Foreign Investment Review

Contributing editor
Oliver Borgers

2017

GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH

Foreign Investment Review 2017

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2012
Sixth edition
ISSN 2048-4666

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Foreign Investment Review 2017

Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Foreign Investment Review*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Jordan, Switzerland and Uzbekistan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
February 2017

Australia

Deborah Johns
Gilbert + Tobin

Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Australia generally welcomes foreign investment. The Australian government screens foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest. The kinds of proposals examined include both business investment proposals (which can capture transactions outside of Australia if there is a sufficient Australian nexus) across all sectors of the economy and investment in land, in each case subject to materiality thresholds described in more detail in question 3 and question 8.

In determining whether a foreign investment proposal is contrary to the national interest, the Australian government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition (noting that this is a different test to the test applied by the Australian Competition and Consumer Commission in examining merger clearances), the economy and the community (for example, as a result of the investor's plans to restructure the business in Australia after the acquisition) and other government policies such as tax and the environment, as well as the character of the investor.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian government takes into consideration (in addition to those described above) when examining those proposals:

- for agricultural investment proposals, the Australian government typically considers the effect of the proposal on the quality and availability of Australia's agricultural resources, including water; land access and use; agricultural production and productivity; Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and Australia's trading partners; biodiversity; and employment and prosperity in Australia's local and regional communities;
- for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- where a foreign investment proposal involves a foreign government investor (defined in question 5), the Australian government considers if the proposed investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

In general, Australia does not impose currency controls (subject to limited exceptions prohibiting, for example, transfers of funds to certain regimes).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The main laws that regulate foreign investment in Australia are:

- the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Foreign Acquisition and Takeovers Regulation 2015 (FATR). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals, or apply conditions to the way such proposals are implemented, to ensure they are not contrary to the national interest; and
- the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of foreign ownership in certain industries, for example:

- the Register of Foreign Ownership of Agricultural Land Act 2015 (Cth) requires foreign persons to register their ownership of agricultural land;
- the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998 (Cth) and banking policy regulate foreign ownership in the banking sector;
- the Air Navigation Act 1920 (Cth) and Qantas Sale Act 1992 (Cth) limit aggregate foreign ownership in an Australian international airline (including Qantas) to 49 per cent;
- the Airports Act 1996 (Cth) limits foreign ownership of some airports to 49 per cent, airline ownership in airports to 5 per cent and cross ownership between Sydney airport (together with the proposed future Sydney West Airport) and any of Brisbane, Melbourne or Perth airports;
- the Shipping Registration Act 1981 (Cth) requires a ship to be majority Australian owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
- aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5 per cent.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

FATA and FATR regulate 'significant actions' of which there are two kinds – those that are 'notifiable actions', and those that are not.

A notifiable action is a subset of significant actions, which must be notified to the Treasurer. Failure to notify is an offence under the law, and the Treasurer has the power to block or unwind a notifiable action that he or she considers to be contrary to the national interest. Notifiable actions include:

- the acquisition by a foreign person of an interest of 20 per cent or more in the shares or units of an Australian company or unit trust valued above the then current monetary thresholds (the monetary threshold is generally A$252 million);
- the acquisition by a foreign person of an interest in Australian land valued above the then current monetary thresholds (for residential land, vacant commercial land, mining and production tenements and any kind of land acquired by foreign government investors, the threshold is generally A$0; for agricultural land, the threshold is generally a cumulative A$15 million threshold taking into account other agricultural land holdings of the acquirer; for developed commercial land, the threshold is generally A$55 million for certain sensitive commercial land and A$252 million for other kinds of commercial land);

- the acquisition by a foreign person of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in an Australian company or unit trust or Australian business that is an agribusiness, where the value of the acquirer's past and current investments in the target exceed the then current monetary thresholds (the monetary threshold is generally A$55 million);
- the acquisition by a foreign person of an interest of 5 per cent or more in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value;
- the acquisition by a foreign person who is a foreign government investor of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus), regardless of value; and
- the starting of an Australian business by a foreign person who is a foreign government investor, regardless of value.

A significant action that is not a notifiable action does not, strictly speaking, have to be notified to the Treasurer. However, the Treasurer still has the power to block or unwind a foreign investment proposal that is a significant action that he or she considers to be contrary to the national interest. Notifying the proposal and obtaining a statement of no objection in relation to it cuts off the Treasurer's power. A foreign person must not proceed with a notifiable action, or a significant action (which is not also a notifiable action) that it has elected to notify, until the Treasurer has issued a statement of no objection, or ceases to be empowered to make orders in relation to the proposal under the law.

Aside from the notifiable actions described above, significant actions include change of control transactions in relation to Australian companies, entities and businesses valued above the then current monetary thresholds, which (unlike most notifiable actions) can capture offshore transactions if they have a significant Australian nexus. The monetary threshold is generally A$252 million.

The system of monetary thresholds is complex: both the way that the threshold is calculated, and the dollar value of the monetary threshold, differs for different kinds of transactions. The monetary thresholds are also indexed annually for inflation. The thresholds are also affected by Australia's treaty obligations, so different thresholds may apply for investors from countries with which Australia has entered into free trade agreements. Not all free trade agreements contain the same exemptions. See question 8 for further detail.

4 How is a foreign investor or foreign investment defined in the applicable law?

The legislation regulates foreign investment proposals by a 'foreign person'. A foreign person means:

- an individual not ordinarily resident in Australia (and therefore could include in certain circumstances a non-resident Australian citizen);
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds an interest of 40 per cent or more;
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an interest of 40 per cent or more; or
- a foreign government or foreign government investor (defined in question 5).

The kinds of foreign investment proposals that are regulated are described in question 3.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Australia scrutinises a broader range of investments by 'foreign government investors' than it does investments by other foreign persons.

A 'foreign government investor' includes:

- a foreign government;
- an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a 'separate government entity'); and
- a corporation, trustee of a trust or general partner of a limited partnership in which (i) a foreign government, separate government entity or foreign government investor from one country holds a 20 per cent or more interest, or (ii) foreign governments, separate government entities or foreign government investors from more than one country hold a 40 per cent or more interest.

The definition of foreign government investor captures not only SOEs and SWFs, but also things like public sector pension funds, the investment funds into which SOEs, SWFs and public sector pension funds invest and, due to tracing rules, portfolio companies for such investment funds.

The following transactions by foreign government investors are 'notifiable actions' (see question 3):

- the acquisition of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus);
- the acquisition of an interest in Australian land, regardless of value; and
- the starting of an Australian business.

These are subject to very limited exemptions.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Treasurer has the ultimate power to decide whether a transaction is contrary to the national interest.

When making foreign investment decisions, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals and advises on the national interest implications. FIRB is a non-statutory advisory body.

FIRB is supported by a secretariat located in Treasury and by the Australian Taxation Office (ATO). Treasury is responsible for the day-to-day administration of the framework in relation to business, agricultural land and commercial land proposals. The ATO administers foreign investment into residential real estate.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The Australian government has wide discretion to approve or reject foreign investment proposals on national interest grounds. As noted in question 1, the test is whether a foreign investment proposal is contrary to the national interest, and the term 'national interest' is not defined. Typically, the factors the Treasurer takes into account in determining what the national interest is and what is contrary to it are as described in question 1, although the Treasurer is not obligated to consider these factors and is not limited to considering only these factors.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

See question 3. The system of monetary thresholds is complex: both the way that the threshold is calculated, and the dollar value of the monetary threshold, differs for different kinds of foreign investment proposals.

In terms of the way that the threshold is calculated:

- for acquisitions of interests in shares of Australian corporations or units in Australian trusts, the threshold is the higher of the value of the gross assets of the target entity and the value implied by the consideration paid for the shares or units;

Update and trends

Since the substantial rewrite of Australia's foreign investment rules came into effect on 1 December 2015, there has been continued tinkering with regulations and policy to try to address unintended consequences and technical glitches in the legislation and its associated regulations. We expect this to continue into 2017, particularly where changes can be made without resort to the legislative process (such as by changes to regulations or written policy guidance).

Perhaps the biggest loser from the new legislation was private equity. Many private equity funds are considered to be foreign government investors because their investor base tends to include SWFs and public sector pension funds, particularly from the Middle East, the US and Canada. Under the new legislation, almost all transactions by such funds, and bolt-on acquisitions by their portfolio companies, require approval as notifiable actions. This even captures offshore transactions that have only a minor Australian nexus. In addition to the regulatory burden this presents, each such application attracts a fee – usually A$25,300. In response to industry concerns, the government introduced some relief in the middle of 2016 so that such transactions below A$10 million in value are eligible for fee relief (generally a fee of A$1,000 would be approved). While this has helped to ensure the application fees for small bolt-on acquisitions for PE fund investees are not wildly disproportionate to the value of the transaction, it has not diminished the regulatory burden of having to obtain FIRB approval for so many applications. Additional relief may be forthcoming in 2017, although it is still unclear what form this would take.

The government has begun to impose more tax conditions on successful applicants, which has been controversial. The initial tax conditions imposed obligations on applicants that potentially exceeded the applicants' obligations under law, and also gave the government a significant 'stick' to enforce compliance with Australian tax laws (being the threat of disposal orders under the foreign investment legislation if the tax conditions were not complied with). In response to widespread concerns about the breadth of the conditions, the government made modifications to them to bring them more in line with the applicants' obligations under law, and in addition recently issued further guidance in relation to the conditions. The tax conditions are divided into two categories:

- Part A tax conditions, which may be imposed if the Treasurer considers that the action may pose a risk to tax revenues (and therefore be contrary to the national interest). Matters to be taken into consideration include the complexity and size of the action and previous interactions with Australia's tax system. The eight Part A tax conditions may apply until a termination event occurs and include compliance with tax laws, providing documents or information to the ATO, paying outstanding tax debts, providing an annual report on compliance with the conditions and advising FIRB within 60 days after the relevant action the subject of the application has been taken, or there has been a termination event.
- Part B tax conditions, which may be imposed in addition to the Part A tax conditions if an action is considered to have a significant or particular tax risk, will be considered on a case-by-case basis and tailored to the particular transaction. The first Part B tax condition requires an applicant to engage in good faith with the ATO to resolve any tax issues in relation to the transaction and its holding of the investment, and the second Part B tax condition requires the applicant to provide information as specified by the ATO on a periodic basis, including at a minimum a forecast of tax payable.

The introduction of a wider range of exemption certificates for acquisitions of interests in land, including by foreign government investors, has been very popular. It has proven possible to negotiate a wide range of conditions for such exemption certificates, which has greatly reduced the regulatory burden for frequent land acquirers, including foreign government investors.

- for acquisitions of interests in Australian agricultural land, the threshold is the consideration for the land being acquired plus the value of all other Australian agricultural land held by the acquirer;
- for acquisitions of interests in Australian agribusinesses, the threshold is the consideration paid for the investment plus the value of all other investments in that agribusiness held by the acquirer;
- for asset acquisitions, the threshold is the consideration for the acquisition; and
- for other control type transactions, the threshold is the gross assets of the target entity.

In terms of the dollar thresholds, question 3 sets out the most common dollar thresholds. These vary depending on the kind of transaction and the nature of the investor and can be affected by Australia's treaty obligations.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

The procedure for securing approval for a foreign investment proposal that is a notifiable action or a significant action is that the applicant must lodge an application with FIRB online. The online application requires basic information about the transaction: names and addresses of the parties, the kind of transaction and information relevant to calculating the monetary threshold for the transaction and the application fee. The applicant is expected to attach a cover letter that explains the transaction in detail, including reasons for the transaction and the acquirer's intentions for the target.

Each application attracts filing fees. The filing fees vary depending on the kind of application. For business applications, most transactions attract a A$25,300 filing fee, except that transactions valued over A$1 billion attract a A$101,500 filing fee. The application is not considered to be lodged until payment is made.

Once the application is lodged, the case officer assigned to the application may contact the applicant to ask questions. More complex transactions may result in an ongoing dialogue between the Treasury and FIRB and the applicant regarding the imposition of conditions.

10 Which party is responsible for securing approval?

In most cases, the acquirer is responsible for securing approval.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

From a statutory perspective, the review process consists of a 30-calendar-day examination period and a 10-calendar-day notification period. The examination period can be extended on request by the applicant or by the Treasurer issuing an interim stop order, which gives the Treasurer an additional period of up to 90 calendar days to examine the application. In practice, the length of time is affected by the time of year, the extent to which the application is being reviewed by other government departments, the election cycle and general levels of business, and voluntary extensions by the applicant are routine.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

For any notifiable action, it is an offence to fail to notify the foreign investment proposal. For a significant action (including a notifiable action) that is notified, it is an offence to proceed with the foreign investment proposal until a statement of no objection is received or the Treasurer's power to make a decision in relation to the proposal expires. The penalties for failing to comply are: for individuals, up to three years' imprisonment or A$135,000 fine or both; and for companies, a fine of up to A$675,000.

Civil penalties for less serious breaches include: for individuals, a fine of up to A$45,000; and for companies, a fine of up to A$225,000.

Officers of companies commit an offence or may be liable for civil penalties if the corporation is convicted of the offence or is the subject of a civil penalty order and the person authorised or permitted the commission of the offence or the contravention of the civil penalty provision by the corporation.

Third parties who knowingly assist a breach may also be subject to civil and criminal penalties.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Most foreign investment proposals are routine and do not require any prior consultation with the Australian government. If an applicant considers that a foreign investment proposal may be controversial, it is possible to engage in dialogue with the Treasury and FIRB before and during the application process. However, guidance will generally not be given as to how an application will be decided.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Most foreign investment proposals are routine, and the review process is confidential. However, given the case-by-case nature of the examination process, high-profile transactions have the potential to become politicised. It is sensible for applicants to monitor the Australian media and political process to ensure that information in the public domain that is inconsistent with the application is appropriately addressed.

There is no procedure for expediting approvals. The Treasury and FIRB may take into account requests for early decisions based on commercial imperatives, but they have no obligation to do so and such requests should be used sparingly.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

If a foreign investment proposal is a notifiable action or significant action, then regardless of whether the transaction was actually notified, if the Treasurer is satisfied that the proposal is contrary to the national interest, the Treasurer has the power to order the disposal of any interests in securities, assets or land that were acquired under the proposal.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

See question 1. In order to make an order prohibiting implementation of a foreign investment proposal or an order to dispose of property acquired under a foreign investment proposal, the Treasurer must be satisfied that the proposal is contrary to the national interest. Because of the discretionary nature of the decision, the question of burden of proof does not really arise, although it is prudent for applicants to show why a proposal is not contrary to the national interest in their applications.

