted voluntarily thereto under a resolution adopted by its shareholders at a general meeting.

iv Other structures for on-the-ground presence

An alternative for marketing and distributing foreign products in Spain without creating a separate structure (i.e., neither a company nor a branch) is to enter into a distribution agreement or an agency agreement with a local company operating in Spain. Additionally, an investor may carry out a service in collaboration with another company through a joint venture.

Distribution and agency agreements must be carefully negotiated and drafted. When an agency agreement is terminated, the agent is entitled to claim an indemnity from the other company in consideration for the agent having attracted new clients for the principal party or increased sales to existing customers. Courts have also expanded the indemnification obligation to distribution agreements not clearly separated from agency agreements. The indemnification cost may be significant.

Apart from contractual joint ventures, Spanish law provides for two additional forms of joint venture:

a temporary business alliances (TBAs), which are established for the purpose of carrying out a specific project or service, allowing several companies to operate together in one common project;13 and

13 Governed by Law 18/1982 of 26 May concerning the tax regime of temporary business groupings and associations and regional industrial development companies.
b economic interest groupings (EIGs),\(^\text{14}\) which are commonly used to provide centralised services within the context of a broader association or group of companies, such as centralised purchasing, sales, information management or administrative services.

One of the key differences between TBAs and EIGs is that EIGs are commercial entities with a legal personality separate from their partners.

IV REVIEW PROCEDURE

i Definition of foreign investor and investment

Under Spanish law, foreign investors are defined as individuals not resident in Spain, legal entities domiciled abroad and foreign public entities.

With regard to foreign investment, this would include:

a holdings in Spanish companies;

b establishment and increase of capital allocated to branches;

c subscription for and acquisition of marketable debt security issued by residents;

d holdings in foreign investment funds registered with the CNMV;

e acquisition of property sited in Spain and valued at more than €3,005,060.52, or any investment from a tax haven jurisdiction regardless of the value of the property; and

f formation of or participation in joint ventures, foundations, economic interest groupings, cooperatives and co-ownerships if the total value exceeds €3,005,060.52, or any investment from a tax haven jurisdiction regardless of the amount.

ii Review procedure

The review procedure by the relevant competent authority of an acquisition of an interest in, or an asset of, a Spanish company (or the concession of a licence) in the sectors described in Section II, in which an authorisation is required, differs between sectors and varies depending on the type of investment; in some cases, the nationality of the acquirer (i.e., EU versus non-EU investors) also introduces certain peculiarities. Because of the limited scope of this chapter, only a brief overview of the main features of this procedure is provided.

The authorisation period ranges from 30 days to six months, depending on the affected sector. It is important to highlight that, in general, these authorisation periods may be suspended by the relevant competent body (by means of information requests), and the period can therefore be extended. As a general rule, if a resolution denying the acquisition is not issued after expiry of the specified period, authorisation can be presumed.

In the case of authorisations related to the financial sector, the information that must be provided in the authorisation request is broadly described in the applicable regulations, and generally aims to offer proof of the investor’s integrity, experience, solvency and its ability to comply with all the applicable sectoral legislation.

Except in the case commented on in Section II.vi pertaining to the energy sector, authorisations generally operate as a condition precedent, and the transaction cannot be closed until authorisation is obtained.

\(^\text{14}\) Governed by Law 12/1991 of 29 April on economic interest groupings.
During the review process, the public bodies are obliged to keep the information confidential. However, the dissemination of information between different departments has an inherent risk of leakage. In the event of a leak, the existence of the transaction could reach the media, but normally information provided to the regulator is not leaked.

With the exception of competition files, in which other players in the sector may express their position regarding the potential acquisition, authorisation processes are handled only with the interested parties (the acquirer or the buyer, or both, as the case may be).

A public resolution denying an authorisation is subject to administrative or judicial challenge, or both.

### iii Competition

Companies planning to enter the Spanish market should take into consideration the fact that the acquisition of, or merger with, companies active in Spain may be subject to a mandatory merger control review by the competition authorities. This mandatory review regime implies an obligation on the acquiring company or on the merging parties to notify the deal and to suspend its execution until its approval by the authorities.

Transactions that may be subject to merger control review are mergers of two independent companies, acquisitions of sole or joint control over undertakings, and the creation of a joint venture.

A notification and suspension obligation will apply provided that certain thresholds are met. In this regard, it is important to take into account that two sets of rules apply to transactions affecting the Spanish market: EU merger control rules and Spanish legislation. For transactions that do not reach the EU thresholds (typically those of a smaller scale), Spanish merger control legislation may apply. According to this legislation, transactions must be notified to the NCMC if one of the following alternative thresholds is triggered: (1) if the transaction results in the acquisition or increase of a market share of 30 per cent or more in the relevant market in Spain, or (2) if the combined turnover of the relevant undertakings in Spain amounts to €240 million, provided that at least two of the undertakings concerned have a turnover of €60 million in Spain.

However, transactions are exempt from the notification obligation when the turnover or assets in Spain of the acquired company do not exceed €10 million, as long as the parties do not have an individual or joint market share of 50 per cent or more in any of the markets concerned.

Public takeover bids will not be subject to the suspension obligation provided in the Spanish merger control legislation, provided the following conditions are met: (1) the transaction must be notified to the national competition authority within five days of submission of the bid to the CNMV, and (2) the acquirer must not exercise the voting rights attached to the shares acquired, or must do so only to maintain the full value of those investments and on the basis of a derogation granted by the competition authority.

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15 Once the authorisation is granted, all or part of the information can be accessed by third parties in the internal registries that most regulatory bodies maintain.

16 If a transaction has an EU dimension, the European Commission will have exclusive jurisdiction over the merger, and the Spanish merger control procedure will not apply. In this regard, Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings sets out the relevant thresholds that trigger the obligation to notify the European Commission.

17 See footnote 7.
FOREIGN INVESTOR PROTECTION

With regard to multilateral international treaties related to the protection of foreign investments, Spain joined the International Centre for Settlement of Investment Disputes (ICSID) in 1994, whose primary purpose is to provide facilities for conciliation and arbitration of international investment disputes. In 1998, Spain ratified its adhesion to the Energy Charter Treaty, signed in Lisbon on 17 December 1994, which establishes a legal framework through which to promote long-term cooperation between its members in the energy field and provides protection to investors similar to that established in the bilateral investment treaties (BITs) described below.

Moreover, Spain has entered into BITs for the promotion and protection of investments with a significant number of countries.18 These BITs have been agreed with countries that are, or are meant to be, the main focus of Spanish investments and that have a similar structure, which can be summarised as follows:

a. admission and promotion in their respective territories of investments coming from the other country;

b. the obligation for the host country to bestow fair and equitable treatment on the foreign investment;

c. non-discrimination, which obliges the host country to confer on investors of the signatory country the same beneficial rights as those offered to third-country investors (most-favoured-nation clause) and to offer to those investors a treatment no less favourable than that granted to national investors (national treatment clause);

d. the obligation for each country to allow investors from the other country to repatriate the rents, profits and any other payments related to the investments made; and

e. the banning of expropriation or similar acts, except where, for public interest reasons, with no discrimination, the legal process is followed and there is appropriate compensation.

The BITs include mechanisms enabling investors to bring any dispute to different international tribunals of arbitration after a period of friendly negotiation and, in some cases, after submission of the dispute to the local jurisdiction. In connection with this, ICSID and the ad hoc arbitration set forth in the United Nations Commission on International Trade Law (UNCITRAL) Arbitral Regulations are the preferred tribunals of arbitration, but in some other BITs, such as those with Cuba and the Dominican Republic, parties direct their disputes to the International Court of Arbitration of the International Chamber of Commerce. Additionally, the Energy Charter Treaty allows disputes to be brought before the ad hoc arbitration of the UNCITRAL Arbitral Regulations or the Arbitration Institute of the Stockholm Chamber of Commerce.

In addition, from the perspective of private relationships between investors, any person has the right to submit any controversy to the Spanish tribunals (whenever these are competent), the decisions of which are appealable before a higher tribunal. Moreover, and regarding arbitration, Spain adhered in 1977 to the Convention on the Recognition and

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Enforcement of Foreign Arbitral Awards of 10 June 1958, and has incorporated in its internal legislation the main features of the UNCITRAL Model Law on International Commercial Arbitration.

Finally, the Lisbon Treaty has given the European Commission full exclusive competence regarding FDI. Accordingly, the European Commission will gradually negotiate and sign new BITs on behalf of all Member States with a view to the progressive replacement of Member State BITs that are in force or may enter into force. However, until this replacement occurs, it is provided that Member State BITs with third countries may be maintained in force or enter into force, as long as they do not constitute a serious obstacle to the negotiation or conclusion by the European Union of bilateral investment agreements with third countries.

VI OTHER STRATEGIC CONSIDERATIONS

The strategy to carry out foreign investment in Spain will obviously depend on the features of the potential investment and the target (i.e., acquiring a controlling stake differs from acquiring a minority stake, and whether a regulatory approval or an antitrust clearance is needed is also relevant).

As in every investment opportunity, it is critical to analyse the financial, legal and tax implications of the transaction beforehand, and the resulting structure, to make sure that any potential synergies are achieved. It is also advisable to gain an understanding of Spanish employment law and check that any labour plans for the target are lawful.

In the event of major investments triggering regulatory approvals by a supervisor (other than in a takeover bid scenario, where confidentiality is crucial), it is generally advisable to approach the relevant supervisor to explain the transaction and the proposed timetable. This will not guarantee that the transaction will be authorised, but it will certainly smooth over the process (when public officers are informed in advance of a given transaction and its background, they are likely to be more interested in starting the file analysis). However, any such approach will be considered from case to case, and balancing the consequences of potential information leaks.

VII CURRENT DEVELOPMENTS

i Relevant investments

What follows is a list of the most relevant investments made by foreign investors in Spanish companies or assets from July 2018 to June 2019:

a the acquisition by Minor International Public Company Limited (Thailand) of 48 per cent of the shares of NH Hotel Group, SA, by means of a tender offer, for a total price of €1.18 billion;
b the acquisition by KKR (United States) of 55.4 per cent of the shares of Telepizza Group, SA for a total consideration of €326 million upon launching a voluntary tender offer for 100 per cent of its share capital for a total maximum consideration of €770 million;

19 Law 60/2003 of 23 December on arbitration.
20 Sales of foreign assets or companies held by Spanish companies are not included in this list.
the acquisition by DS Smith (Great Britain) of 100 per cent of the shares of Papeles y Cartones de Europa, SA (Europac) after launching a voluntary public takeover bid worth €1.67 billion;

d the acquisition by LetterOne (Luxembourg) of 40 per cent of the shares of Distribuidora Internacional de Alimentación, SA for a total amount of €170 million;

e the acquisition by Investindustrial LLP (Great Britain) of 100 per cent of the shares and convertible bonds of Natra through a voluntary tender offer with a full cash consideration of €158 million;

f the acquisition by the asset investment funds Nazca and Aberdeen (Great Britain) of Terratest Group SA with an approximately equity value of €200 million;

g the sale of a controlling stake in Testa Residencial SOCIMI, SA to Blackstone Group Inc (United States) worth €1.895 billion on a 100 per cent basis;

h the launching of a voluntary tender offer for 100 per cent of the shares of Parques Reunidos Servicios Centrales, SA by a company controlled by the investment firm EQT (Sweden);

i the acquisition by Lone Star (United States) of an 80 per cent interest in two Bankia's real estate owned portfolios with a total value amounting to €1,650 million and a 100 per cent interest in a Bankia's non-performing loan portfolio with a total gross value of €1.420 billion;

j the acquisition by GIC (Singapore) of a 20 per cent significant stake in ConnecT, an investment vehicle through which GIC, Adia (Abu Dhabi) and Edizione (Italy) hold an indirect 29.9 per cent stake in Cellnex Telecom, SA;

k the acquisition by Rhône Capital (France) of 45 per cent of the share capital of the Spanish manufacturer of explosives and ammunition MaxamCorp Holding, SL at a price of €265 million (equity value);

l the acquisition by FCapital Dutch, BV, a Grupo Finaccess subsidiary (Mexico), of 10.67 per cent of the shares of AmRest Holdings, SE at an aggregate purchase price of €310 million; and

m the acquisition by Lone Star (United States) of 80 per cent of the real estate business of CaixaBank, valued at €5.6 billion.

On a separate note, equity capital market activity in Europe, including Spain, suffered a significant slowdown during the second quarter of 2018, caused by geopolitical uncertainties and shifts in trade policies, which ended in instability and volatility in the markets. As a consequence, investors adopted a cautious and very selective approach, and a significant number of candidates for initial public offerings had to cancel or postpone their transactions (and await a better market momentum). The outlook for the second half of 2019 is still uncertain, although there would be a significant pipeline on standby.21

ii Possible trends

The economic and political situation still raises some concerns. At a local level, future trends in foreign investment will very much depend on the ability of the Spanish parliament to form a government and to reach stable agreements as to, among others, internal and external policies that contribute to sustaining growth in the Spanish economy and to manage the

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situation in Catalonia. From an international perspective, the effects of Brexit are still difficult to measure, although it will necessarily affect the Spanish economy (the United Kingdom is Spain's sixth biggest investor country) and the rest of the eurozone.

Nevertheless, according to ICEX Spain Trade and Investment, opportunities may still be found among Spanish companies, particularly in the following sectors: information and communications technology, automotive industry, logistics and transport, aerospace, biotechnology and pharmaceuticals, agribusiness, real estate and tourism, and environment and natural resources.
INTRODUCTION

Legislation, policy and practices

The United Kingdom does not currently have a domestic legal framework that specifically governs inward foreign direct investment (FDI). Neither is there a formal policy distinction between domestic and foreign investment in the United Kingdom. However, there are a number of means by which the government can intervene in transactions, as discussed further in this chapter. While these provisions are of general application and not specific to foreign investors, intervention may be more likely in some circumstances when foreign investors are involved, in particular with regard to the public interest intervention regime that allows for intervention in transactions that may raise issues of national security (including public security).

Many transactions involving the acquisition of UK businesses will be subject to review from a competition law standpoint (i.e., assessing whether the merger will have a significant negative effect on competition). The review will be conducted either under the UK merger control regime, as set out in the Enterprise Act 2002 (the Enterprise Act), or the EU merger control regime, as set out in the EU Merger Regulation (EUMR). Some reference will be made to these regimes (e.g., with respect to their jurisdictional thresholds, which are also relevant to the public interest intervention thresholds), but the general merger control regime will not be discussed in detail.

The UK government can also intervene to review transactions from the perspective of protecting the UK’s public interests, including with respect to transactions raising concerns regarding national security (including public security), media plurality or financial stability, if certain conditions are met. The government’s current powers to intervene in mergers raising public interest concerns are in the Enterprise Act. For so long as the United Kingdom is a member of the European Union (EU), any intervention must be compatible with EU law, as discussed further below.
In addition to the above-mentioned regimes, express controls are also prescribed in some other areas, notably:

a. under Section 13 of the Industry Act 1975, the Secretary of State has the broad power to block an acquisition by a non-UK-based entity of an ‘important manufacturing undertaking’ when it appears that a change of control would be contrary to the interests of the United Kingdom or any substantial part of it; and

b. the government holds ‘golden shares’ in a limited number of UK companies that typically allow it to prevent certain investors holding more than a certain percentage of shares. A number of golden shares also include powers over the disposal of material assets.

Again, EU law imposes some limits on the exercising of these rules.

In some sectors of the economy, the government or independent regulators also operate licensing or authorisation schemes, allowing for the scrutiny of individuals participating in particular activities. Certain investments in regulated sectors – such as water and financial services – may be subject to different merger control assessment or authorisation requirements, or both. Independent regulators operate in a number of sectors, including communications, water, electricity, gas and energy, nuclear and aviation (regulated by Ofcom, Ofwat, Ofgem, the Office for Nuclear Regulation and the Civil Aviation Authority, respectively). The scope of regulators’ powers for intervention varies (such as licensing schemes for existing enterprises or approval requirements prior to commencing a new infrastructure project) as do the processes and timescales associated with the different regimes. None of these regulatory processes are specific to foreign investors, although, in some cases, the nationality of an investor will play a part in the authorisation process. Mergers concerning the defence sector may also require consent from the Ministry of Defence (MOD) to assign or novate any defence contracts. Details of these sector-specific regulations are outside the scope of this chapter. However, consent requirements and policy direction in particular UK business sectors should be further investigated before undertaking investment activities.

3 For example, in the water sector, a special regime applies to mergers between licensed water companies. The Competition and Markets Authority has a duty to refer mergers involving two or more water enterprises to ‘Phase II’ unless certain turnover thresholds are not exceeded (Sections 32 and 33 Water Industry Act 1991, as amended by Section 15 Water Act 2014). There are limited exceptions to this duty. It will be able to accept undertakings in lieu of a mandatory reference in certain circumstances (Section 33D Water Industry Act 1991 as inserted by Section 14 Water Act 2014). Water supply and sewerage licences are also granted by Ofwat based on an assessment of a potential operator’s managerial, financial and technical competencies.

4 For example, the acquisition or increase of ‘control’ over a UK authorised financial services firm (including banks, investment firms and insurers) requires the prior approval of the appropriate UK financial services regulator. Acquiring control for these purposes includes where a person holds 10 per cent or more of the shares or voting power of the authorised firm or, as a result of its shares or voting power, is able to exercise significant influence over management. Control is increased when the percentage of shares or voting power held crosses certain specified thresholds, or if the acquirer becomes a parent undertaking of the UK authorised firm. A parallel notification regime exists for reductions in control crossing particular thresholds (see Sections 178 to 184 Financial Services and Markets Act 2000).

5 For example, European Union (EU) rules, implemented in the United Kingdom, specify that an entity operating an airline within the EEA must be majority owned and effectively controlled by an EEA Member State or nationals of such Member States. This requirement is reflected in the basic licensing requirements for commercial air carriers whose principal place of business is the United Kingdom. See www.caa.co.uk/Commercial-industry/Airlines/Licensing/Requirements-and-guidance/Airline-licensing/.
A recent development is that the government has been taking steps to reinforce safeguards and to broaden the range of transactions that can be reviewed based on national security concerns. This is in line with broader international activity aiming to reinforce screening powers in light of growing concern that hostile states may use the ownership or control of entities and assets, particularly those concerning critical infrastructure and key technologies, to undermine national security through espionage, sabotage or exerting inappropriate leverage. The changes formulated also aim to address the changing and developing risks that the UK is facing because of national security, in particular in light of technological developments and the increasing importance of technology in society.

As a short-term (temporary) step, the UK government lowered the legislative thresholds at which it can intervene in transactions to protect public interest for targets involved in activities connected with three areas of the economy – goods and services with military or dual use, computer hardware technologies and quantum technologies – allowing the government to review a greater range of transactions in these areas (including those where the target has much lower UK turnover). These powers were used to review the proposed acquisition by Gardner Aerospace (a subsidiary of a Chinese aerospace and mining company) of Northern Aerospace in June 2018. In a second, longer-term step, the government is proposing to introduce a stand-alone (voluntary) notification and review process for investments, acquisitions and other events raising national security concerns. This new regime is expected to expand significantly the range of circumstances in which the government can analyse and address national security concerns (there will, for example, be no jurisdictional safeguards based on the target’s UK turnover or share of supply). The government’s initial analysis anticipated that this regime may result in around 200 notifications (and around 100 in-depth national security reviews) per year. This represents a marked increase in the number of transactions that will be subject to national security scrutiny going forward, the government having formally intervened in only eight cases on national security grounds since 2002.

When introducing the above-mentioned policies, the government was keen to emphasise that ‘scrutiny does not mean making any part of the UK’s economy off-limits to foreign investment’ and that the proposals are not ‘in any way designed or intended to limit market access for any individual countries’. Nevertheless, it is clear that the proposals, as currently formulated, will lead to a far greater number of transactions being reviewed for national security concerns than is currently the case, with corresponding consequences in terms of deal timeline and risk certainty going forward. At the time of writing, the current proposals for this regime, which are discussed further in Section VII, are still in draft form. While the public consultation on the proposals closed in October 2018, the government is continuing to review the feedback it received and there is no indication as yet as to when the government expects this new regime, in whatever form that may take following the feedback, to come into force.

The Department for International Trade (DIT) is a government department that helps promote the United Kingdom as an investment destination and assists overseas companies

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to locate and grow in the United Kingdom. The DIT provides foreign companies with information about starting or expanding a business in the United Kingdom and can also provide support for UK inward investors looking to set up companies in the United Kingdom.7

ii Significance of foreign investment in the United Kingdom

The United Kingdom has a reputation for being one of the most open economies to foreign investment, reflecting the values on which its economic approach is based, including the welcoming of overseas investment.8 It is an attractive place for businesses within Europe, with one of the lowest corporation tax rates in the G20 countries, lower labour costs than businesses in Germany, France and Italy and up to 230 per cent tax relief available on research and development costs.9

A UK attractiveness survey conducted by Ernst & Young (EY) reports that, in 2018, the United Kingdom remained the number one destination for foreign direct investment within Europe (with a total of 1,054 projects). However, this statistic is overshadowed by the fact that the UK's share of all European FDI projects fell to its lowest level since EY's FDI database was launched in 1997.10

FDI has seemingly been affected by the Brexit vote (discussed further in Section VII), with EY’s survey of 400 investors revealing that 5 per cent of investors had reduced their investment as a result of the Brexit referendum. However, this is compared to a 6 per cent reduction in 2017 and 15 per cent responding that they had put their investment plans on hold, indicating that investors are waiting to see how the Brexit situation develops.11 The UK's position as the European leader for FDI has been particularly affected by its ability to attract investment in the digital sector in recent years. For example, while the digital sector in Europe grew by 5 per cent in 2018, in spite of an overall declining European FDI market, the UK's share of that growth declined four points from 2017 to 23 per cent as project numbers fell by 10 per cent.12 There were also significant falls in UK FDI in manufacturing, HQ projects, research and development projects, and chemicals in 2018. However, while investor sentiment toward the UK has recently weakened as a result of the Brexit vote, the EY survey reveals that investors are clear on which issues need addressing for confidence in UK FDI to heal, including the impact of Brexit on customs compliance costs and supply chain disruption.13 The long-term effects of Brexit on FDI performance are therefore likely to depend on the outcome of the Brexit negotiations, in particular on these areas of investor concern, and the government's ability to capitalise on post-Brexit opportunities.

7 For further information, see www.gov.uk/government/organisations/department-for-international-trade/about-our-services. Further, www.great.gov.uk, a DIT website, provides information about investing in the United Kingdom.
9 See invest.great.gov.uk/.
11 Id., pages 4 and 6.
12 Id., page 4.
13 Id., page 6.
II FOREIGN INVESTMENT REGIME

There is generally no formal policy distinction between domestic and foreign investment in the United Kingdom. However, there follows an overview of the main (generally applicable) legislation regulating government intervention. Further details on the jurisdictional tests and processes under the public interest intervention regime are provided in Section IV.

i Merger control law

Inward investment in the United Kingdom that involves the acquisition of a business, part of the activities of a business or the creation of a joint venture may fall to be reviewed under EU or UK merger control law, if the relevant jurisdictional thresholds are met. As a general proposition, transactions will be reviewed by the European Commission (the Commission) when the EU merger control thresholds are met, and by the UK’s Competition and Markets Authority (CMA) when the UK thresholds (but not the EU thresholds) are met.\(^\text{14}\) The authorities will investigate whether there are any competition concerns associated with a transaction.\(^\text{15}\) The nationality of the parties to a transaction is not a relevant consideration for this assessment.

The EU merger control regime is a mandatory, suspensory notification regime, meaning that parties must notify a transaction meeting the relevant thresholds and must await approval prior to implementation (regardless of whether they are based within or outside the EU). Significant penalties can be levied for a failure to file or for implementation prior to clearance, with potential fines reaching up to 10 per cent of the worldwide aggregate turnover of the undertakings concerned.

The UK merger control regime is a voluntary system, meaning that parties are not obliged to notify a transaction that meets the jurisdictional thresholds for review. However, pre-merger notifications are recommended in challenging cases for the sake of legal certainty, because the CMA can review (completed and anticipated) mergers on its own initiative, can issue interim orders (preventing integration or completion, or unwinding integration) and can impose conditions (e.g., requiring divestments if, on reviewing a transaction, it believes that the transaction has resulted or may be expected to result in a substantial lessening of competition).

ii Public interest review regimes

Both the UK and EU merger control regimes include provisions allowing a transaction to be reviewed on certain specified grounds other than competition law (so called ‘public interest’ or ‘legitimate interest’ grounds) when the nationality of a party to a transaction can have greater relevance.