FIRB has published a variety of resources in order to provide guidance to prospective applicants, including a document entitled 'Australia's Foreign Investment Policy', detailed Guidance Notes and Fact Sheets. These are all located on FIRB's website.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Although it is possible that the Australian government could consult or cooperate with officials in other countries (particularly in relation to tax) in reviewing applications for foreign investment proposals, it is more common for the Treasury and FIRB to share information with other governmental departments; for example, it is routine for applications to be provided to the Australian Competition and Consumer Commission (even where no merger clearance is being sought), the ATO and state and territory governments.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

The application process is confidential (including the fact that an application has been made, unless the acquirer chooses to make a public announcement), and there are no formal rights for third parties to intervene in the process. It is possible for third parties to intervene informally, through the media or by lodging a submission to the FIRB if they are aware that an application has been made. FIRB may undertake any enquiries that it wishes, although it does not engage in any formal public consultation processes. As noted in question 17, applications are routinely shared with other government departments.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a foreign investment proposal is a notifiable action or significant action, then regardless of whether the transaction is actually notified, if the Treasurer is satisfied that the proposal is contrary to the national interest, the Treasurer has the power to issue an order prohibiting completion of the proposal, or if the proposal has completed, an order disposing of any interests in securities, assets or land that were acquired under the proposal.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Part of the application process involves a dialogue with the Treasury and FIRB, which may result in agreement on conditions that the Treasurer may impose as a condition to allowing a foreign investment proposal to proceed. If a foreign investment proposal is completed without having been notified, it is possible to reach a negotiated solution with the Treasurer but there is no guarantee that a negotiated solution will be reached.

21 Can a negative decision be challenged?

An order prohibiting a foreign investment proposal, or requiring disposal of assets, could be challenged on the grounds that the transaction was not a notifiable action or significant action or on procedural grounds. Otherwise, an order cannot be challenged as the Treasurer has complete discretion to decide what the national interest is and whether a foreign investment proposal is contrary to it.

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22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

For its part, the government respects confidentiality, and 'leaks' are extremely rare. There are no remedies if confidentiality is breached, however. The government may be compelled to disclose information under freedom of information laws, but the information contained in FIRB applications is usually commercial in confidence information, which is not subject to such disclosure. Applicants should, however, state in their applications that the information contained in them is commercial in confidence and is not subject to disclosure under freedom of information laws.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The vast majority of applications for business proposals were approved without conditions. Counting the number of rejections can be difficult: in some cases, foreign investment proposals were never formally rejected, but the parties terminated the transactions for reasons associated with the foreign investment review process (for example, conditions may have been imposed that the parties did not accept). Taking these 'effective' rejections into account, there are approximately 10 to 15 business transactions that have been rejected, most of them in the past 10 years.

Because of the case-by-case nature of the review process, it is more instructive to look at trends than individual cases. The trends evident in rejections (and effective rejections) include:

- national security concerns (for example, the attempted acquisition of AusGrid, the NSW electricity distribution company, by bidders from China and Hong Kong; development and operation of mines near sensitive Department of Defence-owned land);
- genuine competition concerns (for example, the attempted acquisition of a rare earths miner by an acquirer from China, when Chinese companies already controlled a significant portion of the world's supply of rare earths; or the attempted acquisition of an Australian miner by a Chinese miner where there was insufficient diversity of ownership in a newly emerging resources area);
- concerns around the ability of the acquirer to move important Australian assets offshore and to be beyond the reach of Australian regulation (for example, the attempted acquisition of the Australian Securities Exchange by the Singapore Stock Exchange);
- concerns as to the motivations of foreign government investors (for example, the attempted acquisition of the Australian Securities Exchange by the Singapore Stock Exchange and the attempted acquisition of Rio Tinto by Chinalco); and
- political issues (for example, the attempted acquisition of S Kidman & Co, (which holds approximately 1 per cent of Australian land and approximately 3 per cent of Australia's arable land), and the attempted acquisition of Graincorp by ADM, both of which were thought to have been driven by election year politics).

Brazil

Eduardo Boccuzzi and Marco Orlandi

Boccuzzi Advogados Associados

Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Brazil has a fairly liberal policy towards foreign investment, which faces few restrictions and serves to confirm the general rule that foreign nationals are by and large free to invest in the country, even in sectors that are traditionally subject to control in other countries, such as energy, mining, telecoms, and oil and gas. The main limitations relate to press and broadcasting, the financial industry, airlines and the purchase of rural land or areas located near international borders. In the sectors where restrictions exist these are usually applied using objective criteria and recourse to the concepts of national interest or national security are secondary.

Although foreign investment is largely unregulated, Brazil has currency controls that are enforced by the Brazilian Central Bank (BCB) and require foreign direct investment to be registered upon entrance to allow for future remittance of dividends or return of the capital invested abroad. Although there is an obligation to register, the registration process is straightforward and can be completed electronically. Moreover, when it comes to foreign direct investment, no previous approval from the BCB is required to take funds in or out of the country, although local banks will review the supporting documentation of the transaction.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

In the sectors where restrictions on foreign investment exist, these are usually applied using objective criteria, which are set forth in the Brazilian Constitution (BC) or specific legislation, and recourse to the concepts of national interest or national security are secondary.

Press and broadcasting

In the press and broadcasting sector, companies shall be exclusively owned by either Brazilian-born citizens or foreign nationals who obtained Brazilian citizenship for more than 10 years (BC, article 222, caput) or companies set up under Brazilian law with headquarters in the country. In any case, at least 70 per cent of the total share capital and voting capital shall belong directly or indirectly to Brazilian-born citizens or foreign nationals who obtained Brazilian citizenship for more than 10 years (BC, article 222, section 1). Moreover, programming and editorial responsibilities shall be exclusively in the hands of Brazilian-born or foreign nationals who obtained Brazilian citizenship for more than 10 years (BC, article 222, section 2).

Financial industry

In the financial industry, the admission of foreign participants in the local market is subject to prior approval by Brazilian authorities (BC, article 52, sole paragraph of the Act of Transitory Constitutional Provisions), which is formalised by a presidential decree recognising that the envisaged investment would be in line with the Brazilian government's interest. The application process for this authorisation is regulated by Circular 3,317/2006 of the BCB.

Health services

Brazilian law has recently lifted the ban on the participation of foreign companies or capital in the health assistance services industry, and it now allows foreign companies and capital to participate, directly or indirectly, including as controlling stockholders, in legal entities whose corporate purpose is to install, operate and explore: (i) hospitals, specialised hospitals, poly clinics, general clinics and specialised clinics; and (ii) family planning actions and research (article 142, Law 13,097/2015, reforming article 23, Law 8,080). Brazilian law already allowed foreign individuals and companies to own and participate in companies incorporated in Brazil to operate private healthcare plans (article 1, section 3, Law 9,656/1998).

Domestic airlines

Domestic airlines have to be based in Brazil and directed by Brazilian nationals. The stake of foreign investors cannot exceed 20 per cent (article 181, Law 7,565/1986) and the sale of voting shares has to be previously approved by the government. There are indications that the Executive Branch may propose legislation this year lifting this restriction completely and opening the market to foreign investors.

Rural land

Until 2010, the acquisition of rural land by foreign-controlled Brazilian companies was regarded as normal business, since the prevailing opinion was that the restrictions imposed by Law 5,709/1971 no longer applied. However, a legal opinion from the Federal Attorney's Office published in August 2010 overturned this construction and in practice restored the limitations set forth on the aforesaid law.

Among other points, this legislation stipulates that foreign nationals cannot own more than 25 per cent of the area of a municipality, each foreign nationality cannot account for more than 40 per cent of the said area and Brazilian companies controlled by foreign nationals need prior approval from the government to complete a purchase. There are proposals to lessen or even lift these restrictions completely advocated agribusiness entities. Draft Law (PL) 4,059/2012, which is being discussed in the National Congress, may amend existing legislation in that direction.

National interest and national security

The concept of national interest is used to limit the scope of financing from public financial institutions, such as the National Bank for Economic and Social Development, to foreign-controlled companies, which can only be granted when it involves investment in sectors or regions where a 'high national interest' is involved (article 37 and 39, Law 4,131/1962). This concept of high national interest is constructed rather extensively and includes public services infrastructure involving energy exploitation, energy generation, transmission and distribution; telephony; port and transport systems; sanitation; and investments in the petrochemical, mining and metallurgy, car making, agro-industry and forestry, capital goods, electronics, tourism and lease of capital goods industries (Decree 2,233/1997).

On the other hand, the concept of national security is employed to limit the acquisition of areas near the international borders, which are deemed indispensable to national security and must be authorised by the National Defence Council (article 7, Law 5,709/1971 and article 1, Law 6,634/1979). This is a different and distinct limitation from the acquisition of rural land by foreign nationals in general, as mentioned in 'Rural land', above.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

As outlined in question 2, in the few sectors where Brazilian law provides for limitations on foreign investments, it will typically either bar them from taking place, as in the nuclear sector (BC, article 21, XXIII), or set maximum thresholds for the shareholding stakes that can be held by foreign investors, (eg, press and broadcasting (30 per cent) and airlines (20 per cent)). Where restrictions exist, the investment can take place without further scrutiny provided the thresholds prescribed by applicable law are duly observed.

The exceptions are investments in the financial industry and the acquisition of land near the international border, where any new foreign investment shall be subject to review by the BCB and the National Defence Council, respectively.

With respect to the former, Circular 3,317/2006 clarifies that the direct or indirect acquisition by a foreign individual or legal entity of shares in Brazilian financial institutions, regardless of the percentage of shares; the increase of foreign participation in the corporate capital of Brazilian financial institutions; and establishment, in Brazil, of foreign financial institutions, are all subject to BCB review and require prior approval from the Presidency.

4 How is a foreign investor or foreign investment defined in the applicable law?

According to Law 4,131/62 (article 1), a foreign investor is an individual resident or domiciled abroad, or a legal entity whose headquarters are abroad, who brings capital, assets or equipment into Brazil in order to develop economic activities in general, such as the production of goods and provision of services.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Brazilian law does not distinguish between ordinary foreign investors and SOEs or SWFs.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

As regards the financial industry, the decision on whether the foreign investor will be allowed to form a new bank or acquire a stake from an existing institution is the responsibility of the Presidency of the Republic, with the support from the BCB. With respect to land near international borders, the responsibility belongs to the National Defence Council.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Although investment review is very limited in scope, as relatively very few transactions are subject to it, the authorities have great discretion to approve or reject an operation when investment review is required by law.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

As mentioned in question 6, investment review on grounds of national interest and national security would only take place with respect to the financial industry and the acquisition of land near international borders. However, most investments in these areas would be subject to investment review, disregarding the turnover, asset size or purchase price. Filing is mandatory and the transactions cannot be completed without clearance from the authorities.

Update and trends

Domestic airlines have to be based in Brazil and directed by Brazilian nationals. The stake of foreign investors cannot exceed 20 per cent (article 181, Law 7,565/1986) and the sale of voting shares has to be previously approved by the government. However, there are indications that the Executive Branch may propose legislation this year lifting this restriction completely and opening the local market to foreign investors.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

For the financial sector, the application shall be made with the BCB, as per Circular 3,317/2006 and once the dossier is complete, it is forwarded to the Presidency of the Republic, where a final decision will be taken and, if the investment is approved, a presidential decree will formalise the government's blessing. As regards the acquisition of land near international borders, the process will start at the National Institute of Rural Settlement and Agrarian Reform or another body, depending on the nature of the project, and will afterwards be forwarded to the National Defence Council, which is responsible for analysing the matter from a national security perspective.

10 Which party is responsible for securing approval?

Either or both parties may take responsibility for securing approval.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

As review processes are rare, it is hard to provide an estimated time frame for their completion. Practical circumstances may play an important role in expediting the process; if the area near the international border being purchased is essential to the establishment of a new project that will create jobs and if the foreign investor is about to acquire a financial institution that is in trouble, the government will probably give priority to these applications as they are in line with national interests.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Yes, in both cases the transaction cannot take place before clearance is obtained. In both cases the operations would be deemed null and void. With respect to the financial sector, the bank could lose its authorisation to operate. On the acquisition of land near international borders, a fine of 20 per cent over the amount of the transaction could be applied (article 6, Law 6,634/79).

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

It is possible to consult with and obtain informal guidance from the authorities, although this is not institutionalised, but handled on a case-by-case basis.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Public affairs or lobbying specialists can be usefully employed throughout the process. Again, this is not institutionalised, but handled on a case-by-base basis.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

Not applicable.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

Brazilian law does not establish a substantive test to verify whether a transaction is in line with the national interest or national security.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The BCB may consult with its foreign peers on the credentials of the potential foreign investor that is willing to enter the local market. Such cooperation is unlikely when it comes to the National Defence Council, although it cannot be ruled out.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

In principle, no other parties shall be involved in the review process.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

See question 12.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Not applicable.

21 Can a negative decision be challenged?

In the case of the acquisition of areas near international borders, the applicant may appeal to the President within 120 days (article 4, Decree 85,064/1980). The appeal must be filed with the general secretary of the National Defence Council, who will forward the procedure to the President within 60 days. With respect to the finance industry, applicable regulation does not provide for an administrative appeal.

In both cases one could also envisage challenging a negative decision in court. However, the chances of success would probably be very slim, as one is dealing with a highly discretionary issue.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

There are no specific safeguards in place to protect confidential information and any decisions made will have to be made public.

However, the files of application proceedings would not be readily available to the general public and it is possible that one could make arrangements with the competent body for the protection of confidential information.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Not applicable.

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The applicable statute is the Investment Canada Act.

Long-awaited changes to the 'net benefit' review threshold for World Trade Organization (WTO) investments by non-state-owned enterprise investors came into force in 2015. This threshold, which determines whether a non-Canadian investor must seek approval from the Minister of Innovation, Science and Economic Development (formerly the Minister of Industry), under the Investment Canada Act by filing an application for review, changed from C$369 million (2015) of 'asset value' to C$600 million enterprise value (which the Canadian government has said will rise to C$1 billion enterprise value in 2017, which is two years earlier than scheduled). Generally speaking, the direct acquisition of control by a non-Canadian of a significant Canadian business (either by virtue of its enterprise value in excess of C$600 million or asset value of C$5 million if it is engaged in a 'cultural' business in Canada – see question 8) requires review and prior approval by the Minister of Innovation, Science and Economic Development (or Minister of Canadian Heritage for cultural transactions). Although Canada welcomes foreign investment, in such circumstances, a non-Canadian investor will be required to satisfy the relevant minister that the transaction will likely be of 'net benefit' to Canada before the minister will approve the transaction. It is typical for a non-Canadian investor to agree to give written undertakings to the government of Canada to secure approval. Such undertakings often include promises relating to employment and expenditures in Canada and Canadian participation in the business.

The direct acquisition of control by a non-state-owned enterprise investor of a non-cultural Canadian business, where either the vendor or purchaser is ultimately controlled in a country that is a member of the WTO other than Canada (a WTO investor), benefits from the higher C$600 million enterprise value threshold. The direct acquisition of control of a cultural Canadian business (or a non-cultural business where neither purchaser nor vendor are WTO investors) is subject to an asset value C$5 million threshold. If an acquisition involves the direct acquisition of a Canadian business by a state-owned enterprise (SOEs), then it is reviewable where the asset value of the Canadian business is C$375 million (2016) or more.

An indirect acquisition of control of a non-cultural Canadian business (acquisition of control of a corporation outside Canada that controls an entity carrying on a Canadian business) is not subject to review and approval if either the vendor or purchaser is a WTO investor.

Although very few transactions have been rejected since the Investment Canada Act was created in 1985, there has been increased enforcement of the Act in recent years with some notable rejections of major transactions, including the rejection of Accelero Capital Holdings's attempted acquisition of Allstream and BHP Billiton's attempt to acquire Potash Corp – see question 23.

There are two relatively recent and important developments to the Investment Canada Act:

- In 2009, a national security review regime was created (somewhat similar to the Committee on Foreign Investment in the United States regime). To the extent that the Canadian government believes that a transaction that involves a non-Canadian may be injurious to Canada's national security, such a transaction can be blocked or, if already implemented, unwound. These national security powers apply not only to significant acquisitions of control (as is the case for a 'net benefit' review), but also to lower valued acquisitions of control and minority investments. In late 2016, the Canadian government issued guidelines that have shed some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review.
- At the end of 2012, the Canadian government announced proposed amendments to the Investment Canada Act and related policy framework, which affect investments by non-Canadian investors whom the government considers SOEs. The last of these amendments came into force in 2015 (see question 5).

In an unusual move in late 2016, the new Liberal government consented to setting aside an order made under the previous Conservative government that required O-Net Communications to divest its investment in ITF Technologies on the basis that the investment would be injurious to national security (see question 23). A fresh national security review of investment is set to take place. This development is consistent with the Liberal government's foreign policy objective to deepen trade relations with China. Time will tell whether this move by the government is a sign of an overall policy shift or is a unique case.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The Investment Canada Act and Competition Act are the main laws that regulate investments by non-Canadians. Further, investments in transportation businesses that exceed the pre-merger notification thresholds under the Competition Act may be subject to pre-closing review under the Canada Transportation Act.

Although the Investment Canada Act review process is a separate process from the Competition Bureau's review under the Competition Act, the effect of the investment on competition is one of the 'net benefit' factors under the Investment Canada Act (see question 16). If there is any concern registered under the Competition Act, the relevant reviewing authority under the Investment Canada Act will generally encourage an applicant to deal directly with the Competition Bureau under the Competition Act.

Further discussion regarding the application of the Competition Act and Canada Transportation Act is beyond the scope of this chapter.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Investment Canada Act is a complex statute. However, at its core, it contains two straightforward procedures:

- non-Canadian investors that propose to make sizeable investments in Canadian businesses (see question 8) must submit their proposed investments for review and approval by the Canadian government; and

- non-Canadian investors that propose to make smaller investments in Canadian businesses, or to start up new Canadian businesses, must give notice (which can be filed post-closing) of their proposed activities to the Canadian government.

A 'Canadian business' is defined as a business carried on in Canada that has a place of business in Canada, individuals in Canada that are employed in connection with the business, and assets in Canada used to carry on the business. A Canadian business does not lose that status simply because it is partly carried on in another country. Further, a part of a business will be considered to be a Canadian business if it is capable of being carried on as a separate business.

The term 'business' means any undertaking capable of generating profit and being carried on in anticipation of profit.

Once the non-Canadian investor submits a completed review application or notice, as applicable, the government screens the investment for the following purposes:

- in the case of an investment subject to the review and approval procedure, it is assessed to determine whether it is 'likely to be of net benefit to Canada' (see question 16 for 'net benefit' factors);
- in the case of an investment that is subject to the notification procedure, if it is in a 'cultural business', the notice may trigger a government decision to require a review and approval procedure. Thus, the investment will be assessed for its net benefit to Canada; and
- if it is in a non-cultural business (obviously the vast majority of investments), the investment is not assessed for its net benefit to Canada.

Special scrutiny

The Investment Canada Act reviews involving cultural businesses will take into account government policies that limit investment by non-Canadians in such businesses (see questions 8 and 9).

All investments (including minority investments) may be assessed to determine whether they could be injurious to Canada's national security under the national security regime (created in 2009). Until late last year, publicly available information regarding the Canadian government's approach to national security reviews has been scant. This lack of information, coupled with the fact that a number of important terms regarding the national security scheme are not defined in the legislation, has created uncertainty for foreign investors. With the highly anticipated release of its Guidelines on the National Security Review of Investments in late 2016, the Canadian government has finally shed some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review (see question 8).

Investments by SOEs are also given special attention under the Investment Canada Act (see question 5). In December 2012, the Canadian government announced that acquisitions of control by SOEs of a Canadian oil sands business will, going forward, be approved on an exceptional basis only (see question 5).

4 How is a foreign investor or foreign investment defined in the applicable law?

Review under the Investment Canada Act is triggered by investments by 'non-Canadians'. Under the Act, 'non-Canadian' means 'an individual, a government or an agency thereof or an entity that is not a Canadian'. A 'Canadian' means:

- an entity that is Canadian-controlled. The Investment Canada Act sets out a number of tests and presumptions for determining whether an entity is Canadian-controlled (and therefore not a 'non-Canadian'). For example, an entity will be Canadian-controlled where Canadians own a majority of the voting interests in the entity;
- a Canadian citizen; or
- a permanent resident within the meaning of the Immigration Act (Canada) who has been ordinarily resident in Canada for not more than one year after the time at which he or she first became eligible to apply for Canadian citizenship.

The term 'non-Canadian' includes Canadian-incorporated entities that are ultimately controlled outside Canada. For investments involving an SOE, there are special rules regarding the determination of 'non-Canadian', which broadens the reach of the Investment Canada Act (see question 5).

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Investments by SOE investors may receive greater scrutiny under the Investment Canada Act. In 2012, the Canadian government announced that investments by SOEs would be treated differently than other investments. Following the approvals of two high-profile acquisitions by foreign SOE investors of Canadian businesses in the oil and gas sector in 2012 (Chinese National Offshore Oil Corporation Ltd's proposed C$15.1 billion acquisition of Nexen Inc and PETRONAS Carigali Canada Ltd's acquisition of Progress Energy Resource Corp), the Canadian government announced that investments by foreign SOEs to acquire control of a Canadian oil sands business will, going forward, be found 'to be of net benefit, only in an exceptional circumstance'. It also announced that the review thresholds for investments by SOEs would not increase in the same way that non-SOE investments would with the C$600 million in enterprise value threshold for WTO investments by non-SOE investors, which came into force in 2015. Instead, the lower asset value threshold (C$375 million in 2016, adjusted annually to reflect the change in nominal gross domestic product in the previous year) applies to investments by SOE investors. The Canadian government also introduced other changes to the legal and policy framework governing foreign investment that tighten the rules around investments by SOEs. As such, there are specific SOE-related provisions under the Act in respect of the following: the definition of SOE, the threshold for review, control and acquisition of control rules, and 'net benefit' review.

Definition of SOE

SOE is now broadly defined under the Investment Canada Act. An SOE means:

- a foreign government or its agency;
- an entity that is controlled or influenced, directly or indirectly by a foreign government or its agency; and
- an individual acting under the direction or influence of a foreign government or its agency, directly or indirectly.

SOE review threshold

The review threshold for investments by SOEs has been amended, and, as a result, did not increase significantly in the same way that non-SOE investments did in 2015 (see Update and trends: Legislative change). Instead, the net benefit threshold of C$375 million (2016) in asset value remains in place and will be adjusted annually to reflect the change in nominal gross domestic product in the previous year.

Control and acquisition of control rules for SOEs

As discussed in other questions, subject to certain exemptions, where a transaction involves the 'acquisition of control' of a Canadian business by a non-Canadian and the acquired business exceeds certain financial thresholds, the transaction may be reviewable by the Canadian government under the Investment Canada Act. The Investment Canada Act contains provisions regarding the determination of whether an entity is Canadian-controlled and 'acquisition of control' where an SOE is involved.

Control

Under the Investment Canada Act, even if an entity qualifies as a Canadian (and, thus, not caught by the Investment Canada Act), the minister may nevertheless determine that the entity is not Canadian if he or she determines that the entity is controlled in fact by an SOE. The effect of this rule is that it broadens the reach of the Investment Canada Act where a foreign state is involved. For example, the minister's determination that an investor, which would otherwise be Canadian, is an SOE may give the Canadian government the power to challenge the investment under the national security review regime. Similarly, the minister can now make a determination that a foreign investor is controlled in fact by an SOE. The effect of this amendment is that where the minister determines that a foreign investor is controlled by an SOE and the investor is making an acquisition of control of a Canadian business, then the applicable review threshold is the lower SOE-specific threshold and not the significantly higher threshold for non-SOE investments.

Acquisition of control

The Act contains detailed deeming and presumption provisions to determine acquisition of control. Generally speaking, a minority investment is not an acquisition of control under these provisions and, as such, the investment would not be reviewable under the Act. However, notwithstanding these provisions, the SOE rules allow the Minister to make a determination that there has been an 'acquisition of control in fact' by an SOE. The effect of this is that an otherwise non-reviewable acquisition may be subject to review where it is made by an SOE and the lower SOE-specific review threshold is met.

The Minister may make the above determinations based on 'any information and evidence made available to the Minister'. Further, if an entity does not provide information that the Minister has requested and considers necessary to make the determination, the Minister 'may declare' that an entity is not a Canadian-controlled entity, the entity is controlled in fact by an SOE or that there has been an acquisition of control by an SOE.

The Minister's above determinations may be made retroactively. Consequently, any indirect or tangential involvement by a foreign state will potentially give rise to uncertainty. Because of the retroactive powers that the Minister of Innovation, Science and Economic Development will have to review transactions, it is prudent for parties to consider the feasibility of pre-emptive consultation with the Minister and his or her staff.

Net benefit review of SOE investments

At that time, the Canadian government also released revised administrative guidelines, which set out factors for its review of investments by an SOE. The guidelines provide that in determining whether a reviewable acquisition of control in Canada by an SOE is of 'net benefit' to Canada, the Minister will examine, as part of the assessment of the factors enumerated in the Investment Canada Act (see question 16 for 'net benefit' factors), the corporate governance and reporting structure of the non-Canadian investor. This examination will include whether the non-Canadian adheres to Canadian standards of corporate governance (including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders), and to Canadian laws and practices, including adherence to free market principles. The Minister will assess the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, production and capital levels in Canada. The examination will also cover how and the extent to which the non-Canadian is owned, controlled by a state or its conduct and operations are influenced by a state. The Minister will also assess whether the Canadian business to be acquired will likely operate on a commercial basis, including with regard to:

- where to export;
- where to process;
- the participation of Canadians in its operations in Canada and elsewhere;
- the impact of the investment on productivity and industrial efficiency in Canada;
- support of ongoing innovation, research and development; and
- the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

An SOE should therefore anticipate that it will be required to provide undertakings beyond those normally expected of a privately owned company (see question 20). Indeed, the SOE administrative guidelines state that non-Canadian investors will be expected to address the inherent characteristics of SOEs (specifically that they are susceptible to state influence) in their plans and undertakings. Investors will also need to demonstrate their strong commitment to transparent and commercial operations. The SOE administrative guidelines also suggest undertakings that SOEs may offer to demonstrate 'net benefit', including the appointment of Canadians as independent directors on the board of directors, the employment of Canadians in senior management positions, the incorporation of the business in Canada, and the listing of shares of the acquiring company or the Canadian business being acquired on a Canadian stock exchange.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

For mergers or acquisitions reviewed under the Investment Canada Act, Industry Canada (Investment Review Division) is the government department responsible for the administration of the Investment Canada Act for all investments, except those involving a cultural business (see question 8). The Department of Canadian Heritage (Cultural Sector Investment Review) is responsible for the administration of the Investment Canada Act for investments involving a cultural business. The review of an investment is carried out by the Investment Review Division, the Cultural Sector Investment Review (with respect to cultural matters), or both who make a recommendation to the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions). The relevant minister decides whether or not the investment is likely to be of 'net benefit to Canada'.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The Minister of Innovation, Science and Economic Development (or Minister of Canadian Heritage for cultural transactions) will only approve the acquisition of control of a Canadian business if he or she is satisfied that the transaction is likely to be of 'net benefit' to Canada (see question 16). The Investment Canada Act specifies the information that the Minister shall take into account in satisfying him or herself that the investment is likely to be of 'net benefit' to Canada:

- information submitted by the investor;
- information submitted by the entity from which control of the Canadian business is being acquired;
- written undertakings given by the investor;
- representations by a province of Canada that is likely to be significantly affected by the investment; and
- 'net benefit' factors.

As long as the Minister has not taken into account factors that are not listed above, he or she may decide whether an investment is likely to be of 'net benefit' to Canada and as such, whether a transaction is approved or rejected.

Transactions that could be 'injurious to national security'

As discussed in question 8, a number of important terms in the national security review scheme are not statutorily defined, which thereby creates wide discretion for the Minister of Innovation, Science and Economic Development (or Minister of Canadian Heritage for cultural transactions) and some uncertainty for foreign investors. That said, the government's 2016 Guidelines on the National Security Review of Investments is instructive as to the type of investments that the government is likely to assess under the national security review regime.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

After concluding that the Investment Canada Act applies to an investment, the next step is to determine the appropriate screening procedure. As discussed in question 3, new investments and lower financial value acquisitions require the filing of a notification, whereas higher financial value acquisitions (and acquisitions of cultural businesses) require a more onerous review procedure. To determine whether a review is required (versus a relatively simple notification), one must examine the size of investment, whether the investor or the vendor is controlled in one or more countries that are members of the WTO, whether the investor is an SOE, whether the acquisition is direct or indirect, and whether the target's business is cultural or gives rise to national security concerns.

Review under the Investment Canada Act

Subject to certain exemptions, where a transaction involves the acquisition of control of a Canadian business by an acquirer controlled, directly or indirectly, by non-Canadians (see question 4) and the enterprise value (for WTO investments by non-SOE investors) or the gross book value of the assets (for SOE investors, Canadian cultural businesses or non-WTO investments) of the acquired business exceeds certain threshold amounts, the transaction may be reviewable by Industry Canada pursuant to the Investment Canada Act. The Act sets out an extensive list of activities that are exempt from the operation of the statute, including ordinary course acquisition of voting shares by a trader in securities, acquisition in the course of realising on security for a loan, and corporate reorganisation where the ultimate control does not change. Exempt transactions, of course, do not incur any review or notice obligations.

If a direct acquisition is reviewable, it cannot be completed without the approval of the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions).

Acquisition of control

The acquisition of control of a Canadian business is effected by acquiring:

- substantially all of the assets of a Canadian business; or
- the majority of the voting interests in an entity such as a corporation, partnership, joint venture or trust that carries on or controls a Canadian business.

The acquisition of a third or more of the voting shares of a corporation that controls or carries on a Canadian business will give rise to a rebuttable presumption that control has been acquired. The acquisition of less than a third of the voting shares of such a corporation is deemed not to be an acquisition of control. For any entity (whether a corporation, partnership, joint venture or trust) the acquisition of a majority of the ownership interests is deemed to be the acquisition of control. Notwithstanding these deeming and presumption provisions, in the case of cultural industries, the Minister can look at control-in-fact evidence and make a determination that an acquisition of control has taken place.

Thresholds for review

The Investment Canada Act threshold for 2016 that applies to most direct acquisitions of control of Canadian businesses by non-Canadian, non-SOE investors from WTO member states is C$600 million (the Canadian government has announced that in 2017 it will amend the Act to increase this threshold to C$1 billion). This is the threshold that is relevant most frequently in circumstances where a review is necessary. The threshold applies to the enterprise value of the target. The Investment Canada Act provides for complex formulas for calculating the enterprise value of public entities, non-public entities and Canadian businesses acquired by way of an acquisition of assets. As discussed in question 4, a non-Canadian includes a Canadian-incorporated entity that is ultimately controlled from outside Canada.