For transactions subject to the EU merger control regime, the EUMR permits Member States to investigate a transaction to protect its ‘legitimate interests’ (other than the

\(^{14}\) In certain cases, transactions meeting the EU thresholds may be reviewed in whole or in part by competent authorities of Member States (under Article 4(4), 9, 21(4) or 346 of the EUMR). Transactions not meeting the EU thresholds can also be referred to the European Commission (the Commission) in certain cases (under Articles 4(5) and 22 of the EUMR).

\(^{15}\) The Competition and Markets Authority (CMA) considers whether the transaction may result in a substantial lessening of competition within any market or markets in the United Kingdom or a substantial part of it for goods or services. The Commission considers whether the transaction may significantly impede effective competition in the EU or a substantial part of it.
maintenance of competition). In such cases, the competition review will be conducted by
the Commission (unless jurisdiction is transferred in a manner prescribed by the EUMR),
and a review of the identified ‘legitimate interest’ will take place under the relevant domestic
legislation, such as the Enterprise Act in the case of the United Kingdom. If the Commission
were to clear a transaction on competition grounds, it would still be open to the UK
government to intervene on the basis of a legitimate interest and to impose conditions on
the transaction (for example, Fox/Sky, 2017). However, if the Commission were to block a
transaction based on competition concerns, even if the government considered that it was in
the UK’s public interest for the transaction to go ahead, the government would not be able
to override the block imposed by the Commission.

The question of what constitutes a legitimate interest is a matter for EU law. There are
three specific categories of legitimate interests deemed to be compatible with general principles
and other provisions of EU law, namely public security, media plurality and prudential rules.16
Any other legitimate interest a Member State wishes to protect must be communicated to
the Commission, which then has 25 working days to assess the compatibility of that interest
with EU law before a measure to protect the interest can be taken by the Member State.17 To
trigger the intervention process, the UK Secretary of State will issue a European intervention
notice under Section 67 of the Enterprise Act. Member States may also retain jurisdiction
to examine national security aspects of mergers under Article 346 of the Treaty on the
Functioning of the European Union (the TFEU).18

The UK government acting via a Secretary of State19 can also intervene in a transaction
on defined public interest grounds in circumstances where the relevant EU merger control
thresholds are not met, including in respect of:

a transactions that are reviewable under UK merger control law (known as public interest
cases): a public interest intervention notice is issued in such circumstances, under
Section 42 of the Enterprise Act; and

b transactions that do not meet the requirements for notification under UK or EU
merger control law but raise special public interest considerations (known as special
public interest cases): a special public interest intervention notice is issued in such
circumstances, under Section 59 of the Enterprise Act.

16 Article 21(4) EUMR.
17 In Case No. IV/M.567, Lyonnaise des Eaux/Northumbrian Water [1995], the Commission recognised the
legitimate interest of the UK authorities in applying the relevant provisions of the water regulatory regime
contained in the Water Industry Act 1991. However, in Case No. IV/M.1346, EDF/London Electricity
[1999], the Commission rejected the UK’s request for use of the legitimate interest provisions to apply
aspects of the electricity regulatory regime. It held that the EUMR would not prevent the UK authorities
from imposing regulatory measures on the electricity industry and, as such, the interest in question was not
aimed at the transaction itself.
18 This provides that ‘any Member State may take such measures as it considers necessary for the protection
of the essential interests of its security’ so long as such measures ‘shall not adversely affect the conditions
of competition in the internal market regarding products which are not intended for specifically military
purposes’. Using this provision, Member States have in the past investigated the military aspects of a
transaction, while the Commission investigated the civilian aspects.
19 The Secretary of State for Business, Energy and Industrial Strategy has the power to intervene in all
public interest cases, except mergers in the media, broadcasting, digital and telecoms sectors, in which the
Secretary of State for Digital, Culture, Media and Sport can intervene.
Special public interest mergers are narrowly defined and limited to certain mergers in the newspaper and broadcasting sectors, and mergers involving certain government contractors or subcontractors who hold or receive confidential information or material relating to defence.\textsuperscript{20} Such cases are rare, this provision only having been used twice under the Enterprise Act to date, both of which were in the defence sector.\textsuperscript{21}

For both public interest cases and special public interest cases, the public interest considerations on which the Secretary of State may rely to justify intervention are set out in the Enterprise Act, and include:

\begin{itemize}
  \item \textit{a} interests of national security, including public security;
  \item \textit{b} the need for sufficient plurality of persons with control of the media, the need for a wide range of broadcasting (of high quality and appealing to a wide variety of tastes and interests) or the need for persons carrying on media enterprises, or those with control of such enterprises, to have a genuine commitment to broadcasting standards;
  \item \textit{c} the need for the accurate presentation of news and free expression of opinion in newspapers;
  \item \textit{d} the need for sufficient plurality of views in newspapers; and
  \item \textit{e} maintaining the stability of the UK financial system.\textsuperscript{22}
\end{itemize}

The Secretary of State has the power to modify the above-mentioned list of public interest considerations by specifying a new consideration, or removing or amending any existing specified consideration.\textsuperscript{23} Under Section 42(3) of the Enterprise Act, the Secretary of State may also intervene based on public interest considerations that are not specified in the Enterprise Act, but that in the opinion of the Secretary of State ought to be so specified.

Although all public interest considerations could, in principle, be applicable to foreign investors, national security considerations (including national security, public security and UK security) are clearly of greatest relevance to FDI, given the potential importance of the nationality of the investor.

\section*{iii Treaty on the Functioning of the European Union}

While the United Kingdom remains within the EU, FDI is to a certain extent affected by EU law. One of the key aims of the TFEU is the establishment and development of an internal market between EU Member States. To this end, the TFEU contains provisions to remove tariff and non-tariff barriers to trade, establishment and the movement of capital between Member States. The TFEU thus largely acts to lower the barriers to FDI, at least from other parts of the EU. The prohibition against restrictions on the freedom of establishment

\textsuperscript{20} Section 59 Enterprise Act.
\textsuperscript{22} Section 58 Enterprise Act.
\textsuperscript{23} Section 58(3) and (4) Enterprise Act. In October 2008, the Enterprise Act was amended to include the interest of maintaining the stability of the UK financial system as a specified ground for intervention by the Secretary of State. The new ground was specified to accommodate the \textit{Lloyds TSB Group plc/HBOS plc} merger, which took place in the context of the financial crisis in 2008 and raised a number of competition law concerns (discussed further below).
for nationals of one EU Member State in the territory of another Member State\textsuperscript{24} and the prohibition against restrictions on free movement of capital between EU Member States\textsuperscript{25} are particularly relevant.

There are, however, some limitations on the freedoms granted by the TFEU. In particular, the TFEU provisions enshrining freedom of establishment and free movement of capital have been interpreted to be subject to overriding considerations, such as the protection of national security.

Furthermore, Article 346(1) TFEU underlines that obligations in the TFEU do not preclude a Member State’s rights to take certain steps to protect its essential security interests. Article 346(1) TFEU is a permissive article, and acts to disapply the TFEU rules in certain circumstances. In this way, Member States can derogate from the TFEU protections where justified by that Article.

iv  Golden shares

Following the privatisation of certain companies in the 1980s and early 1990s, the government retained ‘golden shares’.\textsuperscript{26} Golden shares do not give the government a general right to intervene in a company’s day-to-day affairs, but generally the company’s articles of association provide that, without the consent of the holder of the special share (that is, the government department concerned), no shareholder may hold more than a stated percentage (usually 15 per cent) of the equity share capital of the company.\textsuperscript{27}

The Court of Justice of the European Union (CJEU) has previously held that the use of these golden shares can, in certain cases, contravene EU law on the free movement of capital and on the freedom of establishment, and that their use is acceptable only in specific circumstances and subject to strict conditions.\textsuperscript{28}

There have been cases in which the CJEU has not accepted the legality of specific golden shares; for example, in 2003, it held that the government golden share in BAA plc breached EU law, although it confirmed that a potential justification existed for EU Member States holding a degree of influence over private companies that were originally public undertakings if they were active in providing services in the public interest or strategic services, provided the restrictions applied equally to nationals of the Member State concerned and of other EU Member States, and complied with the principle of proportionality.

\textsuperscript{24} Article 49 of the Treaty on the Functioning of the European Union (TFEU) prohibits, with certain exceptions, restrictions on the freedom of establishment of nationals of one EU Member State in the territory of another Member State.

\textsuperscript{25} Article 63 TFEU prohibits, with certain exceptions, restrictions on the movement of capital between EU Member States.

\textsuperscript{26} The UK government holds golden shares in a number of companies, particularly in the defence sector, including Rolls-Royce, BAE Systems and Qinetiq – see The Economist, ‘Defence industry: Take your partners’ (9 April 2016), available at www.economist.com/news/britain/21696551-defence-firms-look-joint-ventures-boost-exports-and-profits-take-your-partners. In August 2017, the UK government completed the sale of the state-backed Green Investment Bank (GIB) to a consortium led by the Macquarie Group. Following the sale, five independent trustees will hold ‘special shares’, giving them power to approve or reject any changes in GIB’s green purposes in the future. See www.gov.uk/government/news/uk-governments-sale-of-green-investment-bank-completed.

\textsuperscript{27} Practical Law Company, Practice note, ‘Competition regime: Utilities’, available at uk.practicallaw.thomsonreuters.com/Document/lf5554892e83211ce398dbb09b4043e0/View/FullText.html.

\textsuperscript{28} Case C-98/01 Commission v. United Kingdom [2003] ECLI:EU:C:2003:273, Paragraphs 44 and 52.
Hinkley Point contract approval 2016

Hinkley Point C is an £18 billion project to construct a nuclear power plant in Somerset, England. It is intended that construction will be mainly financed by EDF (the largely state-owned French utility company) with around one-third of the finance coming from two state-owned Chinese nuclear power companies. Following the board decision of EDF to approve the Hinkley Point plant, former Prime Minister Theresa May’s Conservative government decided to launch a further comprehensive review of the project prior to entering into a contract with EDF. This signalled a more cautious approach than that previously taken by former Prime Minister David Cameron’s government, which had championed the project. The further review was seen as being motivated, in large part, by security concerns over Chinese involvement.29 In September 2016, the government gave the final go-ahead to Hinkley Point C under a revised agreement.30 The government announced that it would have a golden share in the project, which gives it the right to block any change of ownership or control of the power plant during the construction period. The government indicated that future approval of nuclear projects would also be conditional on it holding golden shares.31

At the same time as this approval, the government further stated its intention to pursue wider reform of the legal framework for foreign investment in critical British infrastructure. Draft proposals have now been introduced, as is discussed further in Section VII.

v UK Industry Act 1975

Under the terms of Section 13 of the UK Industry Act 1975, the Secretary of State can block an acquisition by a non-UK-based entity of an ‘important manufacturing undertaking’ when it appears to the Secretary of State that a change of control would be contrary to the interests of the United Kingdom, or to any substantial part of it.

An ‘important manufacturing undertaking’ is an undertaking that, insofar as it is carried on in the United Kingdom, is wholly or mainly engaged in the manufacturing industry, and is considered by the Secretary of State to be of special importance to the United Kingdom, or to any substantial part of it.32

There is no public record of this provision having ever been used to block an acquisition of a UK business and so this provision will not be considered further in this chapter. Ultimately, the EU law provisions on freedom of establishment and free movement of capital will be relevant to its exercise.

III TYPICAL TRANSACTIONAL STRUCTURES

There are generally no specific legal considerations facing foreign entities seeking to set up new facilities or businesses, or to carry out mergers and acquisitions in the United Kingdom, above and beyond the considerations that also face domestic investors.

31 Ibid.
32 Section 11(2) Industry Act.
Corporate law residency requirements
There are no corporate law residency requirements when investing in the United Kingdom, regardless of whether an investment in a UK company is by way of share purchase or asset purchase.

Rules pertaining to takeover bids by foreign companies
There are generally no additional rules relating to the takeover of public or private UK companies by foreign investors as compared with domestic investors.

While acquisitions of interests in non-regulated private companies are generally not subject to specific procedural requirements, a takeover bid by any company (whether domestic or foreign) of a UK public company is usually subject to the City Code on Takeovers and Mergers (the Takeover Code). The Takeover Code provisions cover, inter alia, the timing of takeovers, disclosure requirements and various obligations regarding documentation and announcements to shareholders of a target company. In particular, bidders must make specific statements of intent regarding their plans for a target company, including regarding the company's research and development functions, pension schemes, any material change in the balance of the skills and functions of the target's employees and management and the location of the company's headquarters. Such statements assist target companies' boards, employee representatives and pension scheme trustees to give their opinions on the offer and increase the information available to shareholders. In some circumstances, companies may also voluntarily make legally binding post-offer undertakings in which they commit to take or not take particular actions (see also Section VI). This may be advisable to address concerns about the effects of the transaction on jobs, pensions and the long-term direction and location of the company. Pursuant to Part 28 of the Companies Act 2006 (the Companies Act), the Panel on Takeovers and Mergers is the supervisory and regulatory authority in respect of UK public takeovers.

Asset purchases and share purchases
With the exception of industries that are regulated or involve national security, there are no notable differences between a foreign investor and a domestic investor in respect of share purchases or asset purchases. Tax treatment may vary for many reasons, including the domicile or residence of the acquirer.

Joint ventures
There are no specific UK rules governing a foreign investor's ability to enter into a UK joint venture, whether with a domestic partner or otherwise. The benefits and risks of entering into a UK joint venture are the same as those for a domestic investor.

Corporate ownership structures
The key corporate ownership structures under English law are as follows.

Company
A company is a business vehicle with a separate legal identity from that of its owners, and can therefore enter into contracts on its own behalf. All companies incorporated in England and Wales are registered with the Registrar of Companies for England and Wales (otherwise known as Companies House).
The Companies Act provides for four types of companies:

- limited by shares (which can either be public or private);
- with unlimited liability;
- limited by guarantee; and
- community interest.

The vast majority of companies used for investment structures will be companies limited by shares. In addition, under European legislation introduced in 2001, a Societas Europaea (European company) can be created and registered in any one EU Member State, including the United Kingdom. The European company structure allows companies established across more than one EU Member State to merge and operate under a single set of rules and with a unified management and reporting system. Following the implementation of Brexit, UK companies will no longer be able to operate under the Societas Europaea framework (assuming the final Withdrawal Agreement does not say anything to the contrary).

**Partnership**

Generally, partnerships do not constitute separate legal entities; therefore, when investing in a partnership, the foreign investor will do so under its own name and will be directly responsible for all business conducted by the partnership. However, there are two alternative partnership structures that are also used:

- limited partnership (LP) formed under the Limited Partnerships Act 1907 (as amended) – an LP is similar to an ordinary partnership, in that it does not have separate legal personality, but an LP will typically have a general partner and one or more limited partners; and
- limited liability partnership formed under the Limited Liability Partnerships Act 2000 – the partnership takes on its own legal identity, similar to that of a company.

**Foreign branch**

Broadly, a foreign branch registered with Companies House (in accordance with the Companies Act) is not a legal entity in itself and cannot contract on its own behalf. The foreign branch acts as the UK agent for its overseas entity, which acts as the principal. Tax is a key driver in selecting the optimal investment structure.

**IV REVIEW PROCEDURE**

i **Thresholds for notification and review of foreign investment transactions**

**EUMR notification thresholds**

For a transaction to be reviewable under the EUMR, it must consist of a ‘concentration’ (i.e., the merger of two or more independent undertakings or parts of undertakings, the acquisition of direct or indirect control of the whole or parts of another undertaking or the formation of a ‘full function’ joint venture) that has an ‘EU dimension’.

Concentrations will have an EU dimension when (1) the combined aggregate worldwide turnover of all the parties to the transaction exceeds €5 billion and the EU-wide aggregate turnover of each of at least two parties exceeds €250 million, or (2) the combined aggregate worldwide turnover of the parties exceeds €2.5 billion, the aggregate EU-wide turnover of each of at least two of the parties exceeds €100 million, in each of at least three Member
States the combined aggregate turnover of all the parties exceeds €100 million, and in each of the same three Member States the aggregate turnover of each of at least two of the parties concerned exceeds €25 million. Unless, in each case, each of the parties involved achieves more than two-thirds of its EU-wide turnover in one and the same EU Member State.

When the thresholds are met, a merger filing is mandatory. In certain circumstances, a transaction that meets the EUMR thresholds may be referred entirely or partially to a Member State for review by the national authority.

**UK merger notification thresholds**

For a transaction to be reviewable under the UK merger control regime, the transaction must constitute a ‘relevant merger situation’. The regime covers mergers, acquisitions of minority shareholdings, asset purchases and joint ventures.

A relevant merger situation will generally be created if two or more enterprises cease to be distinct by virtue of being brought under common ownership or control (or if the CMA believes there is an arrangement in progress or contemplation that will lead to this) where either (1) the UK turnover associated with the enterprise being acquired exceeds £70 million or (2) the transaction creates or enhances a 25 per cent share of supply or purchases of any goods or services in the United Kingdom, or in a substantial part of it (the ‘share of supply test’). The term ‘enterprise’ is defined as the activities or part of the activities of a business (it need not, therefore, be a separate legal entity). ‘Control’ is not limited to the acquisition of outright voting control but includes situations of material influence falling short of outright voting control. Intervention is thus possible with respect to acquisitions of minority shareholdings (material influence will be presumed at 25 per cent and can arise at lower levels still, such as 10 or 15 per cent).

For certain ‘relevant enterprises’, the thresholds were lowered as of June 2018. A relevant enterprise is one that is involved in specified activities connected with (1) military or dual-use goods subject to export control, (2) computer processing units or (3) quantum technology. The test for review in these cases requires (1) the enterprise being acquired to have turnover in the United Kingdom of over £1 million, (2) the meeting of the share of supply test or (3) the relevant enterprise being acquired to have a share of supply or purchase of goods or services in the United Kingdom of 25 per cent or more, made in connection with activities by virtue of which it is considered a relevant enterprise (there is no need for an increase in share in such circumstances). Whereas the changes in these thresholds open a wider range of transaction to potential competition review by the CMA, the key driver of the reforms was to reduce the thresholds for government intervention under the public interest regime for transactions raising national security concerns (which, as described below, are based on the same tests). The CMA has indicated in guidance that it would not expect...

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33 Sections 23 and 26(1) Enterprise Act.
34 Section 129 Enterprise Act. A business also need not be trading to constitute an enterprise.
35 For completed transactions, the authority only has jurisdiction to investigate within four months of the date of the merger’s completion, or, if later, from the earlier of (1) the date on which material facts about the merger are made public or (2) the date on which the CMA is informed of the merger.
36 Section 23A of the Enterprise Act lists the activities by which a company will be considered a ‘relevant enterprise’. The list is relatively wide-ranging, for example capturing enterprises whose activities include ‘owning, creating or supplying intellectual property relating to the functional capability of computer processing units’.

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to open competition investigations into deals that fall within its jurisdiction only because of the new thresholds. In line with its usual policy, the CMA will only investigate a transaction on its own initiative if there is reasonable chance that the transaction may give rise to both a relevant merger situation and a realistic prospect of a substantial lessening of competition.37

ii Thresholds for intervention in public interest, special public interest and EU legitimate interest cases

For public interest cases, the Secretary of State must have reasonable grounds for suspecting that it is or may be the case that a ‘relevant merger situation’ has been or will be created (i.e., the relevant UK merger control thresholds are met) and must believe that it is or may be the case that one or more public interest considerations are relevant to the consideration of the transaction.38

For special public interest cases (i.e., those not reviewable under either the UK or EU merger control regimes), the Secretary of State must have reasonable grounds for suspecting that a ‘special merger situation’ has been or will be created (as defined below) and that it is or may be the case that one or more public interest considerations are relevant to the consideration of the transaction.39

A special merger situation may arise if, immediately before the enterprises ceased to be distinct:

a at least one of the enterprises concerned was carried on in the United Kingdom, or by or under the control of a body corporate incorporated in the United Kingdom, and where a person who was carrying on one or more of the enterprises concerned is a relevant government contractor;40 or

b in relation to the supply of newspapers or broadcasting of any description, at least 25 per cent of all the newspapers or broadcasting of that description in the United Kingdom, or a substantial part of it, were supplied by the person or persons by whom one of the enterprises concerned was carried on.41

37 See assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715167/guidance_on_changes_to_the_jurisdictional_thresholds_for_uk_merger_control.pdf, page 6. The new lowered thresholds for intervention were used for the first time on 17 June 2018 when the Secretary of State issued a public interest intervention notice with respect to the anticipated sale of Northern Aerospace to Gardner Aerospace Holdings Limited (a subsidiary of Chinese aerospace and mining company Shaanxi Ligeance Mineral Resources Co Limited). Northern Aerospace had turnover in the United Kingdom exceeding £1 million and manufactured products that constituted ‘restricted goods’ within the meaning of the Act. The transaction concerned the UK aerospace industry, which was described as ‘a strategic priority for defence’ by the Ministry of Defence (MOD) in its representations to the CMA, suggesting that similar transactions may also be subject to review going forward. For further details, see www.gov.uk/government/publications/proposed-acquisition-of-northern-aerospace-limited-by-gardner-aerospace-holdings-limited-decision-notice.

38 Section 42(1) and (2) Enterprise Act. The CMA must also not have made a reference to a Phase II investigation on competition grounds nor taken a decision not to make a reference or to accept undertakings in lieu of a reference.

39 Section 59(1) and (2) Enterprise Act.

40 Section 129 Enterprise Act; the term ‘enterprise’ is defined as the activities or part of the activities of a business.

41 Section 59(3B) Enterprise Act.

42 Section 59(3C) and (3D) Enterprise Act.
For European intervention notices, the Secretary of State must have reasonable grounds for suspecting that it is or may be the case that a 'relevant merger situation' has been or will be created (i.e., the relevant UK merger control thresholds are met), that the EU merger control thresholds are met, must be considering whether to take appropriate measures to protect legitimate interests as permitted by Article 21(4) of the EUMR, and believe that it is or may be the case that a public interest consideration is relevant to the consideration of the transaction.43

iii Procedure and timeline to obtain public interest clearance for transactions and other investments

In respect of each of the categories of public interest mergers under the Enterprise Act, the regime consists of the following stages:

a The Secretary of State, having been notified by the CMA of a Phase I merger case that the CMA believes raises public interest considerations44 or, at its own instance,45 issues an intervention notice to the CMA requesting that it prepare a report in relation to the specified public interest considerations (perhaps following interactions with the parties or third parties regarding the fact that they are minded to intervene).

b The CMA issues an invitation requesting third-party comments on the public interest considerations (and competition issues if relevant) and consults other government departments, sectoral regulators, industry associations and consumer bodies regarding the public interest considerations.

c The CMA conducts its review and prepares its report for the Secretary of State (usually within 40 business days, but depending on the date stipulated in the intervention notice)46 considering jurisdictional issues and summarising any representations received in relation to public interest issues (and in the case of public interest cases, explaining whether the transaction raises competition concerns).

d In addition to the CMA’s report, advice on public interest issues will also normally be provided to the Secretary of State (directly or indirectly via the CMA) by the relevant government department or public body (e.g., Ofcom in the case of newspaper and media mergers,47 the MOD for defence mergers, Ofgem for energy sector mergers,

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43 Section 67(1) and (2) Enterprise Act.
44 The CMA is under a formal obligation to bring to the attention of the Secretary of State any cases it believes raise material public interest considerations under review from a competition standpoint (see Section 57(1) Enterprise Act), which is what, for example, provoked the government’s probe into Trinity Mirror’s proposed purchase of the Express and Star newspapers from Northern & Shell in April 2018.
45 Mergers that raise public interest considerations may come to the attention of the Secretary of State through press coverage, or as a result of representations made by third parties. Government departments and public bodies, such as the utility sector regulators, are also expected to be alert to the possibility of public interest concerns arising in relation to a merger and to raise concerns with the Secretary of State. Department procurement policy and standard contractual terms or other regulatory requirements may bring a transaction to the attention of a government department (e.g., the MOD requires contractors to notify it of any intended, planned or actual change in control of a contractor).
47 When the Secretary of State has intervened on media public interest considerations, Ofcom is required to give a report to the Secretary of State on the public interest considerations of the case (Sections 44A and 61A Enterprise Act and Section 4A Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (PLIO)).
and the Financial Conduct Authority and Bank of England for mergers concerning the stability of the UK financial system). In the case of Ofcom, the regulator will conduct its own public consultation as part of its review.

e The Secretary of State must then decide as soon as reasonably practicable whether to refer the transaction for a Phase II investigation on public interest grounds (and perhaps also on competition grounds in the case of public interest cases), to accept undertakings from the parties in lieu of a reference to a Phase II investigation or not to make a reference (including referring the case to the CMA where public interest concerns are no longer considered relevant but the CMA has identified that competition concerns are relevant). The threshold for referral is low and the relevant Secretary of State has a wide margin for exercising his or her discretion (i.e., he or she has the power to make a referral if he or she believes there is a risk that is not ‘purely fanciful’ that the merger ‘might be expected to operate’ against the public interest (see the statements of the Secretary of State in *Fox/Sky* (2017))). Parties can offer undertakings in lieu of reference to a Phase II investigation. Typically, the Secretary of State will make a decision on whether he or she is minded to accept such undertakings in short order following receipt of the CMA’s Phase I report. However, before formally accepting any such undertakings, the Secretary of State must give public notice of the proposed undertakings and consider any representations made in response. The notice shall specify a period of not less than 15 days in which representations can be made. However, the Secretary of State may dispense with any of these procedural requirements if he or she considers that there are special reasons for doing so, for which the Secretary of State has wide discretion.