Higher reviewable thresholds

European investors

Pursuant to the Canada-EU Comprehensive Economic and Trade Agreement, the threshold for review of acquisitions of Canadian businesses by European companies will be C$1.5 billion. Other free trade agreement partners of Canada are also likely to benefit from this higher threshold pursuant to most-favoured nation commitments in those trade agreements.

Pacific Rim investors

In 2015, 12 Pacific Rim countries reached an agreement on the Trans-Pacific Partnership (TPP). In addition to Canada, parties to the TPP include Brunei, Chile, Japan, Australia, New Zealand, Singapore, Peru, Malaysia, Mexico, the United States and Vietnam. Among other things, the TPP agreement contemplates that TPP countries will benefit from a higher review threshold of C$1.5 billion under the Investment Canada Act. It remains to be seen whether the TPP agreement will be ratified.

Lower reviewable thresholds

Non-WTO

Lower reviewable thresholds apply for certain investments. For direct acquisitions (see 'Indirect acquisitions', below), if both the purchaser and vendor are each ultimately controlled in a non-WTO member state, the review threshold is C$5 million in asset value.

Cultural businesses

Also, where the Canadian business being acquired is a cultural business, the reviewable threshold is C$5 million in asset value regardless of whether the purchaser or vendor is ultimately controlled in a WTO member state. A 'cultural business' is a business that carries on any of the following activities:

- publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form;
- production, distribution, sale or exhibition of film or video products;
- production, distribution, sale or exhibition of audio or video music recordings; or
- publication, distribution or sale of music in print or machine-readable form.

It is important to note that even if an acquisition by a non-Canadian of a 'cultural business' does not trigger the statutory reviewable threshold, a review may, nonetheless, be ordered where the 'Governor in Council considers it in the public interest'.

SOE investors

The review threshold for investments by SOEs did not increase in the same way that non-SOE investments did in 2015 (see Update and trends). Instead, the net benefit threshold of C$375 million (2016) in asset value applies to SOE investments and will be adjusted annually to reflect the change in nominal gross domestic product in the previous year.

Indirect acquisitions

The above thresholds relate to direct acquisitions. If the investment is an indirect acquisition (acquisition of control of a corporation outside Canada that controls an entity carrying on a Canadian business) the following thresholds apply:

- if the target is a cultural business or if purchaser and target are each ultimately controlled in a non-WTO member state (or Canada in the case of the target), the threshold for review is C$50 million in asset value. However, if the Canadian assets being acquired comprise more than 50 per cent of all of the assets being acquired, the threshold for review is C$5 million in asset value; and
- if the purchaser or target is from a WTO member state and the target is not a cultural business, the investment is not reviewable. Instead, only notice of their proposed activities must be given to the Canadian government (see 'Notification under the Investment Canada Act', below).

Transactions that could be 'injurious to national security'

The Canadian government has the power to review all proposed investments (including minority investments) where the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) has 'reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.' There is no statutory definition of 'national security'. No financial threshold will apply to a national security review. A national security review can also apply to minority investments. This means that any transaction that involves a non-Canadian is potentially subject to a national security review. After a review, the Minister may deny the investment, ask for undertakings, provide terms or conditions for the investment or, where the investment has already been made, require divestment. A national security review can occur before or after closing and may apply to corporate reorganisations where there is no change in ultimate control. The major concern for foreign investors under a review for 'national security reasons' is that a number of important terms regarding the 'national security' review scheme have not been defined in the legislation. This lack of definition creates a wide discretion for the Minister and some uncertainty for foreign investors. At the end of 2016, the Canadian government released its highly anticipated Guidelines on the National Security Review of Investments, which sheds some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review. The guidelines provide a list of factors that the Canadian government considers when assessing whether an investment poses a national security risk. These factors focus on defence, technology and critical infrastructure and supply. The Canadian government may take into account:

- the potential effects of the investment on Canada's defence capabilities and interests;
- involvement in the research, manufacture or sale of goods and technology identified in section 35 of the Defence Production Act;
- the potential of the investment to enable foreign surveillance or espionage;
- the potential of the investment to hinder current or future intelligence or law enforcement operations;
- the potential impact of the investment on Canada's international interests, including foreign relationships;
- the potential of the investment to involve or facilitate the activities of terrorists, terrorist organisations or organised crime and other illicit actors;
- the potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
- the potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
- the potential impact of the investment on the supply of critical goods and services to Canadians; and
- the potential impact of the investment on the supply of goods and services to the government of Canada.

Since the national security review process was introduced in March 2009 it has been invoked eight times. The outcomes of these reviews include, that the investor was directed to not implement the proposed investment (three cases), the investor was ordered to divest control of the Canadian business (two cases), investment was authorised with conditions that mitigated the identified national security risks (two cases) and, in one case, the investor withdrew his application prior to a final order being made.

Notification under the Investment Canada Act

If the relevant financial thresholds for review under the Investment Canada Act are not met, a notification must be filed by the investor any time before the implementation of the investment or within 30 days of the implementation.

In 2015, amendments to the Investment Canada Act came into force, which gave rise to additional onerous reporting requirements for investments that are subject to post-closing notification or review under the Investment Canada Act. For example, the investor will be required to provide information relating to: its board of directors, five highest paid officers and individuals that own 10 per cent or more of the investor; whether it is influenced by a foreign state; and sources of funding for the investments.

Following receipt of the notice, the Investment Review Division, the Cultural Sector Investment Review of Canadian Heritage, or both, assess it for completeness and issue a receipt. Eventually, basic details identifying the investor, the target and the nature of the target's business will be disclosed on the Ministry's website.

It is important to note that there are circumstances in which an investment that would not otherwise be reviewable is subject to review under the Investment Canada Act. See question 15.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

Application for review

For those transactions that are reviewable under the Investment Canada Act (see questions 3 and 8) a review is commenced by the completion and filing of an application for review. The purpose of a review is to satisfy the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) that the investment 'is likely to be of net benefit to Canada' (see question 16).

An application for review is a much more detailed document than a notification, and requires much care in its preparation. A key element in the application for review is the requirement to set out the investor's plans for the Canadian business, including plans related to employment, participation of Canadians in the business, and capital investment.

Form and content of the application for review

The preparation of the application for review (which includes the application form stipulated by government) typically focuses on four main components:

- collection of data that is specifically required for the application form. As noted in question 8, amendments to the Investment Canada Act came into force in 2015, which give rise to additional onerous reporting requirements. For example, the investor will be required to provide information relating to:
  - its board of directors, five highest paid officers and individuals that own 10 per cent or more of the investor;
  - whether it is influenced by a foreign state; and
  - sources of funding for the investments;
- collection of 'supplementary' information (the Investment Review Division sets out supplementary information that the officials strongly suggest be submitted with the application for review);
- preparation of the plans for the Canadian business; and
- in most cases, preparation of a submission that outlines why the proposed investment is likely to be of 'net benefit' to Canada.

Plans for the Canadian business

The most important element of any application for review is the articulation of the investor's plans for the target following the acquisition. These plans are the key source of information on which the relevant minister assesses whether the proposed investment is likely to be of 'net benefit' to Canada. Further, the plans are the primary input for the development of the undertakings that the investor is usually required to provide in order to secure approval. The application for review form requests a detailed description of the investor's plans for the Canadian business with specific reference to 'net benefit' factors (see question 16) and the current operations of the Canadian business. The Investment Review Division has suggested the following list of subjects for the plans:

- employment (number and type of jobs created or lost);
- additional investment (increased working capital provisions, expansion);
- resource processing (value added, extent of processing);
- utilisation of parts, components and services (requirements of the Canadian business and opportunity for Canadian suppliers to compete in supplying them);
- exports (percentage of exports compared with total sales, markets served, types of products or services exported);
- Canadian participation (number of Canadians as employees, managers, directors and owners);
- productivity and efficiency (new or expanded plant, new equipment, rationalisation of activities, training);
- technological development (nature of research and development (R&D), R&D expenditures and timing, R&D facility, R&D contract in Canada, use and terms and conditions to use licences, patents, etc);
- product innovation or variety (different or complementary product lines, state-of-the-art products); and
- international competitiveness (world product mandate, access to international distribution networks).

Filing fee

There is no filing fee associated with an application for review or notification under the Investment Canada Act.

Statutory timelines for review

Once the application for review is filed and certified as complete, the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) has 45 days within which to decide whether or not the proposed acquisition is likely to be of 'net benefit to Canada'. The review is carried out by the Investment Review Division of Industry Canada, the Cultural Sector Investment Review of Canadian Heritage (with respect to 'cultural' matters), or both, which make a recommendation to the relevant minister. Other government bodies, such as provinces where the Canadian business operates and government agencies, such as the Competition Bureau, may be consulted in this process. The review process often includes negotiating undertakings that are requested by the reviewing authority, for instance, as to employment levels and location of important offices and facilities. This can lead to intensive negotiations between the investor and the government. When finalised, these undertakings are legally enforceable by the government.

If the relevant minister is unable to reach a decision during the initial 45-day period then he or she can unilaterally extend the period for a further 30 days or such longer period as may be agreed on consent. These time frames can be further extended if national security issues surface. Upon the expiry of this period, the Minister must render a decision or he or she is deemed to be satisfied that the proposed acquisition is likely to be of net benefit to Canada.

If, at the end of the review period, the Minister sends a notice that he or she is not satisfied that the investment is likely to be of net benefit to Canada, the investor has the right, for 30 additional days (or such further period as may be mutually agreed), to make further representations and submit undertakings to the Minister. Upon the expiry of such additional period, the Minister will, in light of further undertakings or representations, either confirm the original conclusion or advise the applicant that the proposed transaction is approved.

Cultural businesses

The Investment Canada Act reviews involving cultural businesses will take into account government policies that limit investment by non-Canadians in such businesses. These policies apply to the publication, distribution or sale of books, magazines and periodicals, and the production, distribution, sale or exhibition of film or video products, or audio or video music recordings. As a practical matter, a non-Canadian investor will find it difficult to obtain Investment Canada Act clearance to acquire or establish a Canadian business in a number of these sectors. In other cultural businesses as well, and notwithstanding the lack of a particular sector policy, a non-Canadian investor will often find it a challenge to gain Investment Canada Act clearance. The Ministry has issued guidelines with respect to the types of issues and undertakings that applicants should be prepared to address during the review process.

Transactions that could be 'injurious to national security'

As discussed in question 8, the Canadian government has the power to review all investments by non-Canadians on national security grounds. The entry point for national security screening will, in most cases, be the notification and review processes under the Investment Canada Act. Under the applicable regulations, the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) has 45 days after an application or notification has been certified, or after the implementation of an investment that does not require notification, to initiate action. An investment subject to a national security review after it has been implemented can be unwound if the Governor in Council (ie, federal cabinet) makes an order directing the non-Canadian to divest itself of its investment or conditions could be imposed on it by order of the Governor in Council.

Where a transaction gives rise to national security risks, parties are advised to file notice of the transaction with the Minister more than 50 days prior to the closing date in order to obtain a pre-clearance (assuming the Minister does not order a further national security review).

The Minister initiates a national security review by sending notice to the non-Canadian investor. The Minister can, and likely will, also send a request for information. Following this preliminary procedure, the Minister can either terminate screening or issue another notice, this time ordering a full national security review of the investment. In 2015, the national security review timelines were extended. As a result, a full national security review could take up to 200 days (or longer with the consent of the investor) from the date of the initial notice of the transaction sent to the Minister.

The Minister can request information from the non-Canadian or any other person involved. The investor will also be given the opportunity to make representations to the Minister. The Minister digests the information, consults the Minister of Public Safety and Emergency Preparedness and other agencies and then sends a report to the Governor in Council (ie, the federal cabinet) with recommendations. The Governor in Council then makes a decision and issues an order that can block the investment, authorise the investment on conditions, or require divestiture (in the case of a completed investment).

Once the national security screening process begins, the deadlines for ministerial decision-making in an Investment Canada Act 'net benefit' review are postponed. Thus, the two procedures become, in effect, merged and would presumably lead to a synchronised outcome.

10 Which party is responsible for securing approval?

The investor is responsible for filing an application for review. However, where the acquisition is friendly, it is common for the Canadian business or seller, or both, to assist the investor by providing supporting information regarding the Canadian business for the investor's application for review.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

See question 9 for the statutory timelines for review. A very limited exception applies and would allow for an earlier closing where the Minister has sent a notice to the investor stating that a delay in closing the transaction would result in 'undue hardship' to the investor or 'would jeopardise the operations of the Canadian business'.

There are actions that the investor can take that may expedite the review process, including ensuring that the appropriate level of information is included in the application for review. The Investment Review Division has stated on its website that the most frequent cause of delays in the review of applications is the lack of adequate information on the investor's plans for the Canadian business and suggests that plans be described in sufficient detail to enable the reviewing officer to obtain a clear understanding of their intentions. It is also helpful for applicants to provide three-year projections for the Canadian business for employment, sales, exports, capital expenditures and R&D expenditures, where relevant.

Once the application for review has been submitted, it is helpful to consider the three key stages of the review period and possible actions that an investor may take at or prior to each stage to expedite the review:

- intergovernmental consultation: depending on the nature of the proposed investment, the officials will interact with the provincial or territorial jurisdiction that is affected by the transaction, other federal government departments, as well as federal and provincial agencies;
- provision of additional information to the government representatives: often the timing of review is affected by the time it takes the investor to prepare and submit information to the government. To the extent that the investor is able to anticipate information likely to be requested by the government, preparation of that material should begin as soon as possible; and
- negotiating the content and scope of written undertakings to be given to the government, if any (see question 20). To the extent that it is expected that undertakings will be required in support of a proposed transaction, this eventuality should be managed early on in the process. For example, draft undertakings should be prepared in anticipation of the Minister's request for undertakings so that once the request has been made, the negotiation of the undertakings can begin forthwith.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Subject to the limited exception described in question 11, if a direct acquisition is reviewable, it cannot be completed without the approval of the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions). If a direct transaction is implemented before clearance is obtained, the Minister can seek a court order, which may require the investor to divest control of the Canadian business, dispose of any voting interests or assets acquired by the investor or pay a penalty of up to C$10,000 for each day that the investor is in contravention of the Investment Canada Act, or all of these. An indirect acquisition of control (acquisition of control of a corporation outside Canada that controls an entity carrying on a Canadian business) can be completed before the Minister makes his or her decision.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Early in the evolution of a reviewable transaction, and certainly if a public announcement has been made, it is commonplace to make a courtesy call to the Investment Review Division, the Cultural Sector Investment Review (with respect to cultural matters), or both, in order to advise them of the proposed transaction. Generally speaking, however, it is unusual for there to be any pre-filing dialogue or meetings between the investor and the reviewing agency.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

In most cases the investor will have legal and financial advisers engaged in respect of a proposed transaction. However, in some complex or sensitive cases, the contribution of public relations and government relations experts can be very valuable. Given the Canadian government's power to undertake a review for 'national security' and its special treatment of investments by SOEs referred to in question 5, it is very important for investors that expect to be affected by these types of reviews to develop an appropriate government relations strategy early on when making an investment in Canada that may be reviewable (including considering pre-filing consultations with key government officials). The Canadian government's recent rejections, based on national security grounds, of Beida Jade Bird's proposal to build a new fire alarm systems factory and Accelero Capital Holdings's attempted acquisition of Allstream (see question 23) highlights the importance of early identification and careful management of sensitive issues. Careful consideration should be given, as soon as possible, to engaging experts whose experience can make the processing of a file much smoother for both investor and government alike.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

Any transaction that involves a non-Canadian is potentially subject to a national security review. A national security review can occur before or after closing. After the national security review, the minister may deny the investment, ask for undertakings, provide terms or conditions for the investment or, where the investment has already been made, require divestment. The minister has 45 days, after a notification has been certified, or after the implementation of an investment that does not require notification, to initiate a national security review (see question 9).