When the Secretary of State refers the case for a Phase II investigation, the CMA is required to conduct an in-depth inquiry into the public interest considerations (and any competition concerns in public interest cases, if referred also on this basis) and to prepare a detailed report for the Secretary of State. The CMA has 24 weeks to prepare the report – this period may be extended by eight weeks where ‘special reasons’ exist for it to be.

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48 The Secretary of State must accept the CMA’s competition and jurisdictional assessment, including on the need for a reference to Phase II and whether undertakings in lieu of a reference would be suitable; however, the final decision concerning referral remains with the Secretary of State. A finding that a merger results in a substantial lessening of competition will be treated as adverse to the public interest unless it is justified by one or more public interest considerations (see Section 45(6) Enterprise Act).

49 See Section 56(1) Enterprise Act.


51 Paragraph 3, Schedule 7 Enterprise Act.

52 In *Hytera Communications Corporation Ltd/Sepura plc* (2017), the CMA delivered its Phase I report to the Secretary of State on 4 May 2017. On 8 May 2017, the Secretary of State announced that he was proposing to accept draft undertakings received from the parties in lieu of reference to a Phase II investigation.

53 Paragraph 2, Schedule 10 Enterprise Act.

54 Paragraph 9, Schedule 10 Enterprise Act. In *Hytera Communications Corporation Ltd/Sepura plc* (2017), the Secretary of State expedited the consultation to only two days, citing ‘the importance of maintaining the service provided by Sepura and in order to minimise the uncertainty surrounding the progress of the proposed acquisition’. For further details, see: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/612855/sepura-hytera-draft-undertakings-consultation-notice.pdf.
for doing so. The report will include the CMA’s conclusion as to whether the merger operates or is expected to operate against the public interest and its recommendations for remedies.

Upon receipt of the CMA’s recommendations, the Secretary of State must decide whether to make an adverse public interest finding (or whether to take no decision at all in public interest cases).55 The Secretary of State must publish the decision within 30 days of receipt of the CMA’s report.56 The Secretary of State must accept the CMA’s conclusions as to whether the transaction will result in a substantial lessening of competition in public interest cases and the CMA’s jurisdictional assessment; the Secretary of State will have ‘regard to’ but is not bound by the CMA’s recommendations for remedies or the wider public interest issues.57 If no action is taken by the Secretary of State in public interest cases, the CMA will proceed to deal with any remaining competition issues.58

The CMA has the power to take by interim order any action it considers necessary to prevent or unwind pre-emptive action (i.e., integration steps that may prejudice the later imposition of remedies), for example by appointing a monitoring trustee or hold separate manager. These powers can be used both in completed and anticipated deals. For example, with respect to the proposed acquisition by Gardner Aerospace of Northern Aerospace (2018), following the issuing of a public interest intervention notice on 17 June, the CMA issued an initial enforcement order on 19 June preventing any action that might lead to integration of the two businesses, transfer of the ownership or control of the businesses, or otherwise affect the ability of the businesses to compete independently in any market affected by the transaction.59

In terms of filing fees, the usual merger fee (ranging from £40,000 to £160,000) will be payable to the CMA in public interest cases. No merger fees are payable in special public interest or European intervention cases.

iv  **Substantive test for clearance of public interest cases**

In public interest mergers under the Enterprise Act, the Secretary of State assesses the public interest issues raised by the transaction and adopts a decision based on whether the merger operates or may be expected to operate against the public interest (the public interest test).

The following are recent examples of cases considering the various grounds for intervention. For further details about how particular grounds will be considered or investigated, reference should be made to relevant cases.

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55  Sections 54(2) and 66(2) Enterprise Act and Section 12(2) PLIO.
56  Sections 54(5) and 66(3) Enterprise Act and Section 12(3) PLIO.
57  Sections 55(3), 54(7), 66(4) and 66(7) Enterprise Act and 12(5) and (8) PLIO.
58  Section 56(6) Enterprise Act.
59  For further details, see assets.publishing.service.gov.uk/media/5b292e88ec915d2c5d01c0b/Variation_order.pdf and assets.publishing.service.gov.uk/media/5b2929e9fed915d2c16268da/Gardner_IEO.pdf.
National security

Until recently, transactions reviewed on this basis have tended to be defence mergers with public security concerns being dealt with through a range of undertakings negotiated or proposed by the MOD, including the maintenance of strategic capabilities within the United Kingdom and the protection of classified information and technology.60

By way of example, in May 2009, when AEUK (a subsidiary of Atlas Elektronik GmbH, based in Germany) sought to acquire Qinetiq’s Underwater Systems Winfrith division (USW, a key supplier of research, advice, enabling technology, systems and support to the UK’s armed forces), the Secretary of State issued a special intervention notice on the grounds of national security concerns.61 AEUK gave a number of undertakings to avoid a reference to a Phase II review, which the Secretary of State accepted. The security undertakings committed AEUK companies to the maintenance of strategic capabilities. In particular, the AEUK companies undertook that, for as long as any of the AEUK companies remained a supplier to the MOD under military programmes:

a a sufficient number of the directors of such an AEUK company would be UK security-cleared British citizens to enable security-sensitive issues to be resolved at board level should the need arise; and

b the military programmes would continue to be directly controlled by a company or companies incorporated in the United Kingdom.

The AEUK companies also undertook to inform and consult the MOD at least six months prior to the removal of any significant part of the UK military capability to any location outside the United Kingdom, the disposal of any significant part of the UK military capability to any entity not directly or indirectly controlled by the AEUK companies, or the reduction in any significant way of the UK military capability with respect to funded programmes. Undertakings concerning the protection and exploitation of technology and information provided that all matters concerning military programmes and security within the AEUK companies that relate to military programmes would be maintained in line with UK national security regulations. The AEUK companies also undertook to adhere to obligations between


61 The MOD and other third parties raised various concerns, including that (1) AEUK might choose to rationalise its defence activities, and that essential UK capabilities (from Qinetiq’s Underwater Systems Winfrith division (USW)) could be run down, sold off or transferred abroad to be combined with AE GmbH other foreign-based activities, (2) ultimate ownership and control of USW would pass to a non-UK company (Atlas Elektronik GmbH), which could influence USW in ways that could prejudice national security, (3) USW was privy to classified information and technology, some of which was only available to UK nationals: leaks to non-UK owners could prejudice the operational security and capability of the UK armed forces and of any other country that agreed to share sensitive information with the United Kingdom, and (4) USW’s acquisition by AEUK, a major manufacturer of underwater systems, could call into question the future independence and impartiality of research output and customer support provided by USW for the MOD.
the MOD and the AEUK companies regarding confidential information, any commercial exploitation levy and UK export control duties, and principles to prevent conflicts of interest in relation to research conducted by AEUK.

In the case of Melrose/GKN (April 2018), concerns were also raised regarding the intended period of ownership and plans for a defence-related business, based on the fact that the acquirer, Melrose (a British listed company), was a turnaround specialist (which acquires, improves and sells businesses). The Secretary of State did not deem it necessary to intervene on public interest grounds based on undertakings agreed by Melrose with the MOD, and binding undertakings offered by Melrose through the takeover process to allay additional concerns held by the Secretary of State, discussed further below. The undertakings agreed with the MOD included an agreement to seek government consent for plans to divest a business, a component of a business or assets engaged in activities that the MOD considered had national security implications (allowing the MOD to first seek relevant protections from the subsequent purchaser), to ensure the continuation of contractual obligations to protect intellectual property and classified information, and to ensure the continued maintenance of any capabilities with a national security dimension. Further, the MOD was granted powers to inspect information and facilities to ensure the protection of classified information.62

Other recent cases have signalled a greater willingness to apply the national security review to broader aspects of public security. For example, the case Hytera Communications Corporation Ltd/Sepura plc (2017) concerned the purchase by a Chinese radio systems manufacturer (Hytera) of a Cambridge-based radio systems provider (Sepura) for £74 million. The Secretary of State issued a public intervention notice on national security grounds on the basis that Sepura supplied communication equipment systems to emergency services across the United Kingdom. Concerns were raised regarding the protection of sensitive information and technology, and for ensuring the maintenance of UK capabilities in maintaining and servicing radio devices used by the UK emergency services. The Secretary of State accepted a series of undertakings, in line with advice received from the Home Office, instead of referring the merger to a Phase II review. The undertakings required the parties to implement enhanced controls for the protection of sensitive information and technology from unauthorised access, as well as granting the relevant agencies, including the Home Office, rights of access to premises and information to audit compliance with the security measures. The two companies also undertook to continue repair and maintenance of relevant radio devices for as long as it is required by the Home Office.63

Newspaper plurality
Trinity Mirror’s proposed purchase of the Express and Star newspapers from Northern & Shell (2018) was reviewed on the basis of the need for (1) free expression of opinion, and (2) sufficient plurality of views in newspapers (as Trinity Mirror also owned the Daily Mirror). The Secretary of State ultimately accepted Ofcom’s conclusions that the merger did not raise concerns in relation to either ground, and decided not to refer the merger for a Phase II review. In its report, Ofcom noticeably mentioned that ‘newspapers face significant

62 See hansard.parliament.uk/commons/2018-04-24/debates/182BCB15-D87C-4C4B-8489-2D9F6E3F3F23/GKN.
financial challenges as news production and consumption increasingly moves online’ and that ‘[m]easures that support the longer-term viability of newspapers and their websites should be welcome’.\textsuperscript{64}

\textbf{Media plurality and broadcasting standards}

In the proposed acquisition by 21st Century Fox of Sky plc,\textsuperscript{65} the Secretary of State conditionally cleared the transaction following a Phase II review by the CMA. The deal was reviewed on the basis of media plurality and commitment to broadcasting standards grounds.\textsuperscript{66} The conclusion by the Secretary of State was that the merger may be expected to operate against the public interest on grounds of media plurality but that the merger may not be expected to operate against the public interest on grounds of the parties’ commitment to broadcasting standards. The key concern in this case was that, following the merger, the Murdoch family trust would control both News Corp (which owns News UK, a publisher of newspapers such as \textit{The Times}, \textit{The Sunday Times} and \textit{The Sun}) and Sky News. An undertaking was given to divest Sky News to the Walt Disney Company, or to an alternative suitable buyer. Undertakings were also given by the Walt Disney Company, including not to sell Sky News without Secretary of State approval for 15 years (should it acquire Sky News). Further, the Walt Disney Company undertook (among other things) to maintain a Sky News branded service for 15 years that would abide by the principle of editorial independence and integrity in news reporting and that, for each of these 15 years, total funding available to Sky News would not be less than £100 million. Fox committed (among other things) to pay funding to Sky News for a period of 15 years.\textsuperscript{67}

At the time of writing, the Secretary of State is investigating whether a sale of a 30 per cent stake in the \textit{Independent} and \textit{Evening Standard} newspapers to a Saudi investor is in the public interest on grounds of the freedom of expression and accurate news reporting. Over the course of the time that the Secretary of State was considering whether to intervene in the transaction, the parties made submissions that, because the \textit{Independent} is an online-only news outlet, it was not a ‘newspaper’ within the definition of the Enterprise Act. The Secretary of State opined that the fact the newspaper was not in hard copy did not prevent

\textsuperscript{64} For further details, see www.gov.uk/government/collections/merger-between-trinity-mirror-plc-and-northern-shells-publishing-assets.


\textsuperscript{67} Other cases reviewed from the perspective of media plurality include BSkyB’s acquisition of a 17.9 per cent stake in ITV (2007). In this case, the Secretary of State imposed remedies recommended by the competition authority of requiring BSkyB to partially divest its shares in ITV down to a level below 7.5 per cent, with behavioural undertakings not to dispose of the shares to an associated person, not to be represented on the ITV Board and not to re-acquire shares in ITV. See assets.publishing.service.gov.uk/media/5519463ed915d1424000382/sky_berr_decision.pdf.

In August 2012, the acquisition by Global Radio Holdings Limited of Guardian Media Group’s radio stations was reviewed. Following the advice of Ofcom, the Secretary of State did not make reference to a Phase II review on media plurality public interest grounds and the case fell to be reviewed on competition grounds by the competition authority. See www.gov.uk/government/news/global-radio-and-guardian-media-group-radio-merger-not-to-be-considered-on-media-plurality-grounds--2. In 2010, News Corp’s proposed acquisition of 60 per cent of shares in BSkyB that it did not already own was also reviewed.
the relevant jurisdictional tests being met. The CMA delivered its report on jurisdictional and competition matters to the Secretary of State on 1 July 2019 and Ofcom has until late August to report on the media issues.68

**Financial stability**

The *Lloyds TSB plc/HBOS* merger (2008) is the only case reviewed on this basis to date. In its report to the Secretary of State, the Office of Fair Trading (the predecessor of the CMA) found that the merger may result in a substantial lessening of competition and recommended that the merger be referred for a Phase II review. However, the Secretary of State decided to clear the merger without referring it for an in-depth review, concluding that the merger would result in significant benefits to the public interest (as it related to ensuring the stability of the UK financial system) that outweighed the potential anticompetitive outcomes identified.69

**UK merger control**

In the UK merger control context, the test is whether the merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

v Powers of the competent authorities to interfere with a transaction

The Secretary of State may take any action considered reasonable and practicable to remedy, mitigate or prevent any effects adverse to the public interest that have resulted from, or may be expected to result from, the transaction.70 This includes, if necessary, prohibiting the merger, accepting undertakings from the parties in lieu of a reference to a Phase II review or imposing remedies after a Phase II investigation. The CMA will advise the Secretary of State of the appropriateness of undertakings and will negotiate those undertakings with the parties.71

Since the introduction of the Enterprise Act, the Secretary of State has been willing, for the most part, to accept undertakings to mitigate identified public interest concerns.

In normal merger control processes, the CMA has the power to address concerns through accepting undertakings, imposing remedies or by recommending that others (e.g., government or sectoral regulators) take action to address concerns. If it is not possible to address concerns, the CMA can prohibit a merger. The three possible options are unconditional clearance, conditional clearance and prohibition.

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70 Sections 55(2), 66(6) and Schedule 8 Enterprise Act and Section 12(7) PLIO.
71 The MOD will negotiate undertakings with the parties on the Secretary of State’s behalf for mergers involving national security considerations.
Remedies available to challenge a negative decision in public interest cases

Any person aggrieved by a decision in connection with a reference or a possible reference in a public interest case (i.e., any of the three types discussed in this chapter) may appeal to the Competition Appeal Tribunal (CAT) for review of that decision. The CAT determines such appeals in accordance with judicial review principles, and has the power to quash the whole or part of the relevant decision or to dismiss the application.\(^\text{72}\)

Subject to judicial leave to appeal, decisions given by the CAT may be appealed before the Court of Appeal of England and Wales, the Court of Session in Scotland, or the Court of Appeal in Northern Ireland, or in certain cases the UK Supreme Court. The decision of the Secretary of State may also be subject to judicial review by the High Court on limited grounds of errors of law and procedure.

Measures for the protection of confidential information

The Enterprise Act contains a general restriction on disclosure of specified information, including information submitted to a public authority in the exercise of any function it has pursuant to the Enterprise Act.\(^\text{73}\) Disclosing information in contravention of the Enterprise Act is a criminal offence.

The Freedom of Information Act 2000 (FOIA) gives any person a right of access to information that is held by a public authority. However, the FOIA contains several exemptions to the general right of access, including, in relation to information that must not be disclosed to safeguard national security,\(^\text{74}\) and information where disclosure would be likely to prejudice the defence of the British Islands or any colony, or the capability, effectiveness or security of the armed forces or any forces cooperating with those forces.\(^\text{75}\)

Lobbyist registration requirements

Foreign investors that choose to engage external political lobbyists in connection with their proposed or existing investments in the United Kingdom should be aware of the statutory regime requiring registration of consultant lobbyists in the United Kingdom. Under the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (the Lobbying Act), organisations and individuals that carry on the business of consultant lobbying of ministers or permanent secretaries must be entered in the Register of Consultant Lobbyists.\(^\text{76}\) Any person or organisation intending to conduct the business of consultant lobbying must be entered on the Register before doing so.\(^\text{77}\) To comply with the Lobbying Act, consultant lobbyists must provide a quarterly update that includes the names of the clients on whose behalf oral or written communications were made (or payment was made) on their behalf.

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\(^\text{72}\) Where it quashes the whole or part of that decision, the Competition Appeal Tribunal (CAT) may refer the matter back to the original decision-maker with a direction to reconsider and make a new decision in accordance with the ruling of the CAT.

\(^\text{73}\) Section 237 Enterprise Act.

\(^\text{74}\) Section 24 of the Freedom of Information Act 2000 (FOIA).

\(^\text{75}\) Section 26 FOIA.

\(^\text{76}\) Section 1 Lobbying Act. For more information on the process of registration, see the web page of the Office of the Registrar of Consultant Lobbyists, available at registrarofconsultantlobbyists.org.uk/.

received to make) personally to a minister, permanent secretary (or equivalent) relating to UK government policy, legislation, the award of contracts, grants, licences or similar benefits or the exercise of any other government function.78 The registration regime does not cover in-house lobbyists advancing the interests of their own company.

V FOREIGN INVESTOR PROTECTION

Foreign investors in the United Kingdom are principally protected by a network of more than 90 bilateral investment treaties (BITs) that the United Kingdom has entered into with countries around the world.79 The EU now has exclusive competence over FDI under Article 207 TFEU and is negotiating and concluding several BITs;80 however, the European Commission can grant authorisation for Member States to negotiate and enter treaties with third countries independently.81

In the case of Slovak Republic v. Achmea, the CJEU has held that BITs between EU Member States are incompatible with EU law.82 This raises a question mark over the possibility of future claims under BITs between the United Kingdom and EU Member States while the United Kingdom remains in the EU.

If the United Kingdom opts out of the EU’s common investment policy in whatever arrangement is in place when the United Kingdom leaves the EU, the consequences for third countries will be that:

a the United Kingdom will not be part of any future BITs concluded between the EU and third countries, and any claims will have to be brought by foreign investors pursuant to UK BITs; and

b the United Kingdom will be able to retain, renegotiate and conclude BITs with third countries without any limitation.

Additionally, after the UK’s departure from the EU, there should no longer be any obstacles to bringing claims under BITs between the United Kingdom and EU Member States.

The UK’s existing BITs with third countries outside the EU framework should be unaffected by its withdrawal from the EU.

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78 Section 5 Lobbying Act.
79 At the time of writing, according to the United Nations Conference on Trade and Development (UNCTAD), the United Kingdom has signed 103 bilateral investment treaties (BITs), of which 93 are in force (see UNCTAD Investment Policy Hub listing of UK BITs, available at investmentpolicyhub.unctad.org/IIA/liasByCountry#iiaInnerMenu).
80 For example, negotiations are complete for the Comprehensive Trade and Economic Agreement with Canada (CETA), which entered into force provisionally on 21 September 2017 pending ratification by all Member States; however, the sections of CETA dealing with investment protection do not apply provisionally and will only enter into force when CETA has been ratified by all Member States (ec.europa.eu/trade/policy/in-focus/ceta).
81 TFEU, Article 2, Paragraph 1. According to the Commission, by mid 2016, it had given 93 authorisations to open new negotiations and 41 to open renegotiations. In addition, it granted 16 authorisations to conclude new agreements and 21 authorisations to conclude protocols for existing BITs with third countries. See S Schacherer, ‘Can EU Member States Still Negotiate BITs with Third Countries?’, 10 August 2016, at www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer.
82 Slovak Republic v. Achmea BV, Case C-284/16, Judgment, 6 March 2018.
While the precise scope of any BIT depends on its terms, it is possible to identify general terms contained in most BITs concluded by the United Kingdom. These treaties provide both general standards of treatment for nationals of one of the states party to the BIT that has investments in the territory of the other state party, and access to international arbitration against the host state if an investor considers that any of these standards have been breached. In this way, UK BITs make the broad standards of investor protection they contain meaningful and enforceable. These standards generally include:

- the non-discrimination standards of most-favoured nation treatment and national treatment, entitling the investor to treatment as favourable as that provided to investors from third countries and domestic investors respectively;
- a right to ‘fair and equitable treatment’, which encompasses both due process norms of procedural fairness and protection for investors’ substantive legitimate expectations;
- a right to ‘full protection and security’, implying a duty of care on the part of the host state to safeguard the physical (and potentially the legal) security of investment property;
- a right to compensation at full market value in the event that investments are expropriated, either directly or through regulatory measures with equivalent effect;
- protection against arbitrary or unreasonable measures that may impair the management, maintenance, use, enjoyment or disposal of investments; and
- a commitment by the host state to observe any undertakings it has entered into with respect to an investment.83

In addition, investors in the United Kingdom may also be protected by domestic human rights legislation, namely on the basis spelled out in the Human Rights Act 1998 by reference to due process, non-discrimination and property rights norms set forth in the European Convention on Human Rights and Fundamental Freedoms.84

VI OTHER STRATEGIC CONSIDERATIONS

Unlike other jurisdictions where foreign investors may need to consider issues such as structuring a transaction around local investment protection legislation, discriminatory taxation of inward investors and restrictions around the extraction of cash, considerations such as these are not relevant for foreign investors investing in the United Kingdom.85 Nevertheless, there are considerations that foreign investors should be aware of in connection with investments in UK assets, regardless of the fact that their application is not limited to foreign investors. For example:

- the identity of the target company or the company selling assets (i.e., whether it is a public or private company), as this will determine the relevant statutory regimes that will apply and the regulatory bodies that will have to be consulted;

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83 Ibid. See Article 2(2) of the UK Model BIT.
85 Although the United Kingdom has now extended its tax base to non-resident investors disposing (directly or indirectly) of UK real estate, this is not dissimilar to the approach taken by many other jurisdictions and puts foreign investors in a similar position to UK resident investors (who have always been within the scope of UK tax on such disposals).
the sector in which the target company operates (broadly speaking, the national security, defence, financial, media and utilities sectors are the most heavily regulated); any company law requirements relating to shareholder and other approvals (as these may affect the time frame of the investment); and

the jurisdiction of the investor and whether it is a jurisdiction in respect of which any current UK (or other) sanctions are in place (which may, for instance, restrict a seller’s ability to transact with the foreign investor).