As discussed in question 5, there are provisions under the Investment Canada Act that significantly affect foreign investors whom the Canadian government considers SOEs. The minister now has broad powers to declare an entity to be an SOE and to declare an otherwise non-reviewable acquisition by an SOE to be subject to review. Under the Act, the minister may make these determinations retroactively.

Cultural business

As discussed in question 8, even if an acquisition by a non-Canadian of a 'cultural business' does not trigger the statutory reviewable threshold, a review may, nonetheless, be ordered where the 'governor in council considers it in the public interest'.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

If a transaction is subject to review (see question 9) the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) must be satisfied that the transaction is 'likely of net benefit to Canada'. The Minister will only approve the acquisition of control of a Canadian business if he or she is satisfied that the transaction is likely to be of 'net benefit' to Canada. The factors that the Minister must consider in his or her 'net benefit' determination are listed in section 20 of the Investment Canada Act:

- the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians;
- productivity, efficiency, technological development, product innovation and variety;
- competition in Canada;
- compatibility with national industrial, economic and cultural policies; and
- Canada's ability to compete in world markets.

The investor's plans for the target, articulated in the investor's application for review, are the key source of information upon which the Minister assesses whether the investment is likely to be of 'net benefit' to Canada. On its website, the Investment Review Division has listed suggested subjects that investors are encouraged to elaborate on, where relevant, in order to assist staff in the assessment of the application for review (see question 9).

SOE investors

For investments by SOE investors, the Canadian government has articulated specific factors that the relevant minister will examine as part of his or her assessment of 'net benefit' factors listed above (see question 5 for SOE guidelines).

Transactions that could be 'injurious to national security'

The law does not set out what the scope of the term 'national security' is. It therefore remains open to interpretation by the government officials and may apply to a broad range of businesses and investors. Furthermore, until recently, since the national security regime was created in 2009, publicly available information regarding the Canadian government's approach to national security reviews has been scant. This has created uncertainty for foreign investors. However, with the release of its Guidelines on the National Security Review of Investments in late 2016, the Canadian government has finally shed some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review (see question 8). In addition to these new guidelines, the Canadian government's recent rejections, based on national security grounds, provide some indication of the type of business that the government considers within the purview of national security. For example, consider Beida Jade Bird's proposal to build a new fire alarm systems factory and Accelero Capital Holdings's attempted acquisition of Allstream (see question 23). According to media reports, Beida Jade Bird's proposal to build a new fire alarm systems factory in Quebec was blocked because of the site's proximity to Canadian Space Agency facilities located under two kilometres away. In announcing that Accelero Capital Holding's acquisition would not proceed, the Minister referenced MTS Allstream's national fibre optic network, which provided critical telecommunications services to businesses and governments.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The Canadian government will generally not consult with any foreign government in the context of a 'net benefit' review. However, with respect to a national security review, it is possible, if not probable, that the Canadian government would interact with the international intelligence and security community.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

As discussed in question 7, the type of information that the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) shall take into account in satisfying him or herself that the investment is likely to be of 'net benefit' is limited to information submitted by the investor, information submitted by the entity from which control of the Canadian business is being acquired and representations by a province of Canada that is likely to be significantly affected by the investment.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) can seek a court order, which may require the investor to divest control of the Canadian business, dispose of any voting interests or

Update and trends

Although Canada has benefited mightily from foreign investment, it retains a perhaps surprising degree of skepticism that foreign investment is always beneficial. As attitudes to foreign investment have evolved, so has the Investment Canada Act. An already complex statute has become lengthier and more complicated. The process of compliance has become more time-consuming and more expensive, even as the percentage of transactions that are subject to the onerous review process is decreased. Today, a more nuanced approach to foreign investment seems to be at work.

Most foreign investment is welcome, and consequently most transactions will encounter no opposition from the Investment Canada Act process (although undertakings will be extracted from the investor). However, in recent years, the government has demonstrated that it is willing to push back against investments that are contrary to evolving public policy, such as concerns about national security or foreign-state-owned investors, and against investors that fail to live up to their commitments (see questions 5 and 23), even if this blemishes Canada's investment-friendly reputation. That said, time will tell whether the events surrounding the national security review of O-Net Communication's investment in ITF Technologies signals a shift in policy under the new Liberal government or is a unique case. In an unusual move, in late 2016, the new Liberal government consented to setting aside an order made under the previous Conservative government that required O-Net Communications to divest its investment in ITF Technologies on the basis that the investment would be injurious to national security. A fresh national security review of investment is set to take place. This development is consistent with the Liberal government's key foreign policy objective to deepen trade relations with China.

Legislative change

New Investment Canada Act regulations came into force in 2015, which dramatically increased the reviewable threshold to C$600 million in enterprise value for investors (other than SOEs) from WTO member nations. In 2016, the Canadian government announced that it would introduce amendments in 2017 that would raise the threshold from C$600 million to C$1 billion, which is two years ahead of schedule.

Other legislative changes have occurred in recent years. The timelines for various stages of the national security review process were extended, potentially resulting in the total review period increasing to 200 days (or longer with the consent of the investor) from 130 days (see question 9). The 2015 amendments to the Investment Canada Act also gave rise to additional onerous reporting requirements for investments that are subject to review or post-closing notification under the Act (see question 8).

In December 2012, the Canadian government announced that investments by SOEs would be treated differently than other investments in respect of the following: the threshold for review under the Investment Canada Act, control and acquisition of control rules under the Investment Canada Act, and 'net benefit' review. These changes are now in force (see question 5).

assets acquired by the investor or pay a penalty of up to C$10,000 for each day that the investor is in contravention of the Investment Canada Act, or all of these:

- if an investor has failed to give notice of an investment or file an application for review;
- if a reviewable transaction is implemented before clearance is obtained;
- if a transaction is implemented on terms and conditions that materially vary from those contained in the application for review or any information provided in relation to the investment;
- if an investor has failed to comply with a written undertaking; or
- if an investor has entered into any transaction or arrangement primarily to avoid the application of the Investment Canada Act.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

As discussed in question 9, during the review period of an application for review, the applicant will commonly be asked to submit written undertakings in support of its application (eg, commitments relating to employment levels and location of important offices and facilities).

A written undertaking is a promise made by the investor to the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions). As discussed above, the Minister will only approve the acquisition of control of a Canadian business if he or she is satisfied that the transaction is likely to be of 'net benefit' to Canada. Generally, the Minister will insist on written undertakings to support a positive 'net benefit' finding. The larger, or more sensitive, a transaction is, the more likely it is that undertakings will be required. Once finalised, these undertakings are legally enforceable by the government.

The content and scope of the undertakings are typically based on the business plans contained in the application for review (see question 9). Although each transaction is different, undertakings often focus on Canadian employment levels, Canadian participation in management, Canadian capital expenditure levels, Canadian R&D commitments and the use of Canadian suppliers and businesses.

Undertakings typically last for three years although they can run longer. During that period, the government can ask for status reports; this is usually done at the 18-month mark. Where market conditions change such that the investor cannot reasonably be expected to abide by the undertakings, the government will sometimes negotiate amendments, although there is no legal requirement for the government to do so.

To the extent that the foreign investor expects undertakings will be required in support of a proposed transaction, this eventuality should be managed early on in the process.

21 Can a negative decision be challenged?

No. There is no right of appeal where the relevant minister (Minister of Innovation, Science and Economic Development or Minister of Canadian Heritage for cultural transactions) decides that an investment is not likely to be of 'net benefit' to Canada and does not approve the investment.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Section 36 of the Investment Canada Act provides that information obtained by the relevant minister is privileged and no one shall knowingly communicate or allow to be communicated any such information. Anyone (including government officials) who contravenes section 36 of the Act is guilty of a criminal offence punishable on summary conviction. These confidentiality protections are subject to certain exceptions, including information contained in any written undertaking given to the government (even though the undertaking may contain sensitive information). Despite the government's right to disclose certain information, it has been the government's policy not to exercise the right of disclosure without investor consent. It is therefore common for the investor and the government to negotiate and agree on what information can be made public. The Minister has a desire to communicate to the public the outcome of a review and the basis for his or her conclusions, whereas the investor typically has an interest in keeping most of the information confidential. Usually the officials and the Minister are amenable to striking a compromise that balances the interests of both sides. It is not unusual for the scope and content of press releases and speaking notes to be discussed and reviewed in advance.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Rejections of investments and enforcement activity are rare, but appear to be escalating. The government of Canada has shown that it will avail itself of the powers it has under the Investment Canada Act to reject foreign investments based on national security concerns. Since the national security review process was introduced in March 2009, which provides the government with formal powers to prohibit or unwind foreign investments on the basis of national security concerns, it has been invoked eight times (see question 8). These cases highlight the importance of early identification and careful management of sensitive issues. Now more than ever, before bringing a deal that raises such sensitivity to the Minister for approval, it will be critical for investors and their advisers to carefully evaluate whether there is a sufficient basis for the Minister to reach a positive conclusion.

Rejections

In recent years, the Minister has disapproved only a handful of transactions, although there have been rumours that other transactions were abandoned when it became clear that Investment Canada Act approval would not be obtained.

In May 2008, the Minister decided that the over C$1 billion sale of Macdonald, Dettwiler and Associates Ltd to US-based Alliant Techsystems Inc was not likely to be of 'net benefit' to Canada. This transaction was likely blocked because of reasons relating to national sovereignty and security. Although no formal reasons were given, many believe that the government was concerned about the loss of Canadian control over satellite technology (developed with government financial support) that could be used for surveillance of Canada's northern territories.

In November 2010, BHP Billiton withdrew its unsolicited takeover bid for the Potash Corporation of Saskatchewan after the Minister delivered a rejection of the bid at the end of the review period, despite BHP Billiton's undertakings that were, in the words of BHP Billiton, 'unparalleled in substance, scope and duration'.

In October 2013, the Minister blocked the proposed C$520 million acquisition of the Allstream division of Manitoba Telecom Services Inc (Allstream) by Accelero Capital Holdings (Accelero) on national security grounds. This is the first known rejection of a transaction under the Act's national security review regime, which was introduced in 2009. The Minister provided the following singular statement as the reason for the rejection: 'MTS Allstream operates a national fibre optic network that provided critical telecommunications services to businesses and governments, including the Government of Canada'.

In 2015, according to Canadian media reports, a Chinese SOE's investment to establish a new Canadian business was blocked on national security grounds. Beida Jade Bird's proposal to build a new fire alarm systems factory in Quebec was blocked based on national security grounds because of the site's proximity to Canadian Space Agency facilities located under two kilometres away. Beida Jade Bird planned on building fire-alarm systems for the Chinese market. Interestingly, the Quebec government had given Beida Jade Bird C$3 million in loans and a C$1 million grant in respect of its project. At the time, the Quebec government indicated that it was continuing to assist Beida Jade Bird, saying that the company plans to locate its factory elsewhere, likely still in Quebec.

In 2015, O-Net Communications was ordered to divest its investment in ITF Technologies. O-Net challenged the order and the government consented to setting aside the order. A new national security review is set to take place. See below for further detail.

Challenges

For the first time, the Investment Canada Act's national security review process was challenged in 2015. According to materials filed before the Federal Court of Canada in 2015, O-Net Communications applied for judicial review of the Canadian government's (Governor in Council's) order to divest its investment in ITF Technologies (a specialty fibre components and modules provider in Quebec) on the basis that the investment would be injurious to national security. O-Net is a high technology company (optical networking, automation and touch panel) listed on the Hong Kong Stock Exchange. In its application, O-Net argues that it was not provided with the basis of the decision nor was it provided with an opportunity to respond. O-Net also argued that its investment is not a threat to national security. However, references to military applications on ITF Technologies' website may provide some insight into the possible cause for the government's national security concern: 'ITF specializes in high-level solutions for specialized photonic applications such as underwater transmission, military manufacturing and manufacturing systems' (see www.itftechnologies.com/ITF/Articles.php?locale=en&Type_No=40&ID_Article=2). In 2016, the Federal Court of Canada set aside the Governor in Council's order with the Canadian government's consent. A new review of the transaction is set to take place.

Enforcement activity

In July 2009, in its first enforcement action, the Canadian government sued US Steel for breaching its undertakings to maintain minimum levels of employment in connection with the Stelco Inc acquisition. In 2007, US Steel acquired Stelco Inc. The acquisition was subject to review and approval under the Investment Canada Act. As part of the approval process, US Steel made undertakings (including production and employment commitments) to the Canadian government to demonstrate that the acquisition was likely to be of net benefit to Canada. In March 2009, US Steel shut down two Canadian plants, citing market conditions as forcing the closures and layoffs. In July 2009, the Canadian government, not satisfied that US Steel was honouring its commitments, sought a court order requiring US Steel to comply with its undertakings on production and employment. This represented the first time that the Canadian government has sought a court order to enforce undertakings under the Investment Canada Act. Up until December 2011, US Steel and the Canadian government were involved in legal proceedings in connection with the government's 2009 application. In December 2011, the then Minister of Industry, Christian Paradis, announced that 'US Steel has given significant new and enhanced undertakings under the Investment Canada Act that provide the basis for the government to settle its lawsuit against US Steel.' Former Minister Paradis accepted US Steel's new commitments (many of which ran to 2015) and requested that the Attorney General of Canada discontinue the court action against US Steel.

There has been a slow escalation of the rigour of enforcement of the Investment Canada Act by the Minister of Innovation, Science and Economic Development over the past years, as evidenced by the increase in the length of reviews and the scale and scope of written undertakings that foreign investors are required to give the Minister to secure approval.

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

In 2016, the Ministry of Commerce of China (MOFCOM) announced its '13th Five-Year Plan for Commercial Development' (the Plan), in which MOFCOM placed the highest emphasis on the importance of foreign investment.

Although the risks relating to global economics are acknowledged, the Chinese government welcomes foreign investment. The Plan specifically states that, during the 12th five-year plan, actual utilised foreign investment increased by 13.5 per cent in comparison with the 11th five-year plan, reflecting China's steady growth and position in global economics. The government is also determined to increase foreign investment for the societal good.

According to the Plan, MOFCOM first aims to fully utilise free trade pilot zones in order to create a more investment-friendly and convenient environment and legal framework. It is MOFCOM's belief that such practice will mark the start of further reform and enable China to embrace the international rules and common practices more efficiently.