In addition to the above, foreign investors should not ignore political and public perception considerations in connection with their proposed investments. In recent times, the following have been at the forefront of public debate:

a Tax avoidance and tax evasion – a foreign investor may find itself an easier target for media accusations of ‘offshoring’ UK profits to reduce its group’s tax bill, and may need to consider recently introduced tax rules targeting such situations (e.g., diverted profits tax). The investor may also need to consider whether it has appropriate group-wide anti-tax evasion policies and procedures in place that would reach the standard required under the UK Criminal Finances Act 2017.

b The negative perception of investments that result in the extraction of economic value from the United Kingdom (if a transaction is likely to be sensitive and to attract a high profile in terms of media or political interest, transacting parties may need to consider whether it would be appropriate to instruct public relations advisers and whether it would be appropriate to make public undertakings in the context of public deals), by way of example:

- the Kraft/Cadbury takeover in 2009 – the future of a Cadbury factory in the United Kingdom was heavily debated prior to the completion of the takeover;86
- the Pfizer/AstraZeneca attempted takeover in 2014 – the potential for job losses and reduction in research and development (R&D) expenditure in the United Kingdom was the focus of significant media and political attention and led to representatives of both Pfizer and AstraZeneca appearing before parliamentary select committees to answer questions about the consequences of the transaction for the United Kingdom. Notwithstanding commitments offered by Pfizer to, inter alia, complete the construction of the planned AstraZeneca Cambridge campus to create a substantial R&D innovation hub, and integrate the operations of the combined company so as to employ a minimum of 20 per cent of its total R&D workforce in the United Kingdom,87 the overall tenor of the press and political commentary was generally hostile towards Pfizer. The Secretary of State suggested the government could use public interest powers to intervene in the

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86 Kraft made certain statements during the offer process suggesting that, at the time, it did not intend to cease operations at the UK factory should its bid for Cadbury be successful. Despite this, Kraft proceeded to close down the UK factory following the takeover and moved its operations to Poland, an act that caused public outcry and, ultimately, resulted in an amendment to the Takeover Code to require bidders to provide more detail about their plans for a target’s business and to bind them to those statements.

takeover. In May 2014, UK ministers were said to have begun exploratory talks with EU officials regarding the expansion of the specified list of public interest considerations in the Enterprise Act (see Section II). Shortly afterwards, Pfizer decided to drop its bid after it was rejected by AstraZeneca’s board; the Softbank/ARM takeover in 2016 – SoftBank’s £24.3 billion acquisition of ARM Holdings was announced in the weeks following the Brexit vote in June 2016. Such a large acquisition of a British technology company faced a strong risk of opposition from the media and government. SoftBank sought to deal with potential concerns about the takeover by becoming the first bidder to give legally binding post-offer undertakings under the UK Takeover Code. Among other things, SoftBank undertook to: (1) at least double the employee head count of ARM in the United Kingdom within five years; (2) increase the employee head count of ARM outside the United Kingdom within five years; and (3) maintain ARM’s global headquarters in Cambridge for five years. SoftBank’s chief executive personally spoke to the Prime Minister, who decided to welcome the investment and the commitments to increase jobs in the United Kingdom. The Chancellor of the Exchequer stated (via Twitter) that the deal demonstrated the health of the British economy post-referendum, suggesting that this may be a counterbalancing factor for similar deals in the near future: ‘Decision by SoftBank to invest in @ARMHoldings shows UK has lost none of its allure to global investors – Britain is open for business’; the Melrose/GKN takeover in 2018 – the Secretary of State raised several concerns about GKN being acquired by a turnaround specialist in terms of its effect on the economy, including the effect on employment (GKN being a valuable employer in the United Kingdom, direct and through its supply chain), the UK’s Industrial Strategy (in light of the importance of GKN’s R&D activities), the fact that GKN benefited from government-sponsored contracts and participated in a sector that enjoyed active engagement from government-sponsored R&D and the large number of pensioner stakeholders who depended on GKN’s ability to fund its pension schemes. In particular, the government felt that companies that benefit (directly or indirectly) from long-term public sector contracts or indirectly from government-supported R&D should adopt appropriate time horizons on investment decisions so as to safeguard public funds. In response,

91 See twitter.com/philiphammonduk/status/754924912855379968.  
92 See assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/694572/Letter_from_Business_Secretary_to_Melrose_Industries_Plc.pdf. The government also suggested that to protect public funding, it may insert change of control provisions into funding agreements to allow the government to claw back funding in the event that a takeover means that the new company does not meet the eligibility criteria to receive the grant or the new company intends a fundamental change to the purpose for which the grant was given. See National Security Review Green Paper, page 18 (see footnote 6).
Melrose offered legally binding post-offer undertakings under the UK Takeover Code, including undertaking to: (1) maintain a UK stock exchange listing and its UK headquarters for at least five years; (2) ensure that a majority of directors are resident in the United Kingdom; (3) ensure that both the aerospace and drive-line divisions retained the rights to the GKN name; and (4) guarantee that spending on R&D would at least maintain GKN's previous levels, amounting to a minimum of 2.2 per cent of sales for the next five financial years. Melrose also undertook not to dispose of the aerospace business for at least five years without the government's consent and offered to meet officials and the Secretary of State every six months to provide updates on its ownership;\textsuperscript{93} and

- the Comcast/Sky takeover in 2018 – the parties agreed upfront a number of post-offer undertakings under the Takeover Code and further undertakings offered by way of deed poll to seek to mitigate the risk of a public interest intervention by the Secretary of State. The undertakings were similar to those given by Fox to the Secretary of State to gain approval for its proposed acquisition of Sky through the formal intervention process (discussed further in Section IV), including in relation to maintaining investment in Sky News for a number of years and enhancing Sky News editorial guidelines.\textsuperscript{94}

c Anti-bribery and corruption issues and, in particular, whether investors are connected to jurisdictions perceived as high risk from an anti-bribery and corruption perspective, or whether they have appropriate group-wide policies and procedures in place that would reach the standard required under the UK Bribery Act 2010. This is the case despite the fact that there is some debate as to the extent to which the Bribery Act applies to a multinational organisation's global operations as a result of the existence within the group of a UK business or subsidiary. Companies incorporated outside the United Kingdom will only be caught by the Bribery Act if they are 'carrying on a business or part of a business in the UK'. In the absence of any other factors, the mere fact that a UK entity, which operates independently, exists within the group will not, in itself, be enough to extend the reach of the Bribery Act to other group entities.

Given the increasing emphasis on FDI screening, and the expanded UK national security regime, it will also be important to analyse early on when considering a potential transaction whether the government will have jurisdiction to review a transaction from a public interest or competition perspective and to analyse the potential risks of public interest and competition concerns arising with respect to a particular transaction, including the risks of intervention.

Deal documentation should address the need and risk associated with any required regulatory processes or approvals, in particular by:

\textit{a} covering required approvals in regulatory conditions precedent, the seller will also want to seek obligations on the buyer to satisfy conditions to closing; and


ensuring cooperation between the seller and target during the pre-closing period in obtaining required approvals and with any government public interest intervention process.95

Depending on the likelihood of a public interest intervention notice being issued, it may (for example) be appropriate to make the transaction conditional on the Secretary of State not having referred the transaction for a Phase II review by a certain date.

The effect of a public interest (or any other regulatory) review on a deal’s timetable should also be taken into account. In particular, the issuing of a public interest intervention notice can have important timing implications as certain parts of the process are not subject to statutory deadlines. The importance of anticipating the impact of such processes on deal timetables is illustrated by the acquisition by Gardner Aerospace of Northern Aerospace, which was nearly derailed when contractual timing for the deal lapsed because of regulatory scrutiny (on competition and national security grounds) and the parties failed to agree on a timeline extension. The seller (Better Capital) announced that it had cancelled plans to sell Northern Aerospace. However, when the Secretary of State and the CMA announced that the transaction was being cleared unconditionally on the basis that there were no national security or competition concerns, the transaction was reinvigorated, closing on 24 July 2018.96

Parties may want to consider proactively engaging with the relevant Secretary of State or government department early on to help determine whether a public interest intervention notice is likely to be issued and to proactively discuss any potential concerns. It may, for example, be possible to avoid the issuance of a public interest intervention notice or an in-depth review if an agreement can be reached directly with the relevant government department regarding suitable undertakings to remedy any potential public interest concerns presented by the transaction. This process has, for example, been followed in cases involving the defence sector that do not raise significant public interest concerns and where, therefore, the full process may not be warranted. For example:

a in Gardner Aerospace Holdings/Northern Aerospace (2018), the Secretary of State cleared the transaction unconditionally and did not deem it necessary to refer it to a Phase II review. In its report to the Secretary of State, the CMA noted that the MOD had obtained written assurances from Gardner confirming that previously agreed protections between Gardner and its current owner would also apply to Northern Aerospace. These protections were designed to prevent Northern Aerospace’s owner accessing restricted information and required the appointment of an independent auditor and the establishment of a series of auditable security arrangements to affirm the protection of restricted information;97 and

95 Sellers may also want to explore remedies if conditions to closing are not satisfied for reasons other than their own fault (e.g., through reverse break fees, which may vary according to particular trigger events) if the financial consequences to not closing are sufficiently serious
in April 2018, the Secretary of State decided not to intervene in the proposed acquisition by Melrose Industries of aerospace and automotive parts maker GKN. The Secretary of State said that the MOD had completed a ‘detailed analysis’ of the deal and had agreed with Melrose a set of undertakings to allay any national security concerns.98

VII CURRENT DEVELOPMENTS

i Proposed legislative reforms to the national security review regime

On 24 July 2018, the UK government published the National Security and Investment White Paper, containing proposals for a new, voluntary, national security review regime (the White Paper).99 The public consultation on this White Paper ended in October 2018 and the government is now reviewing the responses to that consultation to refine its proposals. At the time of writing, there is no clear indication of when the final proposals will be put to the UK parliament to be considered. The regime is not specifically limited to foreign investors.

Once the new review regime has been implemented, parties will be encouraged to notify the government of ‘trigger events’ that they consider may raise national security concerns. The ‘trigger events’, as currently proposed, allow the government to review transactions in a much wider range of circumstances as compared with the current regime.100 For example, no ‘safe harbours’ are provided based on the target’s turnover or the transacting parties’ share of supply. Further, acquisitions of particular assets (e.g., real or personal property, or intellectual property) may be subject to review and the regime will apply to new projects (e.g., new developments, and other business activities that are not yet functioning enterprises).101 The regime will capture entities incorporated or otherwise established outside the United Kingdom, assets situated outside the United Kingdom and rights arising under, or governed by, foreign laws, so long as the entities carry on activities or supply goods or services to persons in the United Kingdom, or the assets are used in connection with activities taking place in the United Kingdom, or the supply of goods or services to persons in the United Kingdom.102 A key purpose of the consultation is to seek views on the proposed trigger events, and thus, the government may amend the above-mentioned proposals following the consultation.

In terms of identifying the trigger events that ‘may pose a risk to national security’, the government is to publish a detailed statement of ‘policy intent’, providing guidance on

100 The trigger events currently proposed include (1) the acquisition of more than 25 per cent of an entity’s shares or votes, (2) significant influence or control over an entity, (3) further acquisitions of significant influence or control over an entity beyond these thresholds, (4) acquisitions of more than 50 per cent of an asset, or (5) significant influence or control over an asset. The definition of ‘asset’ includes real and personal property, intellectual property and contractual rights. The trigger events are currently broadly defined to capture points at which the right or ability to direct an entity’s operations or strategic direction or the operation of an asset is acquired. Further guidance is given in the government’s draft statement of policy intent as to the meaning of significant influence or control over an entity or asset, available at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728311/20180717_Statement_of_policy_intent_-_shared_with_comms.pdf. For further information, please refer to Chapter 3 of the White Paper and Chapter 5 of the statement of policy intent.
101 See Chapter 3 of the White Paper, Paragraphs 3.88 et seq.
102 See Chapter 6 of the White Paper, Paragraphs 6.36 et seq.
the key factors that will make it more likely that a trigger event will be of national security interest to the government. Through publishing this document, the government aims to assist transacting parties in determining whether they should submit a formal notification or engage in informal interaction with government officials. A draft of this document was published on 24 July 2018. The document suggests that, when assessing national security concerns, the relevant Cabinet minister will consider (and, therefore, the parties to the ‘trigger event’ will also need to consider) the target risk, the trigger event risk and the acquirer risk. In particular:

a with respect to target risk, the focus is on the nature of the entity’s activities and of the assets (in the case of land, the nature of the land, its location and proximity). Core areas (i.e., those more likely to pose national security risks), include military and dual-use technologies, certain parts of the national infrastructure sectors (including parts of the civil nuclear, communications, energy and transport sectors and the defence sector), critical direct supplies to the government and the emergency sector, and some advanced technologies. The government also acknowledges that the following areas are more likely to give rise to national security risks as compared with the wider economy: critical suppliers who supply, directly and indirectly, the core areas and parts of the national infrastructure and advanced technologies sectors not in the core areas. However, it is made clear in the document that this is not an exhaustive list and that national security concerns could potentially arise in any sector of the economy; and

b with respect to acquirer risk, the document suggests that foreign nationality may make it comparatively more likely that an acquirer may pose a risk to national security (although this does not negate the fact that the vast majority of foreign nationals pose no national security risk). Assessments will be conducted on a case-by-case basis, taking into account the people controlling the acquiring entity, the entity’s track record in relation to other acquisitions or holdings and transaction rationale (e.g., investing to achieve financial objectives, with no intention to interfere with operations, will indicate a lower risk). In the case of individuals, an assessment will consider the existence of any criminal record and information related to their affiliations. The government is more likely to call in transactions involving ‘hostile parties’ (i.e., those who may seek to use their acquisition to undermine national security), including other states that are hostile to the UK’s national security and parties acting on their behalf or affiliated to hostile states (e.g., through coercion or legal or regulatory control). The assessment will also take into account cumulative ownership (i.e., entities or assets already owned by the would-be acquirer). The risk posed by an acquirer would be comparatively greater if it has control over other entities within the sector or significant holdings within a core area.

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103 The draft statement of policy intent, as of 24 July 2018, is available at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728311/20180717_Statement_of_policy_intent_-_shared_with_comms.pdf. The final statement will be subject to parliamentary approval.

104 See Chapters 2 to 4 of the draft statement of policy intent for further details.

105 For more details on the core areas and the types of entities and assets more likely to raise national security concerns, see Chapter 2 and Annex A of the draft statement of policy intent.

106 See Chapter 2 of the draft statement of policy intent, Paragraphs 2.30 to 2.34.

107 See Chapter 4 of the draft statement of policy intent for further details.
According to the White Paper, regardless of whether parties choose to submit a notification, the government will have the power to call in a transaction for review if it has a reasonable suspicion that (1) it is or may be the case that a trigger event has taken place or is in progress or contemplation, and (2) the trigger event may pose a risk to national security owing to the nature of the activities of the entity or of the asset.108 This call-in power will continue for a prescribed period after the event (the White Paper suggests up to six months).109 Once called in, the parties must not complete the trigger event until approval is obtained, although they can still take preliminary or preparatory steps (e.g., continuing to discuss contractual or commercial terms). If the trigger event has already taken place, the parties will not be able to take further measures to increase the acquirer’s control or take steps that would make it more difficult for the trigger event to be unwound. In such cases, the government may also impose interim restrictions, such as prohibiting the sharing of information or access to certain sites by certain individuals (if there are reasonable grounds to suspect that there is a risk to national security if such measures were not imposed).110 In this respect, it may be in the interest of transacting parties to actively engage with the government early on, if they believe that the government may be inclined to review the transaction.

The review period currently proposed is 30 working days, potentially extendable by a further 45 working days for cases that raise national security risks, with opportunities for the government to stop the clock while information requests are outstanding.111 For voluntary notifications, the government will undertake a screening process (up to 15 days, extendable by a further 15 days) to identify transactions that do not raise national security concerns such that they need not progress to the full review.112 The government intends to increase its resources and invest in tools and systems dedicated to market monitoring, and will introduce powers to request information in response to specific trigger events to help inform their assessment of whether to call in a particular transaction.113 In addition, it is anticipated that the MOD will implement changes to its contractual arrangements to ensure that defence contractors (and subcontractors) are required to notify it of any plans to sell the business or particular assets.114

As under the existing regime, it is anticipated that the government would be able to approve, impose conditions on or, in extreme cases, block or (fully or partially) unwind a transaction. There would also be penalties (civil, criminal or director disqualification) for non-compliance with remedies, completing a trigger event prior to clearance or non-compliance with other orders (e.g., information-gathering requests). If parties felt that conditions had been imposed in an unfair manner, they would have the right to seek an appeal with the High Court challenging the lawfulness of the decision (based on principles of judicial review). Reviews of financial civil penalties would be based on a full merits appeal.

The government’s initial analysis suggested that the new regime would produce 200 notifications per year, with half of those cases requiring a full national security assessment and half of those (i.e., around 50 cases per year) requiring conditions for clearance. This

108 See Chapter 6 of the White Paper, Paragraph 6.03.
109 Id., Paragraph 6.32.
110 See Chapter 7 of the White Paper, Paragraphs 7.18 to 7.27.
111 Id., Paragraphs 7.28 to 7.30 and 7.37.
112 See Chapter 5 of the White Paper.
113 See the Executive Summary to the White Paper, Paragraph 33.

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constitutes a significant increase in reviews, with only eight cases to date having been reviewed for national security concerns under an intervention notice since the Enterprise Act came into force in 2002. The new regime is thus likely to affect deal timing in a number of cases going forward. Owing to the relevance of the buyer to the government’s decision to intervene and risk assessment, there may also be a greater focus during auction processes on the risk a bidder poses in terms of national security concerns (in addition to those posed from an antitrust perspective) going forward. There is no indication in the White Paper as to when the government expects the new regime to come into force, so companies will need to remain vigilant to developments in this area. However, since primary legislation will be required to introduce the new regime, it is not expected to enter into force during 2019.

When the new regime is introduced, the government will remove the national security considerations from the public interest and special public interest regimes under the Enterprise Act. In doing so, this will remove national security concerns from the remit of the CMA. Although the CMA will remain the competent authority for competition law purposes (and its role in public interest interventions related to media plurality and financial stability will remain the same), national security matters will be assessed separately and dealt with by the government.

The government was keen to emphasise when first introducing the prospect of long-term reforms that ‘[s]crutiny does not mean making any part of the UK’s economy off-limits to foreign investment’ and that the proposals are not ‘in any way designed or intended to limit market access for any individual countries’. The government also stressed its intention for the United Kingdom to remain ‘amongst the most open economies to foreign investment’ and emphasised that the measures will ‘reinforce this by strengthening safeguards’. Greater opportunities for scrutiny does not mean prevention; however, this process will need to be factored into deal timelines, and appropriate assurances in terms of cooperation from both the target and the seller and appropriate risk allocation mechanisms built into transaction documents, going forward.

ii Brexit

Following the referendum held on 23 June 2016, the British people voted to leave the EU. The United Kingdom is due to leave the EU by 31 October 2019. At the time of writing, it is still unclear exactly what the new relationship between the UK and the EU will be.

Until the United Kingdom leaves the EU, it will need to continue to comply with EU law, including the aforementioned thresholds for interfering with the freedom of movement of capital and freedom of establishment principles. In addition, the EUMR will continue to apply to concentrations meeting the relevant thresholds.

On exiting the EU, the United Kingdom will remain a member of the World Trade Organization (WTO) and will need to continue to meet its obligations under its BITs and the WTO General Agreement on Trade in Services, which sets out WTO members’ rights and freedoms in relation to investing in the UK’s markets. It will also continue to act in accordance with its commitments on freedom of investment as a member of the Organisation for Economic Co-operation and Development. The government has asserted in this respect that the ‘UK will remain an open economy that welcomes foreign investment’.  

115 See National Security Review Green Paper, pages 2 and 7 (see footnote 6).
116 Id., Paragraph 151.
The effects of Brexit on the current competition merger control process will depend if there is a Brexit deal agreed, and its terms. Unless the new regime alters the position, the UK and EU merger control regimes will be separated and there will be the potential for parallel reviews by the CMA and the Commission, which is likely to increase costs for transacting parties.117

In terms of the effects of Brexit on the public interest intervention regime in the United Kingdom, if the United Kingdom joins the EEA (which seems unlikely in the political climate at the time of writing), the same rules on interventions in the public interest will apply as under the terms of EU membership. However, if Britain is outside the EEA, the UK government would be free to widen the regime to intervene on industrial policy or public interest grounds, subject to international obligations and BIT terms.

The long-term effects of Brexit (in whatever form it takes) on foreign investment into the United Kingdom remains highly uncertain. The EY UK Attractiveness Survey 2019 reported further decline (from 2017) in predicted foreign investor sentiment towards the United Kingdom in the long term. In particular, while the proportion of investors intending to establish or expand operations in the United Kingdom during the next 12 months dropped only one percentage point (to 23 per cent of respondents), close to half of investors globally (42 per cent) expected the UK’s attractiveness for FDI to decline in the next three years. Further, while 15 per cent of investors said that Brexit had caused them to put their investment in the United Kingdom on hold, only 6 per cent of investors expected to reduce their UK activities in the next three years.118

iii EU Foreign Direct Investment Screening Resolution

In April 2019, the regulation adopting the European framework for screening FDI into the EU entered into force.119 The intention is for the framework to be fully implemented at Commission and Member State level by 11 October 2020. The regulation allows for greater cooperation between Member States, with obligations to inform other Member States and the Commission of the intention to screen a FDI within five working days and to be open to comments from other Member States. The Commission could also issue a (non-binding)
opinion on an FDI planned or completed in a Member State.\textsuperscript{120} However, the regulation does not mandate any changes to existing national FDI review frameworks and Member States remain the ultimate arbiters of FDI in their territory.

\textsuperscript{120} For further details, see trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157683.pdf.
I INTRODUCTION

Historically, US policy has favoured foreign investment and generally imposes few restrictions on, or regulatory oversight of, such investment, as exemplified by a statement made by former President Barack Obama while addressing the 2015 SelectUSA Investment Summit encouraging foreign investment in the United States: ‘America is proudly open for business, and we want to make it as simple and attractive for you to set up shop here as is possible’. Recently, the Trump administration has been critical of certain foreign investment, particularly from China, and has threatened to impose greater restrictions on it.

Foreign direct investment in the United States is found in nearly all sectors and has played a role in privatization, development of infrastructure and natural resources, and distressed investments; for example, certain previously state-owned or municipal-owned infrastructure has been leased on a long-term basis to non-US based private equity funds.

The United States receives most foreign investment from its traditional allies, including Canada, Germany, France, Israel and the United Kingdom. However, as other countries, including China, seek to invest private and sovereign wealth abroad to advance technology acquisition goals, the United States sometimes struggles to reconcile its openness to foreign investment with its economic and national security concerns.

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2 According to the World Bank, the United States has the highest absolute net foreign direct investment of all monitored countries, and this investment accounts for approximately 1 to 2 per cent of the gross domestic product of the United States. See World Bank International Financial Statistics and Balance of Payments databases, available at data.worldbank.org/indicator/.
3 Address to 2015 SelectUSA Investment Summit, available at no.usembassy.gov/obama-selectusa-investment-summit/.
4 See www.whitehouse.gov/briefings-statements/statement-president-regarding-investment-restrictions/.
5 For example, in 2005, the City of Chicago sold the rights to operate the Chicago Skyway toll road to Skyway Concession LLC, a company owned by Spanish and Australian companies Cintra Concesiones de Infraestructuras de Transporte SA, Macquarie Infrastructure Partners and Macquarie Atlas Roads. In November 2015, a consortium including Canada pension plans bought the concession company for $2.8 billion. See www.chicagoskyway.org/the-skyway/#about-the-skyway. In 2014, Emirati company Gulftainer was awarded the 35-year concession to operate and develop Port Canaveral’s container and multipurpose cargo terminal. See Gulftainer press release, ‘Gulftainer Expands Into USA’ (26 June 2014), available at www.gulftainer.com/press-release/gulftainer-expands-into-usa/.
The United States has no law prohibiting, or subjecting to review, foreign investment based on economic security concerns or, with limited exception, national origin. It does impose some sector-specific limitations and review procedures on foreign investment in a handful of regulated industries, including the airline and nuclear energy industries. Additionally, the United States has a national security review process applicable to foreign investment that might implicate US national security interests, which was significantly reformed in 2018. A dozen or so transactions each year are abandoned, while only five have ever been formally prohibited on national security grounds.7

II FOREIGN INVESTMENT REGIME

The United States has both national security and sector-specific review regimes applicable to foreign investment.8

i National security review process

The US national security review process is often referred to as the Exon–Florio or CFIUS9 review process after the relevant authorising statute10 and administrative body, respectively. The process was significantly reformed by the enactment in August 2018 of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).11 Prior to the enactment of FIRRMA, the United States had an entirely voluntary national security reviews process applicable to transactions that could result in a foreign person acquiring control of a US business (a ‘covered transaction’). The statute and its accompanying regulations did not

7 Four of the five prohibited transactions involved acquisitions by Chinese companies: (1) China National Aero-Technology and Export Corp’s acquisition of Mamco Manufacturing Inc (a US aerospace parts manufacturer) in 1990; (2) Ralls Corp’s acquisition of a US wind farm operator in 2012; (3) Fujian Grand Chip Investment Fund LP’s attempted acquisition of the US business of German semiconductor manufacturer Aixtron SE in 2016; and (4) China Venture Capital Fund Corporation Limited’s US affiliate Canyon Bridge Capital Investment Limited’s proposed acquisition of US semiconductor manufacturer Lattice Semiconductor Corporation in 2017. Additionally, Broadcom’s proposed 2018 acquisition of US 5G provider Qualcomm was prohibited before Broadcom could re-domicile from Singapore to the United States.

8 Additionally, the US Department of Commerce (DOC) reinstated in November 2014 a post-closing notification requirement for all foreign direct investment (having discontinued it in January 2009), pursuant to which a notice must be submitted to the DOC within 45 days of closing, providing basic details regarding the investment to assist the DOC with statistical reporting on the US economy. See www.bea.gov/surveys/respondent_be13.htm.

9 CFIUS is an inter-agency committee consisting of, as chair, the Secretary of the Treasury, and as members, the Secretaries of Commerce, State, Defense, Homeland Security and Energy, as well as the Attorney General, the United States Trade Representative and the Director of the Office of Science and Technology Policy. The Secretary of Labor and the Director of National Intelligence serve as ex officio members. Other executive branch representatives appointed pursuant to executive order observe and, as appropriate, participate in the Committee’s activities, including the chair of the Council of Economic Advisers, the Director of the Office of Management and Budget, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism.

10 The Exon–Florio Amendment to the Defense Production Act (DPA) of 1950, as amended. 50 USC Section 4565.

11 Public Law 115–232 (13 August 2018).
require that any particular foreign investment be subject to the voluntary national security review process, but did give CFIUS (or the President of the United States (the President), or both, as applicable) the authority to block or impose remedial measures with respect to any covered transaction that was not notified and cleared.

Post-FIRRMA, CFIUS still has the authority to review acquisitions of control of US businesses. However, FIRRMA expanded CFIUS’s jurisdiction in a number of material ways also to include: (1) stand-alone acquisitions, leases, or concessions of real estate in certain instances, and (2) ‘other investments’ by foreign persons (i.e., non-passive investments not amounting to control) in US businesses involving certain key areas of concern, specifically critical infrastructure, critical technologies or sensitive personal data. ‘Other investment’ is defined by reference to access and governance rights rather than a specific investment threshold.

FIRRMA also institutes for the first time a mandatory filing regime with respect to certain transactions, while all other transactions subject to CFIUS’s jurisdiction may still be notified voluntarily. FIRRMA requires that investments made by foreign government-controlled persons in a US business involved in critical infrastructure, critical technology or sensitive personal data must be notified to CFIUS, and also permits CFIUS to implement certain other mandatory notice requirements. CFIUS took advantage of the authorisation to launch in November 2018 a mandatory regime applicable to certain foreign investment in ‘Pilot Program US Businesses’. Under this Pilot Program, parties must submit a filing to CFIUS if their transaction involves a controlling or otherwise non-passive investment (i.e., an investment that provides the investor with certain rights, such as board representation or certain governance or access rights) by a foreign person in a US business when the US business is involved with critical technology (defined with reference to export control laws) and is active in, or designs products for, specified industries. Parties can be fined up to the transaction value for failure to file when required.

The US national security review process originally focused, at least in practice, on the acquisition by foreign companies of US businesses directly or indirectly supplying the US Department of Defense (DOD); however, and especially after the 9/11 terrorist attacks, the concept of national security – and therefore the types of transactions subject to review under the regime – was broadened by statute and practice. National security is an ever-evolving concept, and its expansion in recent years has been fuelled by rapid advancements in technology, increasing digitalisation, increasingly globalised supply chains, and the appearance of China as a significant investor and technological competitor. These considerations led to the passage of FIRRMA to better position CFIUS to address concerns related to them.

The statute does not define ‘national security’, but requires CFIUS to consider the following factors in a review:

- domestic production needed for projected national defence requirements;
- the capability and capacity of domestic industries to meet national defence requirements, including the availability of human resources, products, technology, materials and other supplies and services;
- the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
- the potential effects of the proposed or pending transaction on sales of military goods, equipment or technology to any country:
that is identified by the Secretary of State as a country that supports terrorism, is a country ‘of concern’ regarding missile proliferation or the proliferation of chemical and biological weapons, or is listed on the Nuclear Non-Proliferation Special Country List; or

- that poses a potential regional military threat to the interests of the United States;

- the potential effects of the proposed or pending transaction on US international technological leadership in areas affecting national security; and

- the potential for national security-related effects from the acquisition of US critical technologies and infrastructure, including energy.

### ii Sector-specific requirements for foreign investment

As discussed in Section IV, the United States imposes some restrictions on foreign investment in select regulated industries. Typically, companies in these sectors are required to obtain a licence from the government to operate in the sector, and federal law limits foreign ownership of such licensees. For example, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, restricts foreign governments, individuals and corporations from holding more than 20 per cent of the interests of a broadcast licensee. Proposed foreign investment in such sectors to the extent typically permitted is subject to review and approval by sector-specific regulators. Regulations issued by the sector-specific agency outline the process and standards applicable to the review of foreign investment in the sector.

### III TYPICAL TRANSACTIONAL STRUCTURES

Briefly set out below are typical corporate structures and transactions pursuant to which a foreign investor may enter the US market. A series of state and federal laws govern such investment. Generally, foreign investors are subject to the same corporate legal requirements and required to follow the same corporate formalities as domestic investors.

#### i Choice of structure for new entities

No federal corporate law regulates the formation, operation or dissolution of any structure. Rather, the formation of a legal entity generally is governed by the state of formation or incorporation. Accordingly, foreign investors must become familiar with the particular laws of the jurisdiction of formation. Delaware is the state in which foreign investors most commonly form entities, because the law is well established and the process straightforward. A variety of legal structures are available, distinguishable most notably by different tax consequences, which include the following:

**Corporation**

A corporation is treated as a ‘person’ under law and as a separate and distinct legal entity from its directors, officers and shareholders. The shareholders of a corporation, as a general rule, are not personally liable for the debts and actions of the corporation. Corporations are overseen by a board of directors (each of whom owe certain fiduciary duties to shareholders), and day-to-day management of a corporation is vested in its officers. Under Delaware law, there are no US or state residency requirements to become a board member or to be an officer of a

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12 See 47 USC Section 310(a) and (b) for complete restrictions.
corporation; however, a director must be a natural person (not another legal entity). It is not uncommon for certain members of the board of directors to also hold positions as officers of the corporation.

**Partnership**

In a general partnership, all partners manage the daily operations of the business and all are liable for the losses incurred. In a limited partnership or a limited liability partnership (LLP), the limited partners are typically liable only to the extent of his, her or its investment (not personally liable for the debts and obligations of the limited or limited liability partnership). A partnership is not a taxable entity for state and federal purposes; rather, the income of the partnership is taxable to the partners in proportion to their share in the partnership’s profits. Under Delaware law, a foreign investor may form a partnership with US persons, and the contractual arrangement will be honoured in the Delaware courts. In all cases, liability under Delaware law will not be affected by the fact that a foreign investor is one of the partners, whether as a general partner or a limited partner. Furthermore, there are no requirements under federal or state law that a foreign investor must form a partnership, whether as a minority or majority holder, with a US entity.

**Limited liability company**

A limited liability company (LLC) is a cross between a corporation and a partnership. Like a corporation, members of an LLC are not personally liable for the debts and actions of the company. However, for federal income tax purposes, an LLC is treated like a partnership, with members taxed relative to their share in the company’s profits unless a member of the LLC otherwise requests different treatment be granted by the US Internal Revenue Service. Under Delaware law, a foreign investor is allowed to hold some or all the membership interests of an LLC. LLCs may be managed by the members (shareholders) or by a board of managers. There are no state residency requirements for LLC managers.

**Branch**

A foreign corporation generally may establish a branch under state law provided it is registered to conduct business in one state. Although some states restrict foreign branch operations of certain industries in their jurisdiction (such as banking and insurance), foreign corporations generally can establish a branch in the United States without any additional regulatory hurdles.

**ii Acquisition of a majority or minority stake**

Generally, there are no restrictions prohibiting a foreign investor from taking a majority or minority stake in, or acquiring 100 per cent of, a US private corporation or other legal entity, other than with respect to those entities operating in specific regulated sectors discussed in Section IV. Foreign investors need only comply with the laws that would be applicable to acquisitions by domestic investors (e.g., merger control laws).

Publicly traded companies are regulated by both US federal securities law and the rules of the relevant stock exchange. The laws and rules of the securities exchanges apply equally to domestic and foreign investors acquiring an interest in, or the entirety of, a publicly traded company. For example, if a foreign or domestic investor makes a tender offer to acquire some or all of a US public corporation’s shares, it must comply with federal tender offer rules (in
addition to any state laws). If a foreign investor acquires beneficial ownership of more than 5 per cent of a voting class of a company’s publicly registered securities (either directly or by tender offer), it must file a notice thereof with the Securities and Exchange Commission accurately disclosing the size of the stake, the purpose of the transaction, and the source and amount of funds to be paid in consideration for the voting stock. Such filings are publicly available, and must be updated when the original purpose of the transaction (e.g., change of intent from passive investor to majority takeover) changes.

iii Mergers

There are two primary methods of acquiring a company in the US: a stock acquisition directly from the stockholders or a merger. For public company acquisitions (and some private companies) where the stock is widely held by a disparate group of stockholders, it is impractical to negotiate a direct acquisition of the stock with each stockholder. In such cases, an acquirer will use one of two methods: a tender offer followed by a squeeze-out merger (a ‘two-step’ process) or calling a stockholder vote to approve a merger (a ‘one-step’ process). Both methods of acquiring a US public company are subject to federal securities law as well as rules of the exchange upon which the target company’s shares are traded. In short, in a tender offer, the acquirer makes a public offer to acquire all the shares of the company. Once the acquirer has acquired at least the number of shares required to approve a merger under the target company’s charter documents, it can then force a merger of the offeror and the target company (and squeeze out the other stockholders who either objected or abstained from voting). In a one-step process, the target company calls a stockholder meeting to vote on whether to merger the target company with the offeror. The result in each process is that the acquirer holds 100 per cent of the stock of the target company.

iv Asset acquisition

If a foreign investor seeks to acquire certain or all of the assets of a US target, in most cases, the law governing that acquisition generally will be the law of the contract and the law of the state in which the assets reside. Certain acquisitions of material assets, or all or substantially all of a company’s assets, may require stockholders’ approval (and therefore be governed by the federal securities law and proxy rules) for certain public companies. No unique legal requirements govern the acquisition of assets by foreign investors, and generally there are no restrictions on ownership by foreigners of US real property (except for certain restrictions on agricultural land and mineral lease rights). Because the ownership of equity in US entities is also unrestricted, there is no particular benefit in structuring a transaction as an asset or share deal for foreign investment restriction purposes (though there may be significant tax consequences to structuring a transaction as an asset sale or a stock sale).

IV REVIEW PROCEDURE

This section discusses in more detail the sector-based and national security-based foreign investment review regimes outlined in Section II, and the interaction of these regimes with the US merger control regime. The US merger control regime does not treat foreign investment in the United States differently from domestic investment. Thus, the fact that the buyer is a foreign investor could lead to divergent outcomes under merger control and sector-specific review processes, in which foreign investment may be treated differently. However, this is not the only factor that could lead to divergent outcomes. Because the standards applied
by sector-specific regulators (e.g., a public interest standard) are different from the standard applied by US antitrust regulators (e.g., a substantial lessening of competition), there could be divergent outcomes regardless of whether a foreign investor is involved. Nonetheless, there is typically some interface between the US antitrust review and sector-specific review processes, as the public interest standard applied by sector-specific regulators encompasses competition interests. In these cases, parties must consider strategically the interaction of the review processes in terms of timing and substance.

There is less interface between the US antitrust and national security review processes, as the antitrust regime does not take into account US national security interests, and vice versa, except to the extent that ensuring competition in the supply of goods and services to the US government acting as a consumer constitutes a national security interest.13 The national security review process itself, though, can involve concurrent reviews by several US government agencies, each tasked with administering laws governing foreign ownership of US businesses that hold certain security clearances, manufacture certain export-controlled goods, or both. In these cases, parties must coordinate their outreach to each relevant agency, as the national security-related review processes typically interface via the CFIUS review process.

i National security review process

The US national security review process is conducted pursuant to section 721 of the DPA, sometimes called the Exxon–Florio Amendment, and its implementing regulations.14 The statute grants the President the authority to review any transaction that could result in a foreign person having control over a US business (i.e., a covered transaction) and to suspend or prohibit that transaction if it threatens to impair the national security of the United States. The statute was amended by FIRRMA to expand its applicability to include acquisitions of certain US real estate and non-passive minority investments of any size in US businesses involved in critical technology, critical infrastructure or sensitive US citizen personal data (‘other investments’). This expansion will not fully take effect until implementing regulations issue. CFIUS is charged with conducting the national security review on behalf of the President pursuant to the statute, taking certain remedial action, and, as appropriate, making a recommendation regarding presidential action.

Foreign persons include any foreign national, foreign government or foreign entity, or any entity over which control is exercised or exercisable by a foreign national, foreign government or foreign entity. Control turns on the ability to determine, direct or decide matters affecting an entity, and the regulations specifically recognise dominant minority control.15 In practice, CFIUS interprets control very broadly. Whether a foreign person is making an ‘other investment’ turns on whether the investment provides the investor with certain rights, such as board representation or certain governance or access rights.

13 The US antitrust agencies have refrained from challenging certain transactions determined to be anticompetitive because the DOD supports the transaction for national security reasons (see, for example, Federal Trade Commission press release, ‘FTC Closes Its Investigation into GenCorp’s Proposed Purchase of Pratt & Whitney Rocketdyne’ (10 June 2013)), while committing to considering concerns by the DOD about consolidation in the defence industry (see ‘Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry’ (12 April 2016), available at www.ftc.gov/system/files/documents/public_statements/944493/160412doj-ftc-defense-statement.pdf).
14 50 USC Section 4565.
15 31 CFR Section 800.204.
Prior to FIRRMA, when the US national security regime was voluntary, counsel for the parties to a transaction typically consulted each other with respect to the national security profile of a particular transaction to determine whether a filing was warranted. That calculus is still relevant for transactions falling outside of the newly implemented mandatory regime, but counsel additionally now must consider whether a filing is mandated as discussed in Section II above. Even when there is no legal obligation to file, a filing potentially offers several benefits:

- obtaining a no-action letter provides a safe harbour against future presidential action, provided parties comply with obligations under the statute;
- filing may ensure that relevant government security clearances and licences are not jeopardised, thereby negatively affecting the ability to do business; and
- related regulations involving clearances and licences require parallel notifications that can be coordinated.

The review process depends on whether the transaction is subject to the mandatory regime or not.

If a transaction is subject to the Pilot Program's mandatory filing requirement, the parties must file a declaration not later than 45 days before closing. Declarations are a newly introduced procedural process, and parties can elect to submit a declaration only if the Pilot Program is applicable. Following submission of the declaration, CFIUS has 30 days to review the transaction. At the end of the 30 days, CFIUS can (1) request a full notice (discussed below) from the parties, (2) state that it had insufficient information to complete its review, leaving the parties without a definitive outcome, (3) unilaterally initiate a review as if based on a full notice, or (4) inform the parties that it will take no further action, providing the parties safe harbour for that transaction. Because it is possible that the parties may need to submit a full notice after submitting a declaration, parties need to consider on a case-by-case basis the likelihood of a non-definitive outcome and whether it makes sense to skip the declaration and file a full notice in the first instance. The rules allow submission of a full notice in lieu of a declaration to satisfy the mandatory filing requirement.

If no mandatory filing requirement applies, the official review process typically begins with the submission of a confidential voluntary notification by the parties. Alternatively, CFIUS can initiate its own investigation. However, the regulations recommend that the parties notify CFIUS at least five business days before formally filing a notification, and submit a draft notification. Acceptance of a properly prepared notice triggers an initial 45-day review of the notified transaction. By the end of the 45-day period, CFIUS must decide whether to clear the transaction if it finds no national security concerns, or to initiate an additional 45-day investigation. CFIUS may decide during either of the 45-day periods to issue a no-action letter or to require the parties to enter into a mitigation agreement to

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16 See for example, Reuters, ‘U.S. watchdog expands scrutiny to more Chinese deals’ (11 October 2016), available at www.reuters.com/article/us-usa-china-m-a-insight-idUSKCN12B0C4, reporting that in December 2015, a month after closing, CFIUS approached Fosun International Ltd to express concerns regarding its acquisition of Ironshore Inc. Fosun ultimately divested its interest in Ironshore.

17 If a transaction involves either a foreign government-controlled entity or US critical infrastructure, a 45-day investigation must be undertaken (unless waived by the relevant CFIUS member agencies). Under FIRRMA, the investigation period can be extended for an additional 15 calendar days in extraordinary cases.
resolve any potential national security concerns. CFIUS may impose mitigation measures only after it has identified a specific risk in relation to US national security and determined that a mitigation measure is reasonably necessary to resolve that risk.18

Alternatively, at the end of a 45-day investigation, CFIUS may refer the matter to the President. The President then has 15 days to take action. The President alone has the authority to suspend or prohibit a covered transaction. The Committee must therefore refer a transaction to the President if it recommends that the President suspend or prohibit the transaction. To exercise this authority, the President must find both that there is credible evidence that a ‘foreign interest exercising control might take action that threatens to impair the national security’, and that other laws do not, in the President’s judgement, ‘provide adequate and appropriate authority’ to protect the national security.

Presidential action is rare, partly because mitigation measures often address national security concerns and partly because parties typically decide to abandon a transaction before CFIUS recommends that the President issue a blocking order. Determinations by the President are not subject to judicial review. This was affirmed by the US District Court for the District of Columbia.19

The CFIUS process is confidential and third parties have no right to participate. However, members of Congress, trade or industry groups, and competitors regularly take a public position or write to CFIUS regarding the national security implications of specific transactions. As a result, parties sometimes elect to involve public relations or government relations firms, or both, to manage press regarding the transaction and congressional and executive branch outreach.

As a practical matter, the CFIUS process involves not only the review of a foreign investment by the Committee as a whole, but also a review of the foreign investment by each of the individual member agencies, some of whom independently administer separate reviews of foreign investment. For example, the DOD participates in the CFIUS process but also reviews proposed foreign investment in US businesses that hold security clearances.20 Thus, the review processes administered by the member agencies often interface with the CFIUS review process.

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18 CFIUS has broad authority to develop mitigation measures, although it uses that authority in only a handful of cases each year. Between 2013 and 2015, only 40 cases resulted in the use of legally binding mitigation measures. See ‘CFIUS Annual Report to Congress’ for CY 2015, available at www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20CY%202015).pdf. 2015 is the most recent calendar year for which statistics are available.

19 See Ralls Corp v. Comm on Foreign Inv in the United States, 926 F.Supp.2d 71 (DDC 2013), revised and remanded, 758 F.3d 296 (DC Cir 2014).

20 Federal laws prohibit foreign individuals, foreign companies and US subsidiaries under foreign control from obtaining security clearances and accessing classified information, and any entity that has security clearances is required to notify the DOD of any potential foreign ownership. See National Industrial Security Program Operating Manual, Reg 5220.22-M (February 2006, as amended), available at www.fas.org/sgp/library/nispom/nispom2006.pdf. The DOD determines whether a contractor is under foreign control, ownership or influence (FOCI) on a case-by-case basis. Should the DOD find FOCI, the contractor may undertake measures approved by the DOD to mitigate the FOCI.
Sector-specific limitations on foreign investment

Federal limitations and restrictions on foreign investment focus on sectors that involve public interest and public services. Although not an exhaustive list, the industry sectors below illustrate some of the limitations the US federal government has imposed on foreign investment. Some states also impose limits on foreign investment in certain sectors.

Aviation

Foreign investment in the US airline industry is heavily restricted and is subject to control by the US Department of Transportation (DOT). Under federal regulations, an aircraft must be registered before operating legally in the United States and registration is limited to US citizens, permanent residents, corporations and government entities.

In addition, all operating air carriers must obtain a certificate of public convenience and necessity when applying to operate in the United States and when there has been a substantial operational, ownership or managerial change. Only a citizen of the United States may obtain such a certificate. A ‘citizen of the United States’ is defined as a US citizen, a partnership of US citizens, or a corporation or association organised under US law, ‘of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 per cent of the voting interest is owned or controlled by persons that are citizens of the United States’.

As a result, foreign investment in a US airline is limited to 25 per cent of the voting interests. Furthermore, when evaluating whether the corporation is under the ‘actual control’ of US citizens, the DOT considers factors such as the foreign entity’s involvement in management and business decisions, and its influence and control over the board of directors. While the statute is silent with respect to non-voting interests, the DOT has interpreted the statute to limit a foreign non-voting interest to 49 per cent.

Banking

The US banking industry is heavily regulated at both federal and state level. Federal laws generally do not restrict foreign ownership or control of US banks, but the establishment or acquisition of a bank in the United States by a foreign entity may be subject to review by federal or state regulators.

A foreign bank may establish a branch, agency or commercial lending subsidiary in the United States, but it must seek approval from the Federal Reserve Board (FRB) to do so. The FRB evaluates several factors, including whether:

- the foreign bank’s home country consents;
- the foreign bank is financially sound;

21 49 USC Section 44101.
22 49 USC Section 44102(a).
23 49 USC Section 41101(a).
24 14 CFR Section 204.5.
25 49 USC Section 41102(a).
26 49 USC Section 40102(a)(15).
27 Some states impose citizenship and residency requirements on state-chartered banks. In addition, the directors of national banks chartered at the federal level must be US citizens. 12 USC Section 72.
28 12 USC Section 3105(d).
the foreign bank provides adequate information and assurances;

- the foreign bank and its affiliates comply with US laws; and

- the home country’s financial regulations can mitigate the risk to financial stability in the United States, should the foreign bank pose such a risk.29

Under the Bank Holding Company Act (BHCA),30 FRB approval is also needed to operate as a bank holding company (BHC)31 in the United States or to acquire more than 5 per cent of the voting securities of a US bank or BHC.32 Once the FRB accepts an application for approval as complete, the board generally issues a decision within 60 calendar days. The FRB evaluates several factors when reviewing a foreign bank’s application under the BHCA, including financial stability, competition, public convenience and whether the authorities in the foreign bank’s home country exercise comprehensive consolidated supervision.33

**Communications**

The Federal Communications Commission (FCC) is tasked with reviewing and authorising all radio and television broadcasting licences. The Telecommunications Act of 1996 restricts foreign governments and government representatives from holding a broadcast, common carrier or radio station licence in the United States, and limits the interest a foreign government or company may hold in a licensed US company.

Under the statute, foreign governments and their representatives may not obtain radio station licences.34 In addition, aliens, alien representatives and any corporation organised under the laws of a foreign government may not obtain a broadcast, common carrier, aeronautical en route or aeronautical fixed radio station licence.35

Additionally, foreign governments, individuals and corporations are restricted from directly holding more than 20 per cent of the stock of a broadcast, common carrier or aeronautical radio station licensee.36 If the FCC determines that it would be in the public interest, it has the discretion to refuse or revoke a licence held by a corporation in which

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29 ibid.
30 12 USC Sections 1841 to 1852.
31 A bank holding company (BHC) is one that controls one or more banks but does not itself engage in banking. BHCs exist in the United States because the United States limits the activities in which US banks can be involved; a BHC permits a US bank to be owned by a company that engages in activities in which the US bank is not permitted to engage.
32 12 USC Section 1842(a). Foreign companies that acquire an interest in a BHC or US bank under certain circumstances are exempt from such limitations (e.g., with respect to operations outside the United States, see 12 USC Section 1841(b)(2) and (3); 12 USC Section 1843(c)(9)). Other regulations are applicable to the merger of certain banking institutions not regulated under the BHCA.
33 12 USC Section 1842(c).
34 47 USC Section 310(a).
35 47 USC Section 310(b)(1) and (2).
36 47 USC Section 310(b)(3). With respect to common carrier licences, the FCC has determined to forbear from applying the foreign ownership limitations in 47 USC Section 310(b)(3) to the class of common carrier licensees in which the foreign investment is held in the licensee through US-organised entities that do not control the licensee, to the extent that it determines the foreign ownership is consistent with the public interest under the policies and procedures the FCC has adopted for the public-interest review of foreign ownership subject to 47 USC Section 310(b)(4). See ‘First Report and Order’ in IB Docket No. 11-133, FCC 12-93 (released 17 August 2012), 77 Fed Reg 50,628 (22 August 2012), available at apps.fcc.gov/edocs_public/attachmatch/FCC-12-93A1.pdf, Paragraph 1.
a foreign government, individual or corporation has an indirect investment of more than 25 per cent. The FCC typically will issue a public interest determination regarding the foreign investment in response to a petition for a declaratory ruling. A licensee must obtain FCC approval before direct or indirect foreign ownership exceeds 25 per cent of the licensee’s US parent companies.

**Energy**

Federal and state law heavily regulates energy resources in the United States. Under the federal Mineral Lands Leasing Act (and other laws), only US citizens and corporations organised under US law may obtain particular mineral, gas and oil leases. However, federal laws may allow foreign investment if the investor’s home country extends similar privileges to US citizens and companies.

Nuclear facility licences are also heavily restricted. Under the Atomic Energy Act, a nuclear facility licence may not be acquired by an alien or corporation owned, controlled or dominated by an alien, foreign government or foreign corporation. As a result, such entities are not eligible to apply. The Nuclear Regulatory Commission has issued guidelines for determining whether an alien, foreign government or foreign corporation owns, controls or dominates a licence applicant. According to these guidelines, an applicant that is partially owned by a foreign entity may be eligible for a licence if it imposes certain conditions on the foreign investor, such as limiting nuclear material handling to US citizens.

**Shipping**

Shipping between ports in the United States is limited to US-built, owned and registered vessels, with few exceptions. Only statutorily eligible entities can obtain a registration from the US Coast Guard to engage in this activity and a registration generally is limited to US citizens or entities in which US citizens hold at least 75 per cent of the interests.