Reform of foreign investment regulation is also decreed. To enforce negative-list review and reduce the number of approvals to minimum extent ought to be MOFCOM's priority, with one eye on promoting equal treatment and fair competition between foreign and domestic enterprises. Under this objective, the government intends to replace 'approval-oriented regulation' with 'filing management', making foreign investment simpler and faster. The amendment of China's foreign-investment laws (the Law on Wholly Foreign-owned Enterprises, the Law on Sino-foreign Equity Joint Ventures, the Law on Sino-foreign Co-operative Enterprises and the Law on the Protection of Investment by Taiwanese Compatriots), herald the start of increasing regulation.

The 'negative list', according to the National Development and Reform Commission (NDRC) and MOFCOM's Order 22 (2016), refers to the 'Catalogue of Industries for Guiding Foreign Investment (2015)' (the Catalogue), which, pursuant to the Regulations on Foreign Investment Guidelines (2002), divides foreign investment into three categories: encouraged; restricted; and prohibited. Anything which does not fall into these three categories may be considered to be permitted. According to the Order, items within restricted, prohibited, and encouraged categories with restrictions on shares and corporate management (further deregulated within the four free trade zones under the State Council's Guo Fa [2016] No. 41) constitute the 'negative list'. Aside from these, foreign investments enjoy the benefits of filing management, such as the reduction of requisite information and materials for filing and the lowering of standard of review. The negative list reflects the underlying mindset of foreign investment reviews, which largely centres around the industry policies and its specific requirements. Taking the automobile industry as an example, the ratio of the holdings (the Chinese party should hold no less than 50 per cent of the joint venture), the total amount of investment (no less than 150 million yuan), and the number of the joint ventures that the foreign party owns (no more than two joint ventures within the same automobile sector) are all restricted.

The new filing management is largely covered by the Provisional Measures on Administration of Filing for Establishment and Change of Foreign Investment Enterprises (2016) (the Measure). Filing can be done online no later than 30 days from the issuance of the business licence. The materials and information required are scaled down significantly, and the authorities will not conduct a substantive review. The pre-establishing supervision is replaced with post-oversight in order to lessen the burden of foreign investors while maintaining the effectiveness of the laws. Furthermore, article 11 of the Measure states that the relevant authorities must complete the review of filing in three days (reduced from between 45 and 90 days). Some believe that 95 per cent of investments will benefit in future.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The fundamental legal framework regarding the control over foreign investment lies in the following codes: the Law on Sino-foreign Equity Joint Ventures (2016) and its implementing regulation; the Law on Sino-foreign Co-operative Enterprises (2016) and its implementing regulation; and the Law on Wholly Foreign-owned Enterprises (2016) and its implementing regulation.

The Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (2009) specify the requirements, basic structure, review procedure and materials needed for the merger and acquisition of a domestic enterprise by a foreign investor. It is noted in Order 22 that, notwithstanding the new filing management, mergers and acquisitions by foreign investors are under as strict a review as they ever were.

China's primary regulation regarding the scope, content, procedure and timeline of the review on the basis of national security is the Notice of the General Office of State Council on Establishment of Security Review System Pertaining to Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011). For further information, see question 6.

One of the most uncertain aspects of the new filing management pertains to the content of the negative list and the aforementioned order to it. According to the Measure and Order 22, the negative list refers to the Catalogue, the one that is published in 2015. But since there are other Catalogues connected with foreign investment, such as the Catalogue of Priority Industries for Foreign Investment in Central and Western China (2013) and the Catalogues for the Pilot Free Trade Zones, which may confuse investors, it is believed that the need for a unified catalogue is compelling. Even though the Measure provides a clear picture, there are other contradictory regulations awaiting amendments in order to prevent any potential conflicts.

Finally, foreign investment may trigger the scrutiny of antitrust law. The antitrust laws in China mainly consist of the Anti-Monopoly Law and its regulations; the Anti-Unfair Competition Law; the Price Law. Of these, the Anti-Monopoly Law directly relates to merger and acquisition. According to the Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings (2008):

(i) in the previous financial year, the total worldwide turnover of the undertakings to the concentration exceeded 10 billion yuan; and
(ii) in the previous financial year, the total China-wide turnover of the undertakings to the concentration exceeded 2 billion yuan, and at least two of the undertakings to the concentration each had a China-wide turnover exceeding 0.4 billion yuan.

Reaching the thresholds means that the parties are obligated to notify the relevant authority and obtain its approval, and the transaction may not close before the parties secure clearance.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The supervision and the principal legal framework of foreign investment have been stated in questions 1 and 2. The three laws mentioned in question 2 are in the process of being amended; the scope of review differs according to the sectors, which are provided mainly in the Catalogue, and other details of the investment. Currently all foreign investment is examined by the government. The difference depends predominantly on the Catalogue, as mentioned above. Generally speaking, the restricted items in the Catalogue and sectors of agriculture, energy, telecommunication and culture relating to ideology attract greater attention from the authorities.

4 How is a foreign investor or foreign investment defined in the applicable law?

The exact definition of 'foreign' may differ, but if the nationality of the investor, natural person or legal person, is not Chinese, the person will be considered a foreign investor; and if the capital comes from countries or regions other than Mainland China then the investment will be treated as foreign investment. Hong Kong, Macau and Taiwan investors are also viewed as foreign by China's foreign investment regulation.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

SOEs and SWFs are not specifically addressed in the relevant laws. The review of their investment accords with the aforementioned laws; mainly the Catalogue and the filing management system.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The main regulation regarding the review on national interest grounds are the Notice of the General Office of State Council on Establishment of Security Review System Pertaining to Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011) and the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (2009). The competent authorities are MOFCOM and its local departments. Once MOFCOM confirms that the merger or acquisition falls within the scope of the national security review then the inter-ministerial joint committee (led by MOFCOM and NDRC) will oversee the review.

The triggering of the review, which is crucial to the issue at hand, can be seen in article 1(1) of the above-mentioned Notice, which focuses on the domestic and supporting enterprises:

- involved in the military industry;
- located near key and sensitive military facilities;
- other units related to national defence and security; and
- involved in key agricultural products, key energy and resources, vital infrastructure, important transportation services, core technologies and significant equipment manufacturing.

The definition of merger and acquisition, and the gaining of actual control are provided in article 1(2) and (3).

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The relevant laws and regulations of foreign investment are becoming clearer. Therefore, the investor should have some indication beforehand of how likely it is that they will get approval. However, if the investment involves a national security review, then it is more challenging for the investor to predict the result due to the lack of transparency of the review. As mentioned in question 6, the scope, procedures, factors and other elements of the national security review are quite clear, but the results can be unpredictable because the discretion of the authorities still carries great importance.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

There is no special threshold for foreign investment review in China. The difference now lies in approval and filing management. That is, if the transaction does not belong to the negative list, then it qualifies for the filing management that significantly reduces the burden of the investor. The filing can be made no later than 30 days after the business licence is issued, and during that time the authority will not conduct a substantive review of the materials. The filing is compulsory. As for national security and antitrust reviews, the thresholds are provided respectively in questions 6 and 2.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

In general, the authorities will consider if the transaction or investment conforms to foreign investment access and industry policies, and the impact on national security will be evaluated if it meets the threshold of the national security review. The investor can submit application documents to the local bureau of commerce, and the internal foreign investment division will be responsible. If the application is in line with the foreign investment policies, the division will draft the approval letter and submit it to the head of bureau of commerce for his or her final review, which will ultimately decide whether to issue the official approval letter and certificate of approval.

As stated above, the fundamental legal framework of the national security review is set out in the Notice of the General Office of State Council on Establishment of Security Review System Pertaining to Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011) and its following regulation: The Provisions of Ministry of Commerce on Implementation of Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011).

The scope of the national security review is provided in question 6. Should the transaction need to be scrutinised, the investor shall apply for approval. In such circumstances, MOFCOM should inform the investor within 15 days, and subsequently submit to the inter-ministerial joint committee within five days. Other authorities, national industry associations, competitors and the undertakings upstream or downstream all have the standing to advise MOFCOM to initiate the review. Once informed, MOFCOM should confirm and submit the transaction to the inter-ministerial joint committee within five days. The reviewing date officially starts when the filing materials are deemed to be complete. From this time, the investors are forbidden from closing the deal for another 15 days. Application is free, although it does require certain materials, which can be found in article 5 of the provision in the above paragraph.

Notwithstanding the national security review, MOFCOM's merger and acquisition review is fairly comprehensive. For example, article 1 of the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (2009), which is also mentioned in question 2, candidly includes national and economic security as the factors of the review. NDRC's Project Approval also takes national security into account, pursuant to article 16(4) of the Administrative Measures on Approval and Filing for Foreign Investment Projects (2014).

The reviewing process is mandatory, though free of charge. There is a standard filing form for investment that doesn't fall into the negative list. The investor can visit MOFCOM's official website and enter the filing system, which, with the required information, can be submitted online to the local bureau of commerce. That information includes the foreign investor, the amount of foreign investment, business scope, ultimate controller of foreign investment company if applied, future investment plan and number of employees of the company. Reviewing the information should provide a clear picture of the application.

10 Which party is responsible for securing approval?

The notifying party is usually the foreign or Chinese investors for establishing a foreign-invested enterprise; for other applications it would be the foreign invested enterprise, while details may differ according to the industry and its respective regulation.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

For foreign investment qualified for filing management, the review process takes three days. For other investments still needing approval, the period changes according to the type of the investment, pursuant to the respective regulations: Sino-foreign equity joint ventures, up to 90 days; Sino-foreign cooperative enterprises, up to 45 days; and wholly foreign-owned enterprises, up to 90 days. Other approvals may be necessary, such as name reservation approval, project approval, merger and acquisition approval, antitrust approval, and approval after the establishment of the investment.

In practice, local reviewing authorities have generally shortened their review time to one week. Mergers and acquisitions by foreign investors usually take longer to review than other foreign investments. Factors affecting the timeline include the number of the approvals involved, the sector of the investment, and the profile of the transaction. While there is no exemption, the government usually respects the investor's request to hasten the review if there is any special circumstance, such as the pressure to close on time.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Previously, MOFCOM's foreign investment approval were prerequisites for other registrations such as commercial and foreign exchange registration, therefore, investors could not close the deal before the review was completed. This remains the case, however, the filing-management application process is now quite different. For instance, article 1(3) of the Notice of the State Administration for Industry and Commerce on Registration Work Following Filing Administration for Foreign Investment Enterprises (2016) states that 'the filing certificate issued by the commerce authorities is not a prerequisite for industry and commerce registration.'

Therefore, MOFCOM has stressed the importance of interim and ex-post supervision on different occasions, for example, the Notice of MOFCOM on the Work of Supervision and Inspection of the Filing of the Establishment and Change of Foreign Invested Enterprises (2016). The legal consequence of violating the Measure is that the foreign investment company or its investor will be fined up to 30,000 yuan and possibly have other relevant legal liabilities if it breaks other laws and regulations.

There is no doubt that, when the investment ought to be under national security review, merger and acquisition review, or antitrust review, the legal ramifications are the same as ever: the parties cannot close the transaction. The consequences of doing otherwise include a fine, compulsory termination of the transaction, transferring of assets or equities and other necessary measures.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Most authorities provide guidelines or illustrations of the process as reference points for investors, who are recommended to study them carefully. Even though the relevant regulations remain unspecific, the authorities normally accept a request for pre-filing meeting. Still, there are provisions in this regard, including article 4 of the Provision regarding the national security review provided in question 9. Nevertheless, while in most instances it does assist the parties with a clearer picture of the review and the prevailing opinion of the authority, such meeting or consultation does not have a legal or de facto binding effect on the agency and should be treated with great care.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

There is no unified standard or regulation in this regard. Meetings or communications are mostly welcomed and potentially helpful for the review, but the results differ. Nor are the authorities always willing to meet the representatives from the parties. Such practice is not yet common in China.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

There is no specific provision in this regard under the foreign investment review regime in China. Under the AML, MOFCOM may impose certain penalties and even unwind a notifiable transaction that failed to comply with the notification obligation, according to article 48 of the AML, although there has not been any precedent thus far.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The first substantive test for foreign investment lies in the Catalogue, where the government's view is clear. Needless to say, the prohibited items therein mean no form of investment is allowed. Any attempt to invest in restricted items would certainly invite close scrutiny and pose challenges. Even with encouraged items, there may be some other restrictions, or a limit on the percentage of shares the foreign investor may hold. On the other hand, investments meeting MOFCOM's guidelines are very likely to be looked upon favourably by the authorities. For example, it is one of the original stated aims of the Catalogue that it intends to promote investments in modern agriculture, leading technologies, advanced manufacturing, energy conservation and environmental protection, new energies, and the modern service industry.

The factors to be considered in merger and acquisition security reviews, national security reviews, and antitrust reviews are provided in the respective regulation and are briefly summarised as the following:

- merger and acquisition security review;
  - compliance with the laws, administrative regulations and rules of China;
  - abiding by the principles of fairness, reasonableness, consideration of value, honesty and trust;
  - to avoid excessive market concentration or competitive practices that are exclusionary or restrictive;
  - to not disrupt social economic order, damage public interest, or cause loss to state-owned assets;
- national security review;
  - the impact of merger and acquisition transactions on national defence and security, including the production capacity of domestic products, capacity for provision of domestic services and the relevant equipment and facilities required for national defence;
  - the impact of merger and acquisition transactions on the stable operation of the national economy;
  - the impact of merger and acquisition transactions on the basic order of society;
  - the impact of merger and acquisition transactions on research and development abilities of core technologies involving national security; and
- antitrust review;
  - the market shares of the business operators involved in the concentration and their control over the market;
  - the degree of market concentration of the relevant market;
  - the impact of the concentration of business operators on market entry and technological advancement;
  - the impact of the concentration of business operators on consumers and other relevant business operators;
  - the impact of the concentration of business operators on the development of national economy; and
  - any other factors deemed relevant for consideration by the anti-monopoly enforcement agency of the state council.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Foreign investment review authorities will not consult or cooperate with officials in other countries. In practice, it is also rarely seen in other relevant reviews. However, it is still possible, especially with the establishment of official channels. For example, the EU, the US, Canada and several other countries have not implemented a formal cooperation procedure regarding an antitrust review with MOFCOM in recent years. The frequency or the extent of such cooperation is not yet clear, but it is possible. We anticipate that such relations will become closer in future.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

For a greenfield investment, competitors, customers or other government agencies are not usually involved in the review process. If it's a merger or acquisition, the foreign investment review authority will encourage or request opinions from other competent government agencies, industrial associations and possibly competitors. In national security, and antitrust reviews, all third parties' opinions are valued, and formal channels are provided, such as those discussed in questions 9 and 19. The details differ according to the applicable regulations.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In a national security review, according to the regulation, the inter-ministerial joint committee can ask MOFCOM to terminate the transaction, to force the transferring of the shares or assets involving in the transaction, or to take any other necessary measure in order to eliminate the negative effect brought by the investment. Similar powers are available when MOFCOM conducts merger and acquisition reviews, national security reviews, and antitrust reviews. It is the duty of the authorities to examine whether the terms of a transaction are fair, just and comply with regulations. Nevertheless, according to current practice, the reviewing agencies minimise their presence and involvement in transactions between enterprises. Even if investors do consult with the agencies to clarify the relevant regulations, the scope of the response will be limited in order not to interfere with or obstruct the deal.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Foreign investment review regulations (either approval or filing management) do not have specific provisions for such practice. However, the investor may know the reason for the rejection and can apply again after making an adjustment. In a merger and acquisition review, such a scenario rarely occurs because the main concerns of the government centre around industry policies and entrant requirements, so responding to such concerns is relatively straightforward. In national security, and antitrust reviews, investors are usually allowed to meet with the authorities and to rectify the transaction to an acceptable extent. For example, in a national security review notice, it clearly states that the investor may alter the arrangement during the review in order to reduce the competent authority's concern and obtain the desired approval. The substantive tests provided in question 16 are a good starting point from which to access the likely concerns of the authorities.

21 Can a negative decision be challenged?

According to China's administration law and its jurisprudence, and given the fact that a negative decision from a government prevents foreign investor activity, it should be challengeable. However, it is not usual for Chinese law to explicitly state the legal recourse available (such practice is called the 'instruction of remedy'). For example, there is no such provision in the relevant foreign investment regulations. As stated above, before reaching a final decision, the authorities sometimes give the investor an opportunity to discuss altering their transaction to eliminate their concerns, especially in national security, and antitrust reviews. After a decision is reached, investors are, in theory, given the right to appeal the decision through administrative review or by bringing a lawsuit. The details may vary according to the actual circumstances.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

In mergers and acquisitions reviews, national security reviews and antitrust reviews, the respective regulations, which are all mentioned above, contain provisions requiring the agencies to honour their confidential nature. For instance, article 41 of the Anti-Monopoly Law explicitly states that the agency and its personnel must maintain the confidentiality of the review process. However, the legal recourse of any violation by the authorities may not be as direct as we all hope, and, as for the foreign investment review, neither filing- nor approval-regulation provide similar guarantees of confidentiality.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Not applicable.

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The environment in Germany for foreign investments is liberal and they are encouraged by the government. Domestic and foreign investments and investors are, in general, treated equally. There is, however, a national non-sector related security screening mechanism for foreign investments that has been in place since 2004. The Federal Ministry for Economic Affairs and Energy may prohibit or restrict foreign investments for reasons of public order or security.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The main law is the Foreign Trade and Payments Act (section 5). It is supplemented by the Foreign Trade and Payments Regulation (sections 55 to 62), which provides more details on the screening mechanics and the procedures. The Federal Ministry for Economic Affairs and Energy has specified in more detail which information and documents have to be provided should it review a certain acquisition in a decree dated 2 September 2013 (V B 2 - 480427/57). The acquisition of businesses or substantial stakes in businesses may require further clearance or approvals from other authorities (such as merger clearance, approval by the Federal Financial Supervisory Authority for the acquisition of a substantial stake in financial institutions, business permits restricted to approved owners or operators, etc) but these apply to any investor irrespective of the investor's origin.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Federal Ministry for Economic Affairs and Energy may review any acquisition, direct or indirect, of a domestic business or minority stake in such business in any industry sector if after the acquisition the foreign investor, directly or indirectly, holds 25 per cent or more of the voting rights. Voting rights held by any third party that are covered by an agreement with the foreign investor on the joint exercise of the voting rights are allocated to the foreign investor for determining whether the 25 per cent threshold is exceeded. The law does not differentiate between the means used to acquire the voting rights. Therefore, any type of transaction by which a foreign investor, directly or indirectly, acquires at least 25 per cent of the voting rights in a German business may be subject to review by the Federal Ministry for Economic Affairs and Energy.

4 How is a foreign investor or foreign investment defined in the applicable law?

A foreign investor is, in the case of a natural person, any person resident or habitually resident outside the European Union and the European Free Trade Area and, in the case of a legal person or partnership, any entity based or managed from outside the European Union and the European Free Trade Area. Even investors based in the European Union or the European Free Trade Area may be treated as foreign investors if the Federal Ministry for Economic Affairs and Energy has reason to believe that these investors try to circumvent the review (eg, by setting up an acquisition vehicle in the European Union).

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no special rules for SOEs or SWFs and there are no legal definitions of SOEs and SWFs.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The foreign investment review is done by the Federal Ministry for Economic Affairs and Energy.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The authorities may reject or restrict a transaction only if there is a threat to public order or security within the meaning of articles 36, 51(1) and 65(1) of the Treaty on the Functioning of the European Union. The threat to public order or security must be actual and sufficiently severe. The term 'threat to public order and security' is generic and requires interpretation. The European Court of Justice has held that public order and security covers the supply of telecommunication services and electricity in a crisis as well as the provision of services of a strategic nature. When interpreting it the Federal Ministry for Economic Affairs and Energy has fairly wide discretion. Any rejection by the Federal Ministry for Economic Affairs and Energy must, however, be substantiated and justified. The Federal Ministry for Economic Affairs and Energy would not be allowed to reject a transaction for any other reason. In particular, the Federal Ministry for Economic Affairs and Energy must not prohibit or restrict an acquisition to protect the German economy or certain German businesses against competition.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

There are no thresholds triggering a review. Therefore, any acquisition of at least 25 per cent of the voting rights in a German business by a foreign investor may be reviewed by the Federal Ministry for Economic Affairs and Energy ex officio.

Foreign investors have to notify the Federal Ministry for Economic Affairs and Energy of certain transactions in the defence and IT security sector. Outside the defence and IT security sector there are no requirements for filing or notification of an acquisition. In any event the Federal Ministry for Economic Affairs and Energy may decide whether or not it initiates a review.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

There is no actual requirement to obtain clearance, rather the Federal Ministry of Economic Affairs and Energy may decide to review a particular transaction if there is no detailed procedure.

Outside the defence and IT security sector there is not even a requirement for foreign investors to notify the respective ministries of any acquisition. The Federal Ministry for Economic Affairs and Energy decides ex officio whether it reviews a particular transaction. The Federal Ministry of Economic Affairs and Energy may only initiate such review within a period of three months from the conclusion of the acquisition agreement. In case of a public takeover pursuant to the Securities Acquisition and Takeover Act, the aforementioned period commences upon publication of the decision to submit the offer or on publication of the acquisition of control.

In the case of acquisitions of at least 25 per cent of the voting rights in businesses in the defence and IT security sector, the direct investor is obliged to notify the Federal Ministry for Economic Affairs and Energy in writing of the acquisition. The notification shall provide some basic information on the acquisition, the investor and the target, as well as the basic features of the fields of business of the investor and the target. The Federal Ministry for Economic Affairs and Energy may approve the acquisition, initiate a formal review procedure or remain inactive. If the Federal Ministry for Economic Affairs and Energy does not initiate a review within one month of the receipt of the notification and does not explicitly approve the acquisition then the acquisition shall be deemed to have been cleared.

If the Federal Ministry for Economic Affairs and Energy initiates a review, the direct investor (which is the entity directly acquiring the voting rights in the business) is obliged to provide certain information. The Federal Ministry for Economic Affairs and Energy determined in detail and published in a decree of 2 September 2013 which information shall be provided. The list is not exhaustive; the Federal Ministry for Economic Affairs and Energy may request additional information.

The information to be provided to the Federal Ministry for Economic Affairs and Energy in the first place includes:

- the name and place of business of the direct investor and the target;
- an explanation of the business of the direct investor and the target;
- the shareholder structure of the direct investor and target;
- the annual consolidated financial statements of the direct investor and the target for the past three years;
- business contacts with customers from the public sector over the past five years;
- the acquisition agreement; and
- information on the short, mid and long-term strategy post-completion.

In the case of acquisitions of businesses or at least 25 per cent of the voting rights outside the defence and IT security sector, the foreign investor may apply for a certificate of non-objection before the acquisition agreement is concluded. The investor has to submit information on the proposed acquisition, the investor and the target as well as some basic information on the nature of the business of the investor and the target. The Federal Ministry for Economic Affairs and Energy will issue the certificate of non-objection if there is no objection to the acquisition in terms of public order or security of Germany. If the Federal Ministry for Economic Affairs and Energy does not initiate a formal review procedure within one month after receipt of the complete application, then the certificate of non-objection shall be deemed to have been issued. It is recommended to apply for the certificate of non-objection in order to obtain legal certainty in advance.

10 Which party is responsible for securing approval?

Clearance (if needed) must be applied for by the (direct) acquirer of the business or at least 25 per cent of the voting rights in the business. The target does not have any obligation in relation to clearance.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Until recently, if a certificate of non-objection is applied for it took only days for it to be issued. The time taken for a certificate to be issued has increased and currently takes two or more weeks. In practice, the cases in which certificates of non-objection are sought are clear cases where it is obvious that there is no threat to public order or security.

If the Federal Ministry for Economic Affairs and Energy initiates a review regarding acquisitions outside the defence and IT security sector, it may prohibit or restrict the acquisition until the end of a two-month period after receipt of the completed documents. The review period of two months commences upon receipt by the Federal Ministry for Economic Affairs and Energy of confirmation that the submitted documents are complete. Any prohibitions require the approval of the federal government.

If the Federal Ministry for Economic Affairs and Energy initiates a review following the notification of an acquisition of a business operating in the defence or IT security sector, it may prohibit or restrict the acquisition within one month after the receipt of the complete documents or issue instructions in order to ensure essential security interests of Germany. With regard to the submission of documents the aforementioned statements apply accordingly.

There are no 'fast-track' options provided by the law.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Unlike under competition law, the acquisition of businesses outside the defence and IT security sector are fully effective, but are subject to the condition that the Federal Ministry for Economic Affairs and Energy may prohibit the acquisition within the deadline. As the legal agreement is effective, the parties may complete the transaction. However, if the Federal Ministry for Economic Affairs and Energy initiates a review and decides to prohibit the acquisition, the legal agreements will become void ex nunc. The transaction will have to be unwound. If the foreign investor had already acquired title to the shares in the target then the investor would have to re-transfer the shares against refund of the consideration paid by it.

In contrast, legal transactions regarding the acquisition of businesses in the defence and IT security sector are provisionally ineffective. The legal transaction shall become effective if the Federal Ministry for Economic Affairs and Energy issues a clearance or does not prohibit the acquisition within the deadline. If the parties complete the transaction before it becomes effective, it has to be unwound.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Yes. The Federal Ministry for Economic Affairs and Energy is prepared to discuss acquisitions before formal proceedings are initiated. An early and informal discussion usually simplifies and accelerates the procedure particularly as major issues may be discussed.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

German law provides a strict formal procedure to be followed by the Federal Ministry for Economic Affairs and Energy in order to review foreign transactions for threats to public order or security. The law does not provide for any informal procedures to support or hinder the review. The Federal Ministry for Economic Affairs and Energy is, however, not prevented from speaking with different persons or organisations.

Update and trends

The *Aixtron SE* case (mentioned in question 23) gave rise to a debate over whether Germany would abandon its relaxed attitude to foreign investments and their review. Germany has seen substantial investments from China. Investments from China into Germany are reported to have increased from US$2.6 billion in 2014 to over US$11 billion by the end of October 2016. The German government has expressed the view that foreign investments would certainly be welcome in the future but it has also mentioned that other countries do not have the same open attitude to foreign investments. It was reported that at the European level agreement has been reached on some modifications of the existing rules on the review of foreign investments. Nothing specific has been published yet. It seems clear that we will see some changes but it remains to be seen what these changes are.

Before the Federal Ministry for Economic Affairs and Energy prohibits or restricts an acquisition it must obtain approval from the German government or in some cases approval from the Federal Foreign Office and the Federal Ministry of Defence. Since the Federal Ministry for Economic Affairs and Energy is not obligated to prohibit or restrict a certain acquisition (but is allowed to if there is a threat to public order or security) the German government or the other Ministries are not prevented from considering political aspects.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

In the case of acquisitions of businesses outside the defence and IT security sector the Federal Ministry for Economic Affairs and Energy may, ex officio, review an acquisition within a period of three months from the conclusion of the acquisition agreement. After expiry of this period the Federal Ministry for Economic Affairs and Energy has no authority to initiate a formal review.

Given that pending clearance an acquisition in the defence or IT security sector is provisionally ineffective, completion of the acquisition is delayed until the Federal Ministry for Economic Affairs and Energy has granted the approval or the approval is deemed. The Federal Ministry for Economic Affairs and Energy may withdraw the approval only if the investor has provided false information. The same applies if the approval was deemed to have been issued due to expiry of the period of one month.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The Federal Ministry for Economic Affairs and Energy reviews whether there is an actual and sufficiently severe threat to the public order or security of Germany. The existence of a threat to the public order or security is decided on a case-by-case basis. As the term is not defined by law or jurisprudence, the Federal Ministry for Economic Affairs and Energy has fairly wide discretion regarding the prohibition or restriction of an acquisition. The European Court of Justice has rendered judgments on specific aspects of public order and security. In accordance with the case law of the European Court of Justice it is generally recognised that public security may be affected by acquisitions related to issues such as security of supply, in the event of crisis, of telecommunication and electricity, or the provision of services of strategic importance. Other than that, there is no detailed guidance on when public order or security is affected.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The competent German authorities generally assess independently whether a certain foreign acquisition shall be prohibited or restricted because it threatens to affect the essential interests of society. If the authorities require additional information, they will primarily request it from the investor.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

There is no legal obligation of the Federal Ministry for Economic Affairs and Energy to involve third parties in the formal review process. In particular, third parties may not claim or challenge any decision of the Federal Ministry for Economic Affairs and Energy regarding the clearance, restriction or prohibition of foreign acquisitions. Nevertheless, the Federal Ministry for Economic Affairs and Energy is not prohibited from taking into account third parties' concerns.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Federal Ministry for Economic Affairs and Energy has the authority to prohibit or restrict an acquisition. The nature of the restrictions depends on the specific case. For instance, the voting rights of a foreign investor may be restricted so that it can enjoy dividend rights but is not allowed to vote in the general meeting.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

It is generally recommended to discuss a certain acquisition with the Federal Ministry for Economic Affairs and Energy. The Ministry will typically point out which restrictions it may consider (if it reviews the acquisition at all). Any measure imposed by the Federal Ministry for Economic Affairs and Energy has to be proportionate and must affect the investor's position to the least possible extent. Therefore, the Federal Ministry for Economic Affairs and Energy will, before it prohibits an acquisition, have to thoroughly consider restrictions with which the acquisition may be completed. However, where public order or security are concerned the Federal Ministry for Economic Affairs and Energy will usually not rely on undertakings given by the investor. Rather, it will impose certain restrictions the nature of which depends on the specific case.

21 Can a negative decision be challenged?

Yes. Any decision by the Federal Ministry for Economic Affairs and Energy is subject to judicial review and may be challenged before the administrative court in Berlin. The challenge will typically take at least months if not years. Challenging a negative decision in court is rarely an adequate way to make an acquisition happen.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The Federal Ministry for Economic Affairs and Energy does not disclose confidential information to the public. As with any other public authority it is obligated to keep any confidential information of the investor and the target confidential. It is, however, not yet clear whether

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third parties may have the right (according to the German Freedom of Information Act) to inspect the authority's files after the proceedings have been closed. There are some provisions that should prevent such inspection in cases where an acquisition was prohibited or restricted but the situation is unclear as regards cases in which the Federal Ministry for Economic Affairs and Energy denied a threat to public order and security. If an official breaches confidentiality obligations and discloses information marked as confidential, he or she may be liable under criminal law to a custodial sentence or to a fine. Besides, a breach of confidentiality may be subject to disciplinary sanctions that may include dismissal from office.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

In December 2015, Topcon Europe BV, a wholly owned Dutch subsidiary of Topcon (a Japanese corporation), acquired a stake of 50.1 per cent of the shares in ifa systems AG (a German company) through a public takeover. ifa systems AG is a leading IT company in the field of eye care. The offer by Topcon was conditional on clearance by the Federal Ministry for Economic Affairs and Energy. Topcon Europe BV was only obligated to acquire shares offered to it if: (i) a certificate of non-objection was issued; (ii) a certificate of non-objection was deemed issued because of the lapse of the review period; or (iii) in case of a review no prohibition or restrictions were ordered by the Federal Ministry for Economic Affairs and Energy. The certificate of non-objection was issued within one month of the application.

In February 2016, AptarGroup Inc, (an American corporation) acquired Mega Airless Group, which comprised subsidiaries in 18 jurisdictions, including a subsidiary in Germany. The acquisition agreement was executed on 25 January 2016. It was agreed that the completion of the acquisition of the shares in the German subsidiary was subject to the issue of a certificate of non-objection. The certificate of non-objection was received in February 2016 and the acquisition was completed at the end of February 2016.

At the end of July 2016, Grand Chip Investment GmbH (a German special purpose investment vehicle), a wholly owned subsidiary of Grand Chip Investment (Grand Duchy of Luxembourg), which is itself a wholly owned subsidiary of Fujian Grand Chip Investment Fund LP (a Chinese investor), made a public takeover offer to the shareholders of German Aixtron SE. Initially, the Federal Ministry of Economic Affairs and Energy issued a certificate of non-objection on 8 September 2016. At the end of October 2016, the Federal Ministry of Economic Affairs and Energy revoked such certificate of non-objection and announced that it would review the acquisition. It was reported that a US intelligence agency had been in contact with the German government. The Federal Ministry for Economic Affairs and Energy did not prohibit or restrict the acquisition since before the review period had expired the public takeover offer extinguished. On 2 December 2016, the US President prohibited the acquisition of a US subsidiary of Aixtron SE. As a consequence one of the conditions for the public takeover offer could not be satisfied and the offer was extinguished. This situation is new. In the *Aixtron* case, the Federal Ministry for Economic Affairs and Energy withdrew a certificate of non-objection for the first time ever.

India

Hardeep Sachdeva and Priyamvada Shenoy

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Primarily since 1991, India has sought to liberalise its economy and has continuously opened up most of its industrial and business sectors for foreign investments. In particular, the Indian government has sought to attract foreign investment into the country, as it has the effect of establishing long-term economic relationships with India. In the past year certain important sectors such as defence, financial services, broadcast of carriage services, etc, have been liberalised, for example:

- the earlier condition requiring access to modern 'state-of-the-art' technology in case of foreign investment beyond 49 per cent in the defence sector has been removed, vide Press Note 5 of 2016 issued by the Department of Industrial Policy and Promotion (DIPP);
- vide Press Note 6 of 2016, 100 per cent foreign investment in all 'financial service' activities (which are regulated by the relevant financial sector regulators) is now permitted whereas before it was permitted in only 18 specified NBFC activities; and
- vide Press Note 5 of 2016, foreign investment in the 'broadcasting of carriage services' sector, which previously required prior approval from the government (approval route) for foreign investment beyond 49 per cent, is now permitted up to 100 per cent under the automatic route.

Foreign investments in India are principally governed by the Foreign Exchange Management Act 1999 (FEMA) and the regulations framed thereunder, to consolidate the law relating to foreign exchange and external trade for promoting and developing the foreign exchange market in India. Further, in 2010 the DIPP and Promotion and the Ministry of Commerce and Industry put in place a policy framework (currently the Consolidated Foreign Direct Investment Policy, 2016 (FDI Policy)), which is updated every year and amended from time to time. The FDI Policy contains sectoral requirements that must be complied with by foreign investors for the purposes of investing in particular sectors in India and also by Indian companies that receive foreign investments in India. The FDI Policy also classifies sectors that fall under the approval route and sectors where FDIs fall under the automatic route. Further, there are also certain limited sectors and industries in which foreign direct investments are prohibited. Except for those sectors, subject to conditions for foreign investment or government approval; by and large there are no preconditions for making foreign investment into other sectors in India.

The FDI Policy in consonance with the Securities and Exchange Board of India (SEBI) (Foreign Portfolio Investors) Regulations 2014 (FPI Regulations) read with Schedule 2 and Schedule 2A of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000 also permits foreign institutional investors (FII) and foreign portfolio investors (FPI) to invest in the capital of an Indian company under the Portfolio Investment Scheme (the Scheme), which allows investment in listed securities, including listed debt securities. (Recently, the RBI has allowed FPIs to invest in unlisted debt securities (see Update and trends), although we are awaiting the corresponding amendments in securities regulations.) Also, non-resident Indians (NRI) are free to invest in the capital of any company on a non-repatriation basis, subject to terms and conditions as prescribed under the FEMA.

Therefore, foreign investment in India can broadly be classified into FDIs and investments by FIIs and FPIs (FPI investments).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The key legislation that directly or indirectly regulates and governs acquisitions and investments by foreign nationals is the FEMA (along with rules and regulations thereunder, in particular, the FEMA (Transfer or Issue of Security by a Person Resident Outside India) 2000), as well as other notifications, circulars and directions pertaining to foreign investments issued by the Reserve Bank of India (RBI) from time to time.

Until 2010, the regulatory framework for foreign investment in India consisted of the FEMA, the regulations framed thereunder, the press notes, press releases issued by the DIPP and the notifications, circulars and directions issued by the RBI. After April 2010, the press notes and press releases issued by the DIPP were consolidated into the FDI Policy, which is updated and modified annually; however, the DIPP continues to issue press notes and press releases during each year (which in turn are subsequently incorporated into the FDI Policy) and amendments from time to time.

In addition to complying with the Indian foreign exchange laws and the rules, regulations and policies of India, foreign investors are also required to comply with the relevant sector-specific and state-specific (local laws) legislation applicable to a particular industry or sector.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Under the present laws, except for a few sectors, for example, lottery, gambling and betting, chit funds, *nidhi* companies, and trading in TDRs, where foreign investment is prohibited, foreign investment is allowed in almost all sectors either under the automatic route or under the approval route.

There is a percentage threshold prescribed for foreign investment in some sectors (such as insurance, banking, broadcasting of content services, print media, private security agencies, commodity exchange and power exchange) and, except for some prohibited sectors, foreign investment overall is allowed in almost all sectors under the automatic route up to 100 per cent of the equity shareholding, in some cases with certain compliance conditions.

In some sectors, there are conditions attached for foreign investment, which include minimum capitalisation, exit conditions, etc.

India has consistently liberalised and eased the norms for foreign investments in India. For foreign investment in any automatic route sector, there is no need for prior approval and only certain post-facto filings are required. There have been significant liberalisation and simplification efforts made through recent amendments to the FDI Policy in, for example, important filings such as Form FC–TRS (reporting of transfer of shares between residents and non–residents) and Form

FC-GPR (reporting of issuance of shares by an Indian investee company) has been moved online.

However, in sectors where investments are permitted with the prior approval of the Foreign Investment Promotion Board (FIPB), the government reserves the right to oversee, control, permit or prohibit investments, mainly those sectors considered sensitive (such as print media and multi-brand retail trading).

4 How is a foreign investor or foreign investment defined in the applicable law?

While there is no definition of the terms 'foreign investment' or 'foreign investor' under the FEMA, the FDI Policy defines foreign direct investment as:

> *FDI means investment by non-resident entity or person resident outside India in the capital of an Indian company under Schedule I of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.*

Essentially Indian law allows any set-up that is an association of persons, foundations, trusts, bodies corporate, companies or entities to make FDI in India.

Further, the term 'capital' as referred to in the definition of FDI has been defined under the FDI Policy as follows:

> *capital means equity shares; fully, compulsorily and mandatorily convertible preference shares; fully, compulsorily and mandatorily convertible debentures and warrants.*

Therefore, FDI is primarily allowed only in equity shares of Indian companies or in preference shares or debentures that are fully, compulsorily and mandatorily convertible into equity shares.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Under Annexure 6 to the FDI Policy, an SOE has been defined as a government investment vehicle that is funded by foreign exchange assets and that manages those assets separately from the official reserves of monetary authorities. This term has also been referred to in the FPI Regulation, wherein an SWF is construed as a category I FPI (Regulation 5 (a), SEBI FPI Regulations, 2014). Therefore, a sovereign wealth fund would be able to invest under the Scheme wherein the individual limit for a holding by an FPI or FII in the Indian investee company has to be below 10 per cent of the capital of the company, and the aggregate limit for investment by all FII, FPI or qualified foreign investor in the Indian investee company is 24 per cent of the capital of the company. However, a SWF (and any other FPI or FII) would be able to increase its investment beyond the aggregate limit of 24 per cent (up to the sectoral cap or statutory ceiling prescribed in the Consolidated FDI Policy) in the Indian investee company, if the said company passes a resolution at the meeting of its board of directors followed by a special resolution at the shareholders' meeting to that effect and subject to prior intimation to the RBI (paragraph 3.1.5 (i), FDI Policy).

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

Subject to satisfying the asset and turnover thresholds prescribed under the Competition Act 2002 (Competition Act), and the regulations and notifications thereunder, investments that involve an acquisition of shares, assets, voting rights or control or a merger or amalgamation (combinations) must be notified to the Competition Commission of India (CCI), which is empowered to prohibit or modify transactions that are likely to cause an appreciable adverse effect on competition (AAEC). Furthermore, investments that create minority interests leading to the acquisition of control (affirmative or negative) will also need to be notified to the CCI.

Further, there are specific regulators that review mergers or acquisitions of companies within certain industries and sectors (eg, the Insurance Regulatory Development Authority for insurance companies and the Telecom Regulatory Authority of India for telecom companies).

The FIPB is a body that offers a single window clearance for proposals on FDI in India that are not allowed access through the automatic route. The FIPB also publishes timely reviews that seek to examine the performance of the FIPB on the basis of transparency and objectivity and summarise the important policy changes that have taken place during the period, providing an estimate of foreign investment trends in India. Also, the FIPB conducts periodic meetings (where representatives of concerned ministries such as the Ministry of Home Affairs and the Ministry of Defence are present) for scrutinising the applications and granting or rejecting approvals case by case.

In addition to the requirement of FIPB approval (where applicable), in certain cases the FIPB refers the application to the DIPP, in consonance with the conditions of the FDI Policy. For instance, an application for foreign investment in single brand product retail trade where investment exceeds 49 per cent would be referred to the Secretariat for Industrial Assistance (SIA) in the DIPP.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The FIPB has the discretion to approve, reject or defer a proposal for foreign investment when such proposals have come via the government route. In most cases, we have seen that the FIPB, when rejecting a proposal, does not necessarily specify the reasons or grounds. Apart from the discretion of the FIPB, the proposed investment would also have to be in line with sectoral laws and regulations, and, where necessary, applications for approval from the sectoral regulators would have to be given. If any sector-specific approval is required from any other sector regulator, it must be obtained from the relevant regulatory authority. Again, these authorities reserve the discretion to reject any applications made to them without specifying the reasons.

Further, the CCI's discretion is limited to a qualitative assessment of whether the notified transaction causes or is likely to cause an AAEC in the relevant market in India. The CCI has the power to direct modifications to the terms of transactions, or even prohibit transactions, if it is of the view that such transaction is likely to cause an AAEC in India.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Where the proposed foreign investment is to be made via the government route, the jurisdiction of the FIPB and the SIA is triggered, as they have the authority to review the proposed applications. FDI transactions of more than 50,000 million rupees need the prior approval of the Cabinet Committee on Economic Affairs (CCEA). The FIPB is competent where the investment is being made by a foreign investor, whereas the SIA is competent where the investment is being made by a non-resident Indian (http://dipp.nic.in/English/policy/entry.htm). Further, any investment or payment made into India must be reported to the RBI either through authorised dealers or directly to the RBI, depending on the nature of investment or payment made into India.

Under the Competition Act, a combination will need to be notified if it satisfies the following asset and turnover thresholds:

India	**Assets**		**Turnover**
Either the acquirer or the target or both have	20,000 million rupees	or	60,000 million rupees
The group to which the target will belong has	80,000 million rupees	or	240,000 million rupees
Worldwide	**Assets**		**Turnover**
Either the acquirer or target or both have: In the case of a merger, the enterprise after a merger or created as a result of the merger,	US$1,000 million, including assets of at least 10,000 million rupees in India	or	US$3,000 million including turnover in India of more than 30,000 million rupees
A group has	US$4,000 million including assets of at least 10,000 million rupees in India	or	US$12,000 million including turnover in India of more than 30,000 million rupees

Target-based exemption	Assets		Turnover
A notification is not required in cases of acquisition of shares, assets, voting rights or control where the target enterprise has less than	3,500 million rupees in India	or	10,000 million rupees in India

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

Foreign investments are permitted in India through the automatic route and the approval route depending on the sector. No prior approval is required for activities falling under the automatic route, subject to compliance with applicable conditions. However, areas or activities that do not fall within the automatic route and are under the approval route require prior FIPB approval. To obtaining approval, the investor company or investee company (the applicant) must register on the FIPB website (www.fipb.gov.in) and file a single online application along with such additional information as required (eg, certificate of incorporation and memorandum of articles of the investor and investee company (and in the case of a joint venture, of the joint venture company), diagrammatical representations of the cash flow, funds from the original investor to the investee company and a copy of the board resolution of the investee or issuing company in the case of a fresh issue of shares).

After electronic submission of the application, the applicant is also required to submit a duly signed paper application with a single set of documents to the Facilitation Counter of the FIPB within 10 days of electronic submission. There is no fee for filing an online application.

Further, all combinations must be notified in the format prescribed under the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (Combination Regulations) within 30 days of the execution of any definitive documents, in the case of an acquisition or in the case of a merger, the passing of a final board resolution approving the merger. Subject to the extent of overlaps in relation to the combination, the transaction may be notified in the shorter form (form–I) or a more detailed form (form–II). Subsequent to filing the application, the CCI reviews the combination to ascertain if the combination causes or is likely to cause any AAEC, before passing its final order.

10 Which party is responsible for securing approval?

FIPB approval is required if the investment is made under the approval route and either of the parties, being the foreign collaborator or foreign investor, or the Indian company, can secure approval from the FIPB. Further, where an investment involves an acquisition of shares, assets, voting rights or control, the acquirer will be responsible for notifying the combination to the CCI. In the case of a merger or amalgamation, both parties are jointly responsible for notifying the combination to the CCI.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

There are no prescribed timelines given by the FIPB for reviewing an application. However, as per the brochure available on the FIPB's website, within two days of the applicant's submission, the same is forwarded to the other government departments concerned, which take approximately two to three weeks to examine it. During such examination (stage 1), clarifications or responses can be sought from the applicant on any query posed by the departments. Upon conclusion of such examination, the application is considered, and finally approved or rejected in a meeting convened by the FIPB (stage 2). Stage 2 also takes approximately two to three weeks after stage 1 is concluded. Finally, upon conclusion of stage 2, the FIPB's decision is communicated to the applicant within a further period of two to three weeks via a press release and approval or rejection letter. These timelines