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38 See 47 CFR Section 1.2.


40 30 USC Section 181.

41 ibid.

42 42 USC Section 2133(d).

43 10 CFR Section 50.38.

44 Final Standard Review Plan on Foreign Control Ownership, Control or Domination, 64 Fed Reg 52,355 (28 September 1999).

45 id. at 52,358.

46 46 USC App 883.

47 46 USC Section 12103(a).

48 46 USC Section 50501.
FOREIGN INVESTOR PROTECTION

Foreign nationals and entities that invest in the United States enjoy protection before an independent international arbitration tribunal against certain actions by the United States that breach substantive protections established in bilateral investment treaties (BITs) and the investment protection provisions in free trade agreements (FTAs) to which the United States is a party. BITs offer reciprocal protection for investments made by investors of one signatory country within the territory of the other signatory country. FTAs are broader treaties that address an array of trade-related issues and typically include foreign investment protection guarantees that mirror those in BITs.

This section provides an overview of the basic investment protections that apply to foreign investments in the United States under BITs and FTAs, the investors that may invoke these protections, and the negotiations that are under way to extend these protections to additional investors through new international agreements.

Current framework

Protections applying to inbound investments in the United States

BITs and FTAs provide the bulk of the protections that apply to foreign investments in the United States. Although every BIT and FTA is unique, almost all the treaties that the United States has signed guarantee the following basic protections to foreign investors.

Fair and equitable treatment

Foreign investments generally must receive ‘fair and equitable treatment’ from the United States. The scope of this protection depends on whether the treaty in question links the standard to customary international law (as does the 2012 US Model BIT and most US FTAs) or establishes it as an autonomous protection. When the autonomous standard applies, the actions of the United States must be consistent, non-discriminatory and non-arbitrary. This standard protects the investor’s legitimate expectations at the time it made the investment. These expectations may be based on specific offers or assurances that the United States made to the investor. The customary international law standard has traditionally been understood to be less protective to the investor. To demonstrate a breach of this standard, an investor must show that the United States failed to meet the minimum standard of treatment under customary international law, which has been interpreted by certain tribunals as requiring ‘a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons’.

49 See, for example, 2012 US Model Bilateral Investment Treaty, April 2012, Article 5, available at ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. The government negotiates BITs based on this model text; thus, most BITs to which the United States is a party adhere closely to this document. See also North American Free Trade Agreement, January 1994, Article 1105, available at http://sice.oas.org/Trade/NAFTA/chap-111.asp#a1105.
**Full protection and security**

Almost all BITs and FTAs oblige the United States to afford covered foreign investments ‘full protection and security’, which requires the United States to take reasonable steps to safeguard investments made by foreign nationals protected by the relevant BIT or FTA. The full protection and security standard requires vigilance and, in some cases, protective state action. Traditionally, this standard has been understood to apply only in the context of physical threats to investments (owing to labour unrest, civil conflict, etc.); however, some cases have held that this obligation also extends to legal security.

**Expropriation**

Foreign investments typically enjoy protection against expropriation. The United States may only expropriate a covered investment if the expropriation:

- is for a public purpose;
- is carried out in a non-discriminatory manner;
- is performed in accordance with due process of law; and
- prompt, adequate and effective compensation is provided to the investor.

**National treatment and most-favoured nation treatment**

Foreign investments generally must not receive less favourable treatment than domestic US investments or investments made by investors from any third country.

In addition to the aforementioned core protections, US BITs and FTAs also typically guarantee the free transfer of funds and protect investors against performance requirements, such as export quotas or sales restrictions.

When the United States violates the standards described above (or when an action attributable to the government violates these standards), a covered investor typically may pursue investor-state arbitration before a neutral international arbitral tribunal. The relevant treaty will establish a menu of possible institutions and the investor will select the institution that best suits its objectives. The key institution is the International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank Group, although this requires both parties to the BIT or FTA to be a party to the ICSID Convention. Another frequent alternative is arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL), but this has the disadvantage of being an ad hoc arbitration with no institutional support.

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51 See, for example, Model BIT Article 5; NAFTA Article 1105; CAFTA Article 10.5.
52 See, for example, Model BIT Article 6; NAFTA Article 1110.
53 See, for example, Model BIT Articles 3 and 4; NAFTA Articles 1102 and 1103.
54 See, for example, Model BIT Article 7; NAFTA Article 1109.
55 See, for example, Model BIT Article 8; NAFTA Article 1106.
56 See, for example, Model BIT Article 24(3); NAFTA Article 1120(1).
57 The United States is a party, with 153 other countries (as at July 2019). There are 163 signatories to the ICSID Convention.
**Who can invoke these investor protections?**

Two of the basic requirements that an investor must fulfil to invoke the treaty protections described above are that it made an ‘investment’ as defined in the applicable instrument, and that it is a national of a country covered by a BIT or FTA to which the United States is a party. BITs and FTAs typically include expansive definitions of the term ‘investment’. For instance, the US Model BIT defines ‘investment’ as ‘every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’. 58 US FTAs also define ‘investment’ in broad terms. 59 An investment does not usually include a simple contract for the sale of goods or monies invested in the hope of making an investment (such as expenses incurred to participate in a public bid).

In addition, the investor must be a national of a country that has a ratified treaty with the United States that includes investment protections. As at the date of writing, the United States is a signatory to 47 BITs, 39 of which are in force, and two of which have been terminated but benefit from a ‘sunset clause’. 60 Investors from these countries can pursue investor–state arbitration if the United States violates the guarantees and standards in the relevant BIT. Frequently, arbitration case law has permitted investors to structure their investments through protected states in the event that the state of origin does not benefit from such protection. However, this will depend heavily on the language of the treaty under which protection is sought.

In addition to the BIT-protected countries, the United States has also signed and ratified bilateral FTAs with Australia, Bahrain, Chile, Colombia, Israel, Jordan, Morocco, Oman, Panama, Peru, Singapore and South Korea. Most of these bilateral FTAs contain investment protection provisions very similar to those described earlier, but a few exceptions do exist. Nationals of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua receive investment protection in the United States based on the Dominican Republic-Central America Free Trade Agreement (CAFTA). Finally, the North America Free Trade Agreement (NAFTA) protects Mexican and Canadian investments in the United States. NAFTA will be replaced by the new Agreement between the United States of America, the United Mexican States and Canada (the USMCA), which was signed on 30 November 2018 and has not entered into force as of July 2019. The USMCA will leave scope for ‘legacy’ claims under NAFTA for a period of three years. 61 The investment protections afforded to investors under the USMCA are substantially more restrictive than under NAFTA or a typical BIT.

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58 Model BIT Article 1.
The future of investment protection in the United States

The United States has been negotiating new FTAs and BITs that would extend inbound investment protection to investors from additional countries. However, uncertainty surrounds the status of some of these agreements because of the ‘Trump effect’.

The first executive action President Donald J Trump took was to permanently withdraw the United States from the Trans-Pacific Partnership (TPP). Following the conclusion of negotiations in October 2015, the TPP was signed on 4 February 2016 by ministers from all 12 Member States: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The TPP provided for investor protections and investor–state arbitration. Once the United States withdrew, the remaining 11 TPP signatories went forward with a new version of the treaty called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which was signed by the 11 Member States on 8 March 2018. In April 2018, President Trump announced that the United States was considering rejoining the TPP. However, no further action has been taken by the United States.

The discussions regarding the Trans-Atlantic Trade and Investment Partnership (T-TIP) between the United States and the European Union began in July 2013. Fifteen rounds of negotiations have taken place since then, and the most recent update on the status of negotiations was released in January 2017. The T-TIP aimed to protect inbound investment into the United States from the European Union and vice versa, which would have constituted another important expansion of the US foreign investment protection regime. It had aimed to include reciprocal investment protection provisions, although the inclusion of investor–state dispute settlement provisions has been the subject of considerable

64 The United States has signed and ratified FTAs with six of the TPP countries: Australia, Canada, Chile, Mexico, Peru and Singapore.
debate.\textsuperscript{70} In April 2019, the European Union acknowledged that negotiations for the T-TIP were now ‘obsolete’.\textsuperscript{71} The European Union has proposed a multilateral investment court, rejecting traditional investor–state dispute system practices.

T-TIP negotiations have been more extensive than expected, in part because the implications of the United Kingdom’s referendum vote to leave the European Union have cast doubt on the future progress of the T-TIP.\textsuperscript{72} In addition, while the Trump administration has not signalled any intention to formally withdraw, the T-TIP negotiations have been frozen since President Trump took office. Even if a T-TIP agreement could be negotiated, securing ratification of any such agreement is far from certain.

On 29 April 2017, President Trump ordered a comprehensive review of all US trade and investment agreements.\textsuperscript{73} This process was supposed to be completed within 180 days but, more than two years later, no result of the comprehensive review has been made public.\textsuperscript{74} The United States has only publicly announced the renegotiation of NAFTA and the United States-Korea Free Trade Agreement (KORUS).\textsuperscript{75} The Trump administration thus continues to keep the world guessing what the future holds for investment protection in the United States.

\section*{VI OTHER STRATEGIC CONSIDERATIONS}

\subsection*{Compliance considerations}

US companies can be subject to private lawsuits brought by customers, competitors, employees or shareholders alleging that the company has violated the law, their rights or both. This is in addition to any potential governmental action. Many US laws reward whistle-blowers (i.e., persons who publicly report violations by companies). Therefore, it is important to have resources within the US organisation, including both personnel and processes, to support and ensure compliance with the myriad applicable state and federal regulations. In particular, publicly traded companies in the United States are subject to significant public disclosure and accounting requirements, and these companies must have effective compliance programmes to avoid costly government and private shareholder litigation. Many US companies have compliance divisions charged with ensuring that the company complies with, inter alia, export control, securities, antitrust, anti-bribery and employment laws.

\begin{thebibliography}{99}
\bibitem{TTIP} See, for example, ‘TTIP and the arbitration clause’ (last updated 26 April 2016), available at www.euractiv.com/section/trade-society/special_report/fttip-and-the-arbitration-clause/.
\end{thebibliography}
Additionally, once a company has operations in the United States, its foreign operations may be subject to spillover effects of US regulations. For example, US sanctions and bribery laws prohibit US persons and companies from engaging in business with countries subject to US sanctions, and bribery (broadly defined) of foreign government officials. Under these laws, US employees and operations of a foreign corporation cannot be involved even tangentially with such activities; doing so could subject foreign operations also involved with such conduct to the jurisdiction of US prosecutors.

ii Getting target stakeholders on board

How stakeholders, such as shareholders and employees of a US target, will respond to foreign investment is a critical strategic consideration for foreign investors. Key issues to consider from the outset are how stakeholders will view the transaction and how rival bidders might exploit this when the target board is assessing the transaction. Apart from any concerns linked to national security, the receptiveness of the target and its stakeholders (especially board members) will be particularly key if the foreign investor is from a jurisdiction that is currently experiencing difficulties in its relationship with the United States or that has a reputation for failing to comply with US regulations, including anti-bribery laws. As referenced above, parties may choose to employ a public relations or government relations firm, or both, to promote the benefits of the transaction, identify potential stakeholder concerns, and develop messaging targeted at alleviating those concerns. Certain efforts may fall within the statutory definition of 'lobbying' and are governed by various statutes. The Lobbying Disclosure Act is the primary lobbying statute, which requires registration and reports. Under the statute, registration and reports are made public.\(^{76}\)

A particularly key stakeholder group is the target's employees. Unlike in many jurisdictions, employment of workers in the United States is usually 'at will', meaning that there are no contractually stipulated notice requirements when terminating employment and no law prevents the dismissal of employees upon the sale of a business (other than in relation to certain mass lay-offs or plant closures, for which special rules and notice requirements apply to any buyer).\(^{77}\) However, as a relationship and reputational issue, any investor (and particularly a foreign investor who may be more likely to give rise to concerns about the future relocation of the target's operations) may want to communicate with employees to minimise disruption to the target's business. There are no statutory requirements to inform employees of a pending sale or to obtain their consent. However, any buyer should be aware that if any of the employees are unionised, the seller could be obliged to inform the union of the intended transaction and negotiate the treatment of employees by the buyer going forward, and may require the buyer to assume any collective bargaining agreement.

iii Rival bids

Foreign investors may be perceived as offering less deal certainty or increased complexity, cost or time to completion, which could be exploited by rival bidders. If the investor is from a jurisdiction from which it is difficult to extract cash or other assets or that is experiencing financial instability, or if the investing entity has a corporate form or management structure with which the seller or other interested parties are less familiar, the investor may be required

\(^{76}\) Lobbying Disclosure Act, 2 USC Section 1605.

\(^{77}\) See, for example, Worker Adjustment and Retraining Notification Act, 29 USC Section 2101 et seq.
to provide extra comfort as to its solvency and ability to pay any consideration in a timely manner. This may result in a foreign investor having to commit to paying a certain percentage of the consideration up front as a ‘goodwill deposit’ or place a certain amount of the purchase price in escrow. Guarantees or equity or debt commitment letters from credible financing sources may also be required. Similarly, more diligence will be required in respect of any financial institutions without a significant presence in the United States providing third-party financing. The need for additional consents (e.g., in the home country with respect to outbound investment) and for external advisers to fill any knowledge gaps regarding the US market will represent additional cost to any foreign investor, and require more forward planning and commitment of internal resources.

iv Invest protection clauses

Parties to any contract in the United States enjoy the ultimate freedom of contract. Therefore, whether the foreign investor wants to acquire a US entity or to partner with other investors in a US joint venture, it can seek contractual protections, in particular if the investor is less familiar with the regulatory and economic environment in the United States. For example, in a sale and purchase agreement, an investor can seek the right to abandon the purchase and walk away if there is a ‘material adverse change’ in the financial condition or operations of the target (although this right is notoriously hard to invoke regardless of the domicile of the party seeking to enforce it). An investor may also agree a ‘drop-dead date’ so that all obligations of both the buyer and seller fall away if the regulatory approvals and other conditions to which completion of the transaction are subject, are not achieved within a certain time period. Similarly, investors can gain comfort in terms of their maximum liability for abandoning a transaction by agreeing a ‘break fee’, allowing the buyer to walk away from the purchase, subject to certain conditions, for an agreed sum, although the caps on such fees tend to be lower in the United States than in other jurisdictions.

VII CURRENT DEVELOPMENTS

According to the Foreign Direct Investment Confidence Index calculated by AT Kearney, the United States was ranked at number one in 2018 for the sixth consecutive year.78 Most investment in the United States still comes from Canada and from allies in Europe.79 However, CFIUS reviewed more investments from China than from any other jurisdiction during 2013 to 2015,80 and certain Chinese companies, such as Lenovo, have now established themselves with multiple acquisitions in the US market. Nonetheless, legislation passed the US Congress in 2018 to expand significantly the scope of the US national security review process.

For foreign investors seeking to invest in the United States, especially those from China and other jurisdictions who are not as familiar to US politicians, regulators, employees and consumers, there are a few key points to consider. First, the breadth of national security concerns is growing, as is the aggressive application of the US national security review process. Thus, foreign investors need to consider as broadly as possible the potential national security implications of their US acquisitions or investments. For example, several deals have been effectively blocked or required a remedy because the US target business had substantial

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78 See www.at Kearney.com/gbpc/foreign-direct-investment-confidence-index.
79 See footnote 6.
80 See footnote 19.
databases of personally identifiable information about US citizens. Second, CFIUS is taking action based on more attenuated risks, such as those arising from the ordinary course commercial relationships with non-trusted partners. Third, the number of transactions subject to in-depth review under the US national security process is growing exponentially. Finally, the United States is increasing the aggressiveness of enforcement of its sanctions and anti-bribery laws. Compliance with those laws is essential for doing business in the United States.

Therefore, foreign investors acquiring interests in US businesses that might trigger such a review need to plan for a longer review period and a strategic response that includes potential outreach to political and regulatory constituencies. Advance planning and thorough diligence can be critical to effective deal management and reducing the risk of an adverse investment review.
Chapter 17

VIETNAM

Nguyen Truc Hien and Nguyen Anh Hao

I INTRODUCTION

Foreign investment continues to play a significant part in Vietnam’s advancing economy. Since the government’s introduction of investment reform, the Doi Moi policy, in 1986, Vietnam’s economy has continued to grow.  

Although rising inflation, over-extension of credit and poor supervision of public investments has constrained economic growth in the past few years, recent policies enacted by the government to combat these threats are starting to show promise. In 2017, Vietnam’s gross domestic product (GDP) achieved the estimated growth of 6.8 per cent. GDP in 2018 increased to 7.08 per cent, the highest growth since 2011. Despite the signs of slowing down, GDP in 2019 is expected to reach 6.8 percent.  

A further indication of a return to growth and economic expansion is that Vietnam’s consumer price index in 2018 rose by 3.54 per cent compared with the previous year.

In 2018, the total foreign direct investment in Vietnam was US$35.46 billion, equivalent to 98.8 per cent of the previous year’s figure. In terms of investment by country, it was recorded that 112 countries and territories were investing in Vietnam in 2018; Japan ranked first with 24.2 per cent, South Korea ranked second with 20.3 per cent, and Singapore ranked third with 14.2 per cent.

In 2018, export of the foreign investment sector (including crude oil) was US$175.5 billion, an increase of 12.9 per cent compared with the previous year and accounting for nearly 71.7 per cent of export turnover. Export excluding crude oil was US$173.2 billion, an increase of 13.6 per cent compared with the previous year and accounting for 70.7 per cent of export turnover.  

Meanwhile, the United States was Vietnam’s largest export destination with a turnover of US$34.772 billion; the United States was followed by Hong Kong with a turnover of US$6.416 billion, Germany with a turnover of US$3.048 billion and India with a turnover of US$2.395 billion.
The Trans-Pacific Partnership (TPP) treaty was rejected by the United States in 2016, but in 2017, Vietnam entered into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (another version of the TPP, which excludes the United States). The 14th National Assembly of Vietnam passed a resolution approving the CPTPP and its related documents on 12 November 2018. CPTPP took effect in Vietnam as of 14 January 2019. In addition, the EU–Vietnam Free Trade Agreement (EVFTA) and the EU–Vietnam Investment Protection Agreement (EVIPA) were officially signed in Hanoi on 30 June 2019. The European Union (EU) and Vietnam have not announced the effective date of the EVFTA and EVIPA. When the EVFTA comes into effect, more than 85.6 per cent of tariff lines imposed on Vietnamese products equivalent to 70.3 per cent of Vietnam’s export turnover to the EU will be eliminated, while the remainder will be reduced gradually and ultimately abolished over a period of up to 10 years. Likewise, Vietnam commits to remove 48.5 per cent of import tariff on goods from the EU or 64.5 percent of the bloc’s export turnover. With the promising expectations under the EVFTA and EVIPA, Vietnam is still looking strong for international trade going forward.

II FOREIGN INVESTMENT REGIME

The existing investment regime in Vietnam came into effect on 1 July 2015 and is comprised of a Law on Enterprises (LOE) and a Law on Investment (LOI), which regulate both domestic and foreign investors, for the establishment and operation of corporations and investment in projects.

A foreign investor can invest in the Vietnamese market in several ways, including:

a. establishing a new enterprise (either a wholly foreign-owned enterprise (WFOE) or a joint venture company (JVC) between foreign investors (FIs) and local investors (LIs));

b. making capital contributions to or purchasing shares or equity capital in companies in Vietnam;

c. investing through a business cooperation contract (BCC) between FIs and LIs; and

d. investing in a form of a private-public partnership (PPP), using build-operate-transfer, build-transfer-operate or build-transfer contracts, mainly for infrastructure projects or provision of public services.

As an alternative to establishing or investing in Vietnamese enterprises, foreign business entities may set up a branch or a representative office (RO) in Vietnam, which must be licensed by the relevant authorities.

An RO may be established as a dependent unit of the foreign parent company to seek and promote commercial opportunities for the parent company. Many foreign investors opt to establish ROs to explore the local market before deciding to invest in Vietnam. An RO cannot directly conduct profit-generating activities in Vietnam.

A branch may only be established by a foreign business entity in specific sectors, such as banking and insurance. A branch can directly conduct profit-generating activities in Vietnam.

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Under the LOI, FIs may invest in all sectors not prohibited by law. Areas prohibited by law include:

a. trading of drugs prescribed in an appendix to the LOI;
b. trading of chemicals or minerals prescribed in an appendix to the LOI;
c. trading of specimens of wild fauna or flora as set forth in Schedule 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora; of specimens of species of endangered and rare wild fauna or flora as prescribed in an appendix to the LOI;
d. business activities dealing with prostitution;
e. purchase or sale of human beings, human tissue or parts of the human body;
f. business activities relating to human asexual reproduction; and
g. trading of fireworks.

i. Conditional sectors
As with all countries, Vietnam reserves its sovereign right to restrict investment in sensitive fields by setting conditions for ‘conditional sectors’ that investment projects must satisfy for the purposes of national defence and security, social order and safety, social ethics and community health. The LOI includes a comprehensive list of conditional sectors.

FIs are also subject to conditions in relation to foreign ownership limitation, the form of investment and requirements of Vietnamese partners, operational contents and other conditions as stipulated in the international treaties to which Vietnam is a party. The basic conditions are found in the Schedule of Specific Commitments in Services contained in Vietnam’s World Trade Organisation accession package (the WTO Commitments). More favourable conditions for FIs from ASEAN countries may be found within the ASEAN Economic Community frameworks.

III. TYPICAL TRANSACTION STRUCTURES

i. Incorporation forms
Under the LOE, the following are the four main forms of corporate structure:

a. limited liability company (LLC);
b. joint-stock company (JSC);
c. incorporated partnership; and
d. private enterprise (i.e., sole proprietorship).

All these structures are known as ‘enterprises’.

An LLC or a JSC is the most appropriate structure for foreign investors who want to set up a JVC or WFOE.

Advantages and disadvantages of LLCs and JSCs
When choosing a corporate structure, investors should be aware that an LLC and a JSC both have advantages and disadvantages.

One advantage of a JSC is that the company is permitted to issue shares to raise capital. JSCs can also issue preference shares to alter quorum and voting requirements. Purchasing minor shares in existing JSCs may also be preferable for foreign investors who are interested in testing the market before fully establishing themselves in Vietnam.

The single-member LLC structure seems to be preferred only when it is wholly owned by a foreign investor. Multi-member LLCs are still a preferred option for JVCs.
Joint venture with a local partner
In most cases, when possible, an FI will be better protected and have more control over the investment if it invests via a WFOE. However, there are certain scenarios in which it may be best for an FI to consider investing via a joint venture with a local partner.

Specific land requirements
A joint venture may be especially applicable in investments where real estate plays a significant part in the project (e.g., property development, hotels or resorts) and the land-use rights are held by a Vietnamese party. The Vietnamese party may not have the financial resources to undertake a project but may be able to contribute the land-use rights to the JVC. Many projects have begun in this form, with the FIs later buying out the Vietnamese parties to operate the projects as the sole owners.

Limits on foreign investment
Despite WTO provisions opening many sectors to foreign investment, there are still a number in which foreign investment will not be permitted unless it is in the form of a joint venture with a Vietnamese partner. The level of foreign investment in such projects varies sector by sector. For example, in advertising, an FI may theoretically hold any amount that is less than 100 per cent of the investment, but for container-handling services, the foreign ownership may not exceed 50 per cent. In such investments, a local partner will be required and the company may be structured in a way to maximise the foreign control. This structuring would need to involve establishing the company as a JSC and issuing preference shares to ensure voting control or reserving certain matters for foreign investor consent.

Sensitive sector or conditional sector
Even when 100 per cent foreign investment is permitted in a certain sector, if it is a conditional or sensitive sector, then it may often be more expedient for the local partner to first establish a domestic company, obtain all the necessary operational licences, and then allow the FI to invest in the company up to the level of foreign investment permitted by law.

Strategic investment
While not a true joint venture, this form of investment, in both the private and state-owned enterprise sector, provides a route for FIs with experience in the sector (and most often competitors of the target enterprise) to invest up to a threshold maximum percentage (for banks, the maximum is currently not more than 20 per cent for one foreign strategic investor and not more than 30 per cent for all foreign strategic investors combined). The levels of strategic investment vary from sector to sector. Typically, this type of investment offers a seat on the board and other voting or strategic privileges.

Corporate governance considerations
Shareholding limit for foreigners
A foreign-ownership limit in an enterprise is not provided for in the LOE but is in the WTO Commitments. The general 49 per cent cap on foreign ownership in public companies (whether listed or unlisted) was removed as of September 2015, with exceptions for companies
in business sectors that are subject to conditions for FIs (as discussed in Section II), unless domestic laws provide otherwise. Foreign ownership as stipulated in the international treaties to which Vietnam is a party, or in domestic laws, also applies to public companies.

**Legal representatives**

Subject to the charter of the company, JSCs and LLCs may have more than one legal representative, one of whom must reside in Vietnam.

However, if a company has only one legal representative, he or she must reside in Vietnam, and when he or she leaves Vietnam, he or she must authorise another person in writing to perform the rights and obligations of the legal representative, whose authorisation will be effective until the legal representative returns or authorises another person to replace him or her. A legal representative must be replaced if he or she leaves Vietnam for more than 30 days without authorising another person to perform his or her rights and obligations as legal representative.

**Related-party transactions**

In general, contracts or transactions between a company and any of its management team, a member (LLC) or a significant shareholder (holding more than 10 per cent) (JSC) or their related persons must be approved by members’ council (multi-member LLC), by the relevant corporate body as provided in the charter (single-member LLC) or the shareholders’ general meetings or board of management (JSC).

The transaction will be null and void if the approval is not given as described above.

### Mergers and acquisitions

There have been very few mergers in Vietnam; most transactions are either acquisitions of assets or shares in a company (including all the shares or interest in the company, when permitted). The provisions on mergers and acquisitions are set out in the LOE, but there is very little detail and therefore not much guidance for the actual process. Supplementary legislation was meant to be developed but has yet to be issued. This leaves more room for licensing authorities to operate very discretely and on a case-by-case basis, often resulting in additional delay and documentation.

**Acquisition of a company**

Acquiring interests or shares in a company first requires a consideration of the lines in which the company is licensed to conduct business. If there are business lines that are restricted for foreign investment, then the company may need to restructure first to eliminate or carve out certain business lines from the target company, or the FI may need to adjust the investment strategy to acquire a smaller percentage of the company. In either case, rigorous legal and financial due diligence checks are often necessary, especially because Vietnam has little information that is available in public databases. The issues that most often arise in such a transaction involve labour, land-use rights, loan or credit obligations, other contracts, competition or anti-monopoly, and tax implications. Once the issues are identified, sellers are often required either to correct the problems or to provide necessary indemnities and warranties to the foreign buyer.
**Acquisition of assets**

Acquisition of fixed assets by an FI is not possible in Vietnam. An FI would still have to establish a company in Vietnam with a licensed project and then acquire assets as part of the business plan for that company. As an investment or expansion strategy, acquiring assets is viewed as less risky than acquiring interests in a company as FIs may avoid succeeding legacy and hidden liabilities of the targeted company. However, as mentioned, this is a two-step process and requires first establishing a company in Vietnam, so this may not be the most efficient route for a first-time investor in Vietnam. If the asset is associated with a business that requires an operation licence, the investors will need to consider whether the onerous process of obtaining an operation licence outweighs the issues associated with company acquisition.

**IV REVIEW PROCEDURE**

i  **Threshold for review**

Investment registration procedures for issuance of an investment registration certificate (IRC) apply to all investment projects of FIs or semi-FIs (see Section VII) either made through establishing new enterprises or entering into contracts such as BCCs. Investment registration procedures also apply to semi-FIs who have new investment projects. FIs and semi-FIs who wish to establish a new company for a new investment project will apply for an enterprise registration certificate (ERC) after obtaining an IRC. Certain projects require formal review for issuance of in-principle approval by the National Assembly, the Prime Minister or provincial-level government, depending on the size and the sector of the investment projects.

ii  **Review time frame**

The time frame for investment registration procedures is 15 working days from submission of the completed application or, if a formal review is required, then five working days from the date of the in-principle approval of the relevant authority. A time frame of 35 working days is provided for formal review by provincial-level government while no specific time frame is provided for formal review when in-principle approval is required from the National Assembly or the Prime Minister.

In practice, it normally takes much longer. The review process can encounter delays for several reasons, including the inability of the licensing authorities to review the large volume of applications, the complexity of the projects and a lack of guidelines on certain businesses or transactional structures. The average practical time is two to three months, but may be up to six to nine months or longer for complex projects.

iii  **Test for clearance**

The fundamental test used during the review process is verifying the following:

*a* satisfaction of investment conditions for the FI (if any);

*b* conformity of the investment projects with the master plan for socio-economic development and development planning for the relevant business sectors, land-use zoning, socio-economic impacts and efficiency of the project;

*c* satisfaction of conditions for entitlement to investment incentives (if any);

*d* land-use demand for the project, conditions for land grant or lease and the need for conversion of the land-use purpose; and

*e* technological solutions (if applicable).
Besides the above tests, during the investment registration or project review, the licensing authorities also verify the satisfaction of conditions stipulated by the relevant laws for projects in conditional sectors.

Conditions vary from sector to sector, subject to the laws and regulations governing the relevant sectors. Generally, conditions shall be expressed in the following forms.

**Operation licence**

An operation licence is required after the ERC is issued and before commencement of relevant business in Vietnam. A licence will be required by a business having a significant impact on social or national economic interests, such as education, banking, insurance, securities, hospital and clinics, newspapers and television.

**Certificate of satisfaction of business conditions**

This certificate is for the purpose of ensuring that an enterprise already satisfies the compulsory requirement for its products or services for the interests of customers. For example, a food manufacturer or trader may be required to have a certificate of satisfaction of conditions for food safety.

**Practising certificate**

Practising certificates are required in the professional business sectors, such as the legal profession, aviation, education, construction (architecture and engineering), hospitals and clinics, accounting and auditing. The head of a company or key staff, as the case may be, of a company doing business in an area that requires a practising certificate would need to hold the required practising certificate. The certificate must be issued by the relevant Vietnamese authority. Practising certificates issued overseas may not be accepted in Vietnam, unless otherwise provided in Vietnamese laws or in an international treaty to which Vietnam is a signatory.

**Certificate of professional liability insurance**

To protect customers’ interests, certain types of insurance are compulsory for certain business sectors, such as professional indemnity insurance for legal consultancy activities.

**Legal capital**

Legal capital means the minimum amount of capital required by law for the establishment of an enterprise. Legal capital is required in the banking and financial, real estate business, transportation and telecommunications sectors, among others. Charter capital (i.e., registered or authorised capital) of the enterprises subject to legal capital must be equal to or higher than legal capital.

**Other required approvals of competent authorities**

In some business sectors, further approvals may be required, such as approval for an environmental impact assessment report for a project in which there is a potential risk of causing adverse effects on the environment, or a construction permit for a project involving construction, approval for a plan relating to chemical-related incident prevention and responsive measures for a project relating to production and trading of certain chemicals.
Other requirements

In certain circumstances, an enterprise need not obtain any approval from the relevant authority but must satisfy conditions before conducting the relevant business, such as the requirements relating to infrastructure and technical facilities, personnel capability, etc.

Vietnam does not have an explicit test or official definition of ‘national interest’ or ‘public interest’ in the review process. However, the LOI sets forth provisions for the prohibition of certain types of projects, which could be considered a test for national or public interest.

Vietnam does not have an explicit ‘net benefits’ test either. However, during the review process, investors are required to provide technical and economic statements, which include projections regarding the number of jobs created and the estimated amount of tax. Weak projections may be questioned. The licensing authorities are reluctant to grant extensions for expiring projects that are not profitable unless the investors can satisfactorily explain the reasons and have a plan to become profitable.

iv Availability of appeal or other remedies

FIs who do not agree with the decision rejecting their IRC application may file complaints according to the procedures for making a complaint against an ‘administrative decision’ in the Law on Complaints.

A complainant has the option to file the complaint directly to the person issuing the administrative decision or to the government office of that person, or to file a petition at the Administrative Court.

If the first option is selected and the complainant is not satisfied with the settlement of the first complaint, or does not receive the settlement decision within the stipulated time, the complainant may file a second complaint to the head of the supervising office (one level higher) or file a petition at the Administrative Court. If settlement of the second complaint is not satisfactory, the complainant may file a petition at the Administrative Court.

The second complaint is not applicable if the person issuing the administrative decision at issue is a minister or the head of a ministry-ranking office. The complainant may file a petition at the Administrative Court.

If the administrative decision is issued by the chairman of a provincial People’s Committee (i.e., provincial-level government), the minister concerned will be the one who receives the second complaint if the complainant elects to file a second complaint. For investment activities, the Minister of Planning and Investment will receive the second complaint.

Alternatively, FIs may opt to rely on the right provided under Article 14.2 of the LOI, which allows investors in dispute with Vietnamese state authorities regarding investment activities in Vietnam to refer the dispute to the Vietnamese courts or to arbitration.

The laws, however, do not have further guidelines on settlement of a dispute between FIs and state authorities by arbitration. Therefore, without agreement on arbitration in the specific agreements between the FIs and the state authority, or in international treaties to which Vietnam is a party, FIs will not be able to refer the dispute to arbitration for settlement.

v Practice of authorities engaging in dialogue and cooperation with other jurisdictions

It is not common practice in Vietnam for the authorities to engage in dialogue and cooperation with other jurisdictions regarding their investment application review procedures.
However, FIs may invoke the assistance of their consulate in Vietnam to speak to the Vietnam licensing authority to facilitate investment activities based on investors’ rights provided for in relevant trade agreements or investment agreements.

vi The rights and standing of third parties in the review process

During the review process, the licensing authority may be required to consult different government agencies (at the provincial level or ministry level) for opinions on the conformity of an investment project with different laws of Vietnam. However, involving the public in the review process for investment project registration is not specifically provided for in the legislation (i.e., the licensing authorities are not required to seek opinion from the public during project registration or review). Nevertheless, if investment projects involve the use of land currently being used by other users or occupants, arrangements must be made with the users or occupants to provide compensation to them for having to surrender the land back to the government for leasing to the FIs. These arrangements should be completed before project registration or review, otherwise failure to complete the land acquisition procedures may result in huge delays or even failure of the investment project.

V FOREIGN INVESTOR PROTECTION

i Local law on investment protection

FIs are given similar investment protections to those available to LIs, such as protection of assets and properties, investment capital, income and other lawful rights and interests of investors.

The LOI affirms that investment capital and the lawful properties or assets of investors will not be expropriated by administrative measures. However, the law allows expropriation for the purpose of national defence or security, or other eligible national interest, with the provision that the investors are entitled to compensation at the market price for their investment, properties or assets determined at the time of the expropriation decision. The compensation to FIs will be paid in freely convertible currencies and the FIs have the right to remit the compensation out of Vietnam.

ii Bilateral, regional or other multilateral foreign investment treaties or other international trade agreements dealing with protection of foreign investment

Vietnam has more than 90 bilateral trade agreements (BTAs) and nearly 60 bilateral investment promotion and protection agreements (IAs). It is also a member of WTO agreements, including without limitation the General Agreement on Trade in Services and the Agreement on Trade-Related Investment Measures. In most cases, investment protections are provided for in IAs, with the exception of the United States, for which the investment protections are stated in the BTA.

Vietnam offers the following protections to FIs under its IAs (or the BTA, in the case of the United States):

a Investment promotion: in most IAs, parties undertake that they shall encourage and create favourable conditions for investors of the other party to make an investment in their territory and shall admit such investments in accordance with their laws and regulations. As a result, Vietnam and its counterpart countries reserve their sovereign right to restrict or set conditions for foreign investment according to their local laws.
b Fair and equitable treatment and full protection and security: in most IAs, parties must ensure that investments by investors of the other party be accorded fair and equitable treatment, and full protection and security. In several IAs, however, these protections are not elaborated further, and in others they are elaborated differently. In many IAs, these protections are further elaborated to the extent that a party shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal of the covered investment.

c Expropriation: most IAs adopt the principle that parties shall not take any measures of expropriation, nationalisation or any dispossession, having an effect equivalent to nationalisation or expropriation against the investment by investors of the other party, except when the measures are taken for the public or national interest in accordance with its laws and regulations, the measures are not discriminatory, and the measures are accompanied by provisions for the payment of prompt, adequate and effective indemnity.

d Compensation for losses: most IAs state that where investments by investors of either party suffer losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other party, the investors shall be accorded treatment by the latter party, as regards restitution, indemnification, compensation or other settlements, not less favourable than that which the latter party accords to its own investors or to investors of any third state.

e Free transfer of funds: most IAs provide that parties shall allow without delay the investors of the other party the transfer of funds in connection with their investments and profits in freely convertible currency, including, without limitation, interests, dividends, revenues, profits and other returns, repayments of foreign loan agreements related to an investment, the capital or proceeds from the total or partial sale or liquidation of an investment, and the proceeds from the settlement of a dispute and compensations and indemnities in accordance with the present agreement.

f Most favoured nation (MFN) treatment: most IAs provide that parties shall accord to the investments by investors of the other party a treatment that is no less favourable than that accorded to the investments by investors of any third country with the exceptions of special advantages to investors of any third country by virtue of an agreement establishing a free trade area, a customs union, a common market, an economic union or any other form of regional economic organisation or any international agreement intended to facilitate frontier trade to which the contracting party belongs at the present time or may belong in the future or through the provisions of an agreement related wholly or mainly to taxation. The MFN treatment, however, does not apply to every form of investment protection in every IA. In particular, several IAs require fair and equitable treatment with the investment by investors of any third country but limit the application to management, maintenance, use, enjoyment or disposal of investments without extension to the establishment, acquisition and expansion of investments.

g National treatment (NT): several IAs require a party to accord to investors of the other party no less favourable treatment than the treatment accorded to its investors. However, this NT is limited to certain areas only, such as expropriation, compensation for losses, full protection and security. NT rarely applies to investment promotion. The IA between Vietnam and Japan is one of the rare cases in which Vietnam and Japan commit to accord the investors of the other country treatment no less favourable than the treatment they accord in like circumstances their own investors in respect of establishment, acquisition and expansion of investment (with exceptions in certain sectors).
Investors from other countries may not rely on MFN treatment to claim the same treatment that Vietnam offers to Japan without the MFN treatment being offered exactly for the ‘establishment, acquisition and expansion of investment’ in their relevant IAs.

iii  Complaint and judicial review against expropriation decisions
Investors who do not agree with an expropriation decision or a compensation determination (the administrative decision) by a government agency may file a complaint in accordance with the Law on Complaints. (See Section IV for more on complaints procedures.)

To date, there is no public report of any complaint by FIs owing to expropriation. Vietnam effectively avoids expropriation by administrative measures.

VI  OTHER STRATEGIC CONSIDERATIONS
Vietnam’s emerging economy and developing legal system means more attention needs to be paid to ensuring the efficiency and certainty of transactions. Some important considerations that often arise are discussed below.

i  Baby licences
In addition to an IRC, investments in many sectors and industries in Vietnam will require additional operational licences (see Section IV for the additional requirements that investors need to satisfy after obtaining an IRC). Obtaining ‘baby licences’ (as they are referred to colloquially) often results in delays because licensing authorities have more discretion in approving these licences. An investor should be wholly aware of the baby licences needed for a project in Vietnam. If joining a local investor, it is usually best for the local investor to secure the baby licences first to avoid any unnecessary delay or complication.

ii  Anti-competition
In June 2018, Vietnam enacted a new Law on Competition, which took effect on 1 July 2019. In general, the new law is more stringent than the old law (e.g., expending lists of prohibited restrictive agreements, narrowing list of exemption cases, etc.). The scope of the new law is broader than the scope of the old law. The new law applies to any practices, whether by Vietnamese or foreign individuals or entities which have or may have a competition restraining impact on Vietnam’s market.

In addition, the new law removes the threshold of filing and authorises the government to set thresholds based on the socio-economic conditions from time to time. Instead, besides two options of allowing or prohibiting the economic concentration transaction, the new law adds a new option of allowing the economic concentration transaction with conditions.

iii  Choice of law
It is a common request by FIs to have contracts governed by a foreign governing law when possible. However, even when such a choice of law is legally permissible, it may not be the best practice. First, if the resolving jurisdiction is a foreign court, Vietnam will not recognise a foreign court judgment unless there is a specific bilateral treaty requiring it to do so or on a reciprocal basis. Second, if the resolving jurisdiction is a foreign arbitral body, then the arbitration award is enforceable in Vietnam if it does not violate the basic principles of Vietnamese law. The foreign arbitration awards need to be recognised by the competent court
for enforcement in Vietnam. Similarly, if the Vietnamese courts are resolving the dispute under a foreign law, as required by Vietnamese law, or international treaty to which Vietnam is a party, the foreign law principles must not be contrary to Vietnamese law. In such a situation, the best practice is often to use Vietnamese law as the governing law and then, perhaps, a foreign jurisdiction for arbitration, thus avoiding the public policy exception to enforcement of arbitral awards.

iv  Legal due diligence

It is important not to underestimate the value of a proper legal due diligence process in a developing jurisdiction like Vietnam. There are very few publicly accessible databases through which to research a company in Vietnam. Issues are usually discovered only in the context of an extensive due diligence exercise. There are many rules and regulations in Vietnam and a company may inadvertently find itself out of compliance. Conducting a proper legal due diligence process will better ensure that issues are spotted and dealt with at the earliest possible stages of a transaction.

v  Land use

Many projects in Vietnam involve land use. Unlike in most Western jurisdictions, there is no title to the land itself; there are only land-use rights, which may be held and transferred, subject to satisfying the requisite conditions. Making sure that the required land is zoned for the correct purpose and has the necessary documentation for the proper land-use rights, has been properly cleared and has construction permits (if necessary) are important considerations that should be handled in the preliminary stages of a transaction.

VII  CURRENT DEVELOPMENTS

The current LOI and LOE took effect from 1 July 2015 and were intended to address certain gaps in the previous laws and improve the quality and efficiency of the investment climate. The key developments and changes to the LOI and LOE that affect foreign investment as discussed above are summarised below.

i  Definition of investment

In the LOI, the definition of ‘investment’ was changed for better clarity to include investors acting to inject capital to establish new enterprises, and to make a capital contribution to or purchase equity interest, shares of existing enterprises or to carry out investment projects in other forms for business purposes.

The definition now covers the investment activities under the previous definitions of ‘direct investment’ and ‘indirect investment’ of the previous LOI; the previous definitions have therefore been abolished.

ii  Definition of semi-FIs

The LOI introduced a group of investors who are subject to the investment conditions and procedures applicable to FIs (semi-FIs). Semi-FIs include:

- a company with FIs holding 51 per cent or more of the charter capital;
- a company with investors that are companies such as that described in point (a) holding 51 per cent or more of the charter capital; and
Companies with members or shareholders that are FIs (FIEs), but do not fall within the scope of semi-FIs, will be subject to investment conditions and procedures applicable to LIs.

### iii Introduction of public-private partnership

The LOI introduced a new investment form, the public-private partnership (PPP). For implementation of PPP investment projects, investment contracts must be signed between the competent Vietnam state authority and the investors.

### iv Simplified and transparent business registration

The LOE also tries to enhance freedom and flexibility in business operations for enterprises; for example, (1) LLCs or JSCs may have more than one legal representative, (2) the ERC does not include details of the equity holding of the owners or shareholders or details of the businesses, and (3) the quorum and voting ratio in corporate governance has changed to a lower equity ratio.

The LOE, on the other hand, attempts to increase transparency in relation to the corporate information of enterprises. Enterprises are required to report changes to any of the following to the business administrative authority:

- **a** name;
- **b** branches or representative offices;
- **c** address of the head office, or any branch or representative office;
- **d** business lines;
- **e** charter capital;
- **f** legal representatives; and
- **g** owners of one-member LLCs, members of multiple-member LLCs, partners of partnerships, founding shareholders of JSCs and shareholders who are FIs.

This information will be available for public access, subject to payment of a fee.

### v Effects of the LOI and LOE on existing foreign investment

Existing FIEs continue to operate and implement their projects according to their current investment licence, investment certificate or equivalent (IC). They must comply with rights and obligations under the LOI if not in conflict with the principle of investment protection in the change of law (i.e., old incentives will be maintained) and their operation must be in line with the LOE except for the details provided in their current charter.

According to the regulations on guiding the implementation of the LOI and the LOE:

- **a** existing FIEs may request the issuance of an IRC recording their projects information and an ERC recording their corporate information to replace the current IC;
- **b** adjustments to projects licensed or registered before 1 July 2015 will be made in accordance with the LOI, and the IRC will be issued to replace the ‘project registration’ section in the IC; and
- **c** amendments to business registration details will result in the issuance of a new ERC replacing the ‘business registration’ section in the IC.
ABOUT THE AUTHORS

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Lourdes Catrain has achieved milestone successes in all areas of EU trade law and economic sanctions, including the completion on behalf of a sovereign government of free trade agreement negotiations with the European Union, judicial delisting of an entity from the EU Iran sanctions list, the termination of an anti-subsidy investigation on behalf of the government of Indonesia, and a series of voluntary disclosures in various EU jurisdictions on breaches of economic sanctions and export control laws. In the EU’s largest trade dispute with China, regarding solar panels, she represents the interests of a key EU upstream supplier that forcefully opposes the continuation of measures against imports from China.

Lourdes led the foreign investment filings related to the €12.3 billion acquisition by GE of Alstom’s energy activities. Alstom relied on Lourdes’ expertise on complex foreign investment regimes involving multiple jurisdictions and Hogan Lovells International’s unique ability to provide a ‘one-stop shop’ for all the key jurisdictions subject to foreign investment approval.

She regularly advises companies on complex business dealings with countries subject to EU sanctions and, with the anti-corruption and white-collar crime teams, conducts internal investigation and prepares voluntary disclosures to Member State authorities.

Lourdes is highly ranked in the top tier by *Chambers* and *The Legal 500*.

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A pragmatic and business-oriented lawyer, Pablo Corcuera Bain makes a point of giving advice to corporate clients using the most efficient approach possible, keeping an eye on the business objective and cutting through the background noise that tends to be created during complex transactions and negotiations. Pablo makes it his priority to give clients concise advice and recommendations that the client can act upon.

As a member of the corporate practice group, Pablo advises clients on cross-border transactions (such as private equity investments, mergers and acquisitions, joint ventures, financing and general corporate law advice) every day. His down-to-earth approach and experience in handling the business aspects of law help clients get the results they are looking for.

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Inês Drago is a trainee lawyer currently in the competition law and UE practice area of Uría Menéndez – Proença de Carvalho in Lisbon.

She is a law graduate from the Law Faculty University of Lisbon and is currently completing postgraduate studies in Business and Law of the Catholic University. She also holds a postgraduate diploma in Commercial Litigation, from the University of Lisbon.

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Joaquim Caimoto Duarte is a counsel in the Lisbon office of Uría Menéndez – Proença de Carvalho, where he heads the EU and Portuguese Competition Law practice area.

He focuses his professional activity on European and competition law, advising on matters in various sectors, including the pharmaceuticals, banking and insurance, air transport, motor vehicle, energy, telecommunications, media and large retailer industries.

Joaquim is regularly involved in merger control and infringement proceedings for abusive conduct and restrictive agreements before the Portuguese Competition Authority, the European Commission and the EU courts, and also has ample experience in state aids.

He is a founding member of the Portuguese Competition Lawyers Association and is mentioned by the main international directories and considered by Chambers Europe as one of the best competition lawyers in Portugal.
PAT ENGLISH
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Pat English is a corporate partner and head of the international business group at Matheson. He is also a senior member of the US business and inward investment groups. He practises corporate law, focusing primarily on advising overseas clients on establishing operations and doing business in and from Ireland.

In addition to advising on establishment projects, Mr English advises a broad range of international and, in particular, US clients on international corporate reorganisations, pre- and post-integration transactions, cross-border mergers and general commercial contracts, corporate governance and compliance issues and strategies. In September 2011, he returned from his role as resident counsel and head of the firm’s US offices in New York, where he had been based for two years.

In 2016, The American Lawyer named Mr English a ‘Transatlantic Rising Star’, an award that honours lawyers under the age of 40 ‘for excellence in handling transatlantic matters across the key areas of corporate, finance, disputes and outstanding transatlantic strategy’.

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Cal Goldman is chair of Goodmans’ competition, antitrust and foreign investment group. His practice focuses on all aspects of Canadian competition law, with a particular emphasis on Canadian and international matters before the Competition Bureau as well as foreign investment reviews before Investment Canada. Over the years and in recent years, Cal has acted as counsel in a number of leading competition law and foreign investment review cases in Canada.

Cal is a former Director (since renamed Commissioner) of the Competition Bureau in the Canadian government and a former Vice Chair of the Organisation for Economic Co-operation and Development (OECD) Competition Committee. Subsequently, in the 1990s, he successfully represented the Attorney General of Canada as special counsel in the appellate proceedings (which included the Supreme Court of Canada) on the constitutional validity of Section 45 (the cartel provision) of the Competition Act. Cal was the first appointee to the Soloway Chair of Business and Trade Law, University of Ottawa.

Cal is co-chair of the International Chamber of Commerce Task Force on the International Competition Network. He is also on the Executive of the Competition Committee of the Business and Industry Advisory Committee to the OECD. He is co-chair of the Future of Competition Law Standards Task Force of the American Bar Association’s Section of Antitrust Law (ABA SAL). From 2017 to 2019 he was co-chair of the National Interest and Competition Law Task Force of the ABA SAL. In 2013–2015, Cal was co-chair of the Foreign Investment and Antitrust Interface Task Force of the ABA SAL. Before that, he held other leadership positions in the ABA SAL. He is also a former chair of the National Competition Law Section of the Canadian Bar Association.

Cal is highly recognised globally as a leading competition lawyer in a number of well-known Canadian and international legal publications.
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Deon Govender focuses his practice on project development and corporate and project finance transactions across Africa, with a particular emphasis on southern Africa. His experience ranges from advising on the development and financing of renewable energy and thermal power projects and various other infrastructure assets in the transportation and telecommunications sectors. Deon's experience additionally includes advising on financing independent power producer projects under the South African government's Renewable Energy Independent Power Producer Procurement Programme.

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Nguyen Anh Hao is a partner of VILAF. He joined VILAF in 2006 and was promoted as partner in 2018.

Before joining VILAF, he worked for Willkie Farr & Gallagher LLP and Thompson Hine LLP, US-based law firms, specifically on anti-dumping cases in the United States involving Vietnamese companies for more than one year.

With more than 12 years of legal practice experience, he possesses a wealth of experience in capital market, cross-border M&A, oil and gas, renewable energy, real estates and employment. He has advised many multinational companies in Vietnam in hundred-million-dollar acquisitions in Vietnam and offshore listing, including Nameson Holdings Limited and Regina Miracle International (Holdings) Limited with Vietnam garment operation on its IPO and listing on HKX; Mondelez International in its acquisition of Kinh Do Corporation; Dragon Capital in an investment in a mining project; a Japanese investor's acquisition of Ho Chi Minh City Development Commercial Joint Stock Bank Finance Co, Ltd; CapitaLand in acquiring real estate projects in Vietnam; Shell Vietnam, REPSOL, SA and other petroleum operators in their operation in Vietnam.

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Nguyen Truc Hien is a partner at VILAF's Ho Chi Minh City office. She is recommended by several well-known international legal guides as offering broad expertise in commercial and construction-related works, and for having particular skills in high-value real estate projects. She advises companies regarding many multi-million dollar real estate projects and financing deals in Vietnam, including CapitaLand, Keppel Land, VinaCapital, Prudential, Aseana, Nam Long, Novaland and Hoa Lam. She advises both employers and contractors in construction-related contracts, including design/consultant, construction and turnkey contracts. She has served as an adviser for turnkey contract and credit agreements
in hundred-million dollar transactions. Her clients are issuers and investors in financing deals, both equity and non-equity. She advises Vietnamese and foreign investors in direct investment and M&A transactions. She advises operational issues in many fields, including retail, e-commerce, consumer goods, education, pharmaceuticals and healthcare, feed and livestock, breweries and beverages, hotel management, catering, construction and construction materials. She is also an excellent tax lawyer, and her tax planning helps clients find the best tax-efficient structures for their transactions and business models.

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Jianwen Huang is a partner at King & Wood Mallesons (KWM). She is the director-in-chief of KWM Belt & Road Center for International Cooperation and Facilitation (BRCICF) and a leading partner in KWM’s healthcare group. Ms Huang specialises in investments (including inbound and outbound investment), M&A (including domestic and cross-border M&A), and general corporate matters. Ms Huang acts for clients from varied industry backgrounds for their M&A transactions and general corporate matters. The industries include pharmaceutical, medical, medical devices, food (including health food), agricultural products, cosmetics, direct marketing, clean energy (solar, wind and nuclear energy), machinery manufacturing, aerospace, mining, ports, and telecommunications, etc.

Ms Huang has accumulated extensive experience in investment and M&A, and provided legal services to many multinational companies (including Fortune 500 companies), domestic companies, and state-owned enterprises (SOEs) for their domestic investment and M&A projects. Her legal services include complete architectural design of the investment and M&A transactions, due diligence, drafting and modifying transaction documents, negotiation, and assisting liaison with the government and assisting in the assessment and the approval of the governmental process. Ms Huang's many years of professional experience has helped her familiarise herself with different operation models, management models and philosophies of companies. This helps her to provide the best advice to her clients for their M&A deals. One of her representative matter is acting as GE's counsel with respect to Chinese law in GE's acquisition of Alstom's power and grid business, which is the biggest M&A deal in 2015 in the industry and the biggest industrial investment GE has ever made.

As the leading partner of the KWM healthcare group, Ms Huang has acted for a number of domestic and multinational pharmaceutical companies, medical device companies and medical institution investors in relation to setting up, investment, mergers, daily operations and obtaining all types of relevant approvals. She has also assisted in liaising with the National Medical Products Administration and other authorities. She has served as an expert witness regarding Chinese legal matters and provided opinions on Chinese laws in several overseas cases involving health food.

Ms Huang is recognised as one of the ‘Top 1000 Lawyers of Foreign-Related Affairs’ by the Ministry of Justice of PRC. She is identified as a leading individual in the field of Healthcare & Life Sciences in 2019 by The Legal 500. She is identified as a Tier 1 lawyer in the field of Healthcare & Life Sciences in 2018 and 2019 by Legal Band. She was identified as a highly recommended lawyer in the field of healthcare and life sciences in 2018 by The Legal 500 and was identified as a highly recommended lawyer in the field of corporate and M&A in 2015 by The Legal 500. She was also recognised as one of the 2017 A-List China’s Top 100 lawyers by China Business Law Journal. Moreover, she was recognised as one of the Top 10 Lawyers Returning to China after Overseas Study by the Beijing Bar Association.
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Ms Huang has been qualified to practise law in China since 1996 and her working languages are Chinese and English.

Ms Huang joined KWM in 2003. Prior to joining KWM, she was a lecturer (corporate law) at Beijing Economics and Trade University School of Law.

Ms Huang obtained her LL.M. from New York University School of Law in the United States, and her Master of Philosophy in Law (M.Phil.) from City University of Hong Kong. She was also a visiting scholar at Harvard Law School.

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Mr Iodice graduated in law with honours from the University of Siena in 2007. In 2006, he obtained a diploma in legal studies from Worcester College, University of Oxford, and in 2008, he graduated with distinction from St Catherine’s College, University of Oxford, receiving an MJur, for which he was awarded the Clifford Chance Prize for best overall performance.

Mr Iodice has been a member of the Milan Bar since 2010.

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Justine is actively involved in the competition community, serving as a vice chair of the Canadian Bar Association Competition Law Section’s Young Lawyers Committee, as a young lawyer representative for the American Bar Association, and serves on the executive of the Ontario Bar Association’s Women Lawyers Forum.

Justine frequently writes and speaks on matters related to competition law, diversity and inclusion in the legal profession, and women in business law. Her recent speaking engagements include those for the Law Society of Ontario, Canadian Bar Association, Ontario Bar Association, and Osgoode Hall Law School.
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Ruslana represents clients’ interests before the Federal Antimonopoly Service during investigations into cartels and coordination of economic activity. She has a wide experience in supporting the clients during the dawn raids of the antimonopoly authority and securing the client’s rights during the inspection. She also has experience of consulting the clients on the Eurasian Economic Union transnational legislation on various compliance and investigation issues.

Ruslana also consults with clients on their sales systems and distribution models in Russia and analyses the potential antimonopoly concerns in distribution and dealership agreements.

Among her clients are companies from the heavy industry and automobile sectors, pharmaceutical and medical equipment businesses, oil and gas, natural monopolies, retail and other business sectors.

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Anastasia Kayukova is a senior attorney in the competition and antitrust practice at ALRUD. Anastasia advises clients on antitrust, competition and other regulatory matters, such as foreign investments (in particular, to strategic companies) and merger control clearance, cartel investigations and compliance with competition law requirements.

Anastasia represents clients during dawn raids performed by the Federal Antimonopoly Service, and during a series of cartel and abuse-of-dominant-position investigations. Anastasia is also involved in projects on internal investigations.

In addition, Anastasia represents clients in the Eurasian Economic Commission and advises them on the legislation of the Eurasian Economic Union.

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Michael Koch is a partner at Goodmans whose practice focuses on regulation and public law, including communications, competition, foreign investment and copyright law. Michael has been involved in major competition and foreign investment matters and has played a role in each major CRTC proceeding to establish the competitive framework for the Canadian telecommunications industry since serving as counsel to the CRTC in 1994.
Michael regularly represents clients before numerous administrative tribunals (the CRTC and the Copyright Board of Canada), government departments (the Competition Bureau and the Investment Review Division and Spectrum Management Departments of Innovation, Science and Economic Development, Canada) and has acted for both the Competition Bureau and the CRTC. He has argued over 30 statutory appeals and judicial review proceedings before courts at all levels, including the Federal Court of Appeal and the Supreme Court of Canada. Michael also provides strategic, industry-specific advice and representation to telecommunications and media companies, and competition and foreign investment review advice to investors and clients in other industries.

Michael’s speaking engagements have included subjects in administrative law, communications regulation, copyright and competition law for the Law Society of Ontario, the Ontario Bar Association, the University of Toronto, Osgoode Hall Law School and internationally.

Described in Chambers Global as the ‘go to guy for competition and copyright issues’, Michael is recognised as a leading lawyer by a number of legal publications including the Canadian Legal Lexpert Directory, the Lexpert American Lawyer Guide to the 500 Leading Lawyers in Canada, Chambers Global, Who’s Who and Euromoney.

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Nikolay Kolev is a counsel in Boyanov & Co specialising in corporate law/M&A, concessions and underground resources, energy, litigation and arbitration. He graduated from the legal faculty of the St Kliment Ohridski University of Sofia (LLM, 2005) and completed his PhD in civil and family law with the State and Law Institute at the Bulgarian Academy of Sciences (PhD, 2011). Mr Kolev is admitted to the Sofia Bar and is an associate professor in civil and family law at the State and Law Institute at the Bulgarian Academy of Sciences, where he chairs the Civil Law Department. He was a team member in a number of M&A transactions, such as the acquisition by Warburg Pincus of more than 20 cable and internet providers, the takeover of Bulgarian Plus business by Lidl, a number of arbitration disputes and administrative and commercial litigations of the Bulgarian companies of Dundee Precious Metals group, EVN group, Montupet, etc.

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Edurne Navarro is the partner in charge of the Brussels office of Uría Menéndez. She joined the firm in 1992 and became a partner in 2002.

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Ms Navarro is regarded as a leading lawyer by the main international legal directories, including Chambers and Partners, PLC and Who’s Who Legal.

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With more than 10,000 hours of experience in corporate transactions, Federico De Noriega Olea is widely recognised for his extensive experience in the financial sector. As a partner in the Mexico City office, he advises clients on financial transactions, mergers and acquisitions, and data privacy issues, including data processing, data transfers and security breaches. His approach combines a robust knowledge of the legal issues with practical solutions and risk-mitigation strategies.

Federico is also widely recognised for his work with entrepreneurs and in financing innovative new ventures and start-ups, an area he has focused on extensively since 2008. Federico was a foreign associate in the New York office of a global law firm in 2007 and 2008, after which he rejoined Barrera, Siqueiros y Torres Landa (BSTL) (now Hogan Lovells).

He was awarded Academic Excellence by the Ibero-American University for scoring the highest GPA of his graduating class, and he received his master of laws degree from Harvard Law School.

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Alex Potter is a partner in the firm’s antitrust, competition and trade (ACT) group, based in London and often works out of Brussels. He has significant experience in helping clients
to obtain merger control approvals around the world for their cross-border transactions, coordinating the clearance effort in multiple jurisdictions and, where necessary, negotiating remedies to remove concerns. He is an EU and UK specialist, and regularly leads complex cases before the competition authorities in Brussels and London. Mr Potter also counsels clients and represents them before the EU and UK authorities on complex abuse of dominance and cartel matters, and other regulatory investigations. Mr Potter also advises on state aid law and distribution arrangements. His state aid experience includes advising government, government-owned businesses and the private sector on reducing risk and obtaining clearances from the European Commission.

Mr Potter has experience in a wide range of industries, with particular expertise in consumer products, defence, financial services, pharmaceuticals and regulated utilities. This has included advising Smiths Group plc on its US$710 million acquisition of Morpho Detection, a California-based detection and security solutions company, cleared subject to remedies after a Phase I review by the European Commission; Sysco Corporation on its US$3.1 billion acquisition of Brakes Group, a European food service distributor, cleared unconditionally by the European Commission after a Phase I review; DE Master Blenders 1753 on its combination with the coffee business of Mondelēz International to form Jacobs Douwe Egberts, cleared subject to conditions by the European Commission after a Phase I review; Coty Inc on its US$12.5 billion acquisition of Procter & Gamble's fragrance, colour cosmetics and hair colour business, cleared unconditionally by the European Commission at Phase I; and the Rank Group Plc on obtaining clearance subject to remedies for the acquisition of Gala Casinos after a Phase II investigation by the UK authorities.

Mr Potter's experience of working in London, Brussels and Beijing – and of regularly coordinating antitrust strategy across multiple jurisdictions – enables him to offer a truly international perspective. Mr Potter speaks English and French. He has an LLB from the University of Bristol. In 2008–2009, he spent 18 months in Beijing, co-heading Freshfields Bruckhaus Deringer's China ACT group.

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Felipe Gruber Ribeiro is a partner in the corporate practice with extensive and recognised experience in corporate law, mergers and acquisitions, private equity and project finance. Felipe has worked for leading Brazilian law firms, and as a foreign associate in the London and New York offices of Linklaters and the New York office of Shearman & Sterling. He has represented several national and international clients on M&A, corporate restructuring and debt refinancing transactions and on petrochemical project finances in Brazil and abroad. Felipe has also represented international banks and funding agencies in the development and financing of energy and infrastructure projects in Latin America.

He has been recognised by the legal publication The Legal 500 and Leaders League, and holds an LLM from the University of California, Berkeley.

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David Rosner is a partner in the competition, antitrust and foreign investment group at Goodmans. He provides strategic advice on all aspects of Canadian competition law, particularly with respect to complex mergers (including in regulated industries), mergers
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David was recognised as one of the most highly regarded North American partners by Who’s Who Legal: Competition – Future Leaders in 2018 and 2019, which profiles the foremost practitioners in the competition community under 45. Clients describe David as ‘a sharp thinker with great analytical capabilities’, and praise his ‘straightforward practical advice’.

David is an active member of the Canadian competition law community. He has been a professor at Osgoode Hall Law School and served as chair of several committees of the Canadian Bar Association’s National Competition Law Section.

VASSILY RUDOMINO

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As the firm’s senior partner, Vassily Rudomino is an expert with extensive experience in all aspects of Russian competition legislation, including the merger control clearance of complex transactions and cartel investigations. He represents the interests of clients before the Federal Antimonopoly Service and its territorial divisions, during inspections and in anti-monopoly disputes in the courts. Vassily advises clients from a range of industries, including healthcare, life sciences and chemicals, banking and finance, consumer goods and retail, technology and media and telecommunications.

Vassily is a member of the International Bar Association (IBA) and the American Bar Association, he has served on the IBA Legal Practice Division Council (2014 to 2016) and is a board member of the Russian Arbitration Association. He is chairman of the Board Committee of the non-commercial partnership Competition Support Association for the CIS countries, the creation of which he initiated, and is a founder member of Russia’s Competition Experts Association. Through his roles in these organisations, Vassily participates actively in the preparation of the latest amendments to competition law.

On 16 July 2015, Vassily was awarded the Medal of the Order ‘For Merit to the Fatherland’, Class II, in recognition of the formation of effective practice in competition law enforcement and active participation in antitrust lawmaking.


GIUSEPPE SCASSELLATI-SFORZOLINI

Cleary Gottlieb Steen & Hamilton LLP

Giuseppe Scassellati-Sforzolini is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in the firm's Rome office. He is active in public and private mergers and acquisitions and capital markets transactions, corporate governance, securities and banking regulation, competition law and EU state aid law. He has worked on takeover bids, tender offers, negotiated acquisitions, divestitures, joint ventures and private equity investments involving Italian companies, particularly in regulated sectors such as financial services, energy, media, telecommunications and airlines. He has co-authored several publications on business law issues.
He graduated in law with honours from the University of Bologna in 1984 and obtained an LLM degree from the University of Michigan Law School in 1987.

Mr Scassellati-Sforzolini has been a member of the Bar in Italy since 1986 and a member of the New York Bar since 1988. He is admitted to practise before the Italian higher courts.

OLIVER SCHRÖDER
Cleary Gottlieb Steen & Hamilton LLP

Oliver Schröder advises domestic and international clients on M&A, private equity, public takeovers, corporate law and reorganisations, as well as related commercial law matters. His work extends to a broad range of industries and clients, including the financial institutions, automotive retail, consumer, construction and energy sectors.

Oliver regularly publishes on corporate and M&A topics. *Chambers Global, The Legal 500* and *JUVE* recommend Oliver as one of the leading M&A lawyers in Germany.

MIGUEL STOKES
Uría Menéndez – Proença de Carvalho

Miguel Stokes joined the Lisbon office of Uría Menéndez – Proença de Carvalho in 2009 and has been a senior associate of the firm since 2018. Between July 2015 and December 2016, he was assigned to the London office of Uría Menéndez.

Miguel Stokes holds more than nine years of professional experience in advising industrial and financial clients in the areas of mergers and acquisitions and capital markets.

Miguel Stokes advises in share and asset deals, privatisation procedures and capital markets transactions involving the acquisition of shareholdings in public listed companies, public takeovers, initial and secondary equity and debt offerings, financial intermediation, incorporation, management and marketing of mutual funds and market abuse.

GUSTAVO ALBERTO RACHED TAIAR
ASBZ Advogados

Gustavo is a partner in the corporate practice at ASBZ Advogados, with broad experience in corporate law, mergers and acquisitions, private equity, capital markets and fund formation. Gustavo served as a foreign associate in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison and other leading Brazilian corporate law firms. He is currently the head of the firm’s fund formation practice. He is a recommended lawyer according to *The Legal 500 Latin America* 2018 editorial for corporate and M&A (including compliance), and holds an LLM from the University of California, Berkeley.

TRAYAN TARGOV
Boyanov & Co

Trayan Targov is an associate in Boyanov & Co specialising in transport law, information and communications technology law and food law. Other areas of practice include banking and finance, pharmaceuticals, travel and hospitality, corporate and commercial law. He has been advising and assisting on a regular basis some of the world’s largest commercial jet aircraft leasing companies and global leaders in aircraft finance in respect of the leasing, financing, delivery and redelivery of aircraft in Bulgaria. Trayan joined Boyanov & Co’s legal team in
2012. He graduated from the legal faculty of the St Kliment Ohridski University of Sofia (LLM, 2013) and is a member of the Sofia Bar Association. In 2016, Trayan completed an international secondment in Allen & Overy’s Global Projects, Energy and Infrastructure Group in Warsaw, Poland. There, he was involved in various international projects such as international project financing of wind farms in Serbia, gas stations in Ukraine and intermodal terminal facilities in Egypt. As part of Boyanov & Co’s Tier 1 transport law practice, Trayan Targov has been outlined in the 2019 edition of The Legal 500 EMEA as a ‘noteworthy practitioner’ and Next Generation Lawyer for Transport (including Shipping).

KSENIA TARKHOVA
ALRUD

Ksenia Tarkhova is a senior associate in the competition and antitrust practice at ALRUD. Ksenia advises clients on matters concerning compliance with the requirements of Russian competition legislation, participates in the development of internal documents and regulates the business activities of clients. She participates in the projects related to obtaining merger control clearance for the transactions on purchase, transfer of assets, shares (stocks) of companies doing business in Russia and also takes part in projects concerning cartel investigations. Ksenia conducts the seminars adapted to clients’ business sectors on compliance of current performance with the competition law requirements.

Ksenia is a member of the International Bar Association, the Inter-Pacific Bar Association, the Competition Support Association for the CIS countries and also a member of the Competition Experts Association within which she is actively involved in development and improvement of the existing competition legislation.

Best Lawyers in Russia (2020) recommends Ksenia for competition and antitrust law.

ELENI THEODOROPOULOU
Hogan Lovells International LLP

Eleni Theodoropoulou focuses her practice on EU and international trade and investment law. She advises on EU sanctions and export controls, EU customs matters, as well as international trade and investment policy in the context of free trade agreements.

Eleni’s experience includes advising sovereign governments in their free trade agreement negotiations, focusing on the investment provisions of such agreements. She also advises companies and sovereign governments on foreign investment laws and Bilateral Investment Agreements, including on mechanisms of screening foreign direct investment in the EU.

Prior to joining Hogan Lovells, Eleni gained experience at the European Commission’s Directorate-General for Trade, the International Centre for Trade and Sustainable Development in Geneva, the Permanent Representation of Greece to the Council of Europe in Strasbourg, and in private practice in Athens.

DIDIER THÉOPHILE
Darrois Villey Maillot Brochier

Didier Théophile is a partner at Darrois Villey Maillot Brochier. He is the founder and head of the firm’s antitrust and competition law practice. His own practice covers all aspects of competition law, from counselling to litigation, including matters of merger control, non-merger conduct and state aid. Mr Théophile frequently represents clients before the
European and French competition authorities and courts, and has vast experience in large cross-border transactions and high-profile antitrust litigation. He is particularly recognised for his antitrust law expertise in regulated sectors, such as media, the banking industry and postal services.

Mr Théophile was educated at the Strasbourg Institute of Political Science (Sciences Po Strasbourg) (diploma, magna cum laude, 1986), the University of Strasbourg Faculty of Law (LLL industrial property, summa cum laude, 1989) and the College of Europe, Bruges, Belgium (LLL legal European studies, summa cum laude, 1990). Mr Théophile has written articles on a wide range of antitrust and competition law topics. He is a member of the International Bar Association, the board of the French Association of Lawyers Practising Competition Law and the French Association of Competition Study. He is also a non-governmental adviser to the International Competition Network for the French competition authority.

**JUAN FRANCISCO TORRES-LANDA RUFFO**

*Hogan Lovells BSTL, SC*

Juan Francisco Torres-Landa Ruffo has distinct skills gained during more than three decades of practice as a corporate lawyer in Mexico. He has helped many companies establish a presence in Mexico and grow over the years.

His long-term involvement in corporate deals of all kinds allows him to help clients better navigate complicated projects, joint venture arrangements and M&A deals in general. A combination of experience and know-how results in a lawyer who sees the big picture and paves the way to better results and fewer obstacles.

He serves clients in many industries, with a particular focus on the automotive sector. Companies rely on his insight, which stems from decades of experience and a thorough knowledge of corporate, contractual, foreign investment, environmental, antitrust and tax matters.

He is well known in the legal community for his responsiveness and careful, results-oriented approach, along with his successful track record as a troubleshooter and his commitment to pro bono and citizenship programmes.

**ROMAN VEDERNIKOV**

*ALRUD*

Roman Vedernikov is an associate in the competition and antitrust practice at ALRUD. Roman advises on a wide range of antimonopoly and related issues. His relevant experience includes merger control clearance of global M&A/JV transactions including with conduction and presenting to the authority economic analysis for complex deals. Roman represents clients during national security clearance of transactions with the Federal Antimonopoly Service (FAS) and the Governmental Commission for Control over Foreign Investments.

Roman assists clients during cartel investigations, dawn raids, represents clients before the FAS and conducts antimonopoly compliance trainings for the clients’ employees. Roman’s experience also includes advising on competition rules of the Eurasian Economic Union.

Roman has considerable experience and special focus on advising international retailers on different and difficult antimonopoly aspects of enforcement of Russian trade law. Roman represents the interests of the clients in the FAS on the associated issues.

Among his clients are companies from such industries as food retail, automotive, oil and gas, electrical energy, luxury goods, chemical, aviation and other industries.
Roman is a member of the International Bar Association, the Competition Support Association for the CIS countries and the Competition Experts Association.

**ALFONSO VENTOSO**

*Uría Menéndez*

Alfonso Ventoso joined Uría Menéndez in September 2002. Prior to this, he amassed experience in real estate law and litigation, and worked in London in the insolvency department of a UK firm.

From January to July 2009, he was seconded to Davis Polk & Wardwell in New York, where he was assigned to the capital markets practice group as part of the firm’s foreign temporary associates programme.

Mr Ventoso’s practice is focused mainly on equity capital markets (including listings and delistings, public offerings and block trades), and on providing general advice to financial entities and listed companies on regulatory aspects relating to securities markets and corporate governance.

In addition, he has significant expertise in M&A deals involving listed companies and financial entities, takeover bids and the issue of debt securities, especially hybrid instruments.
Appendix 2

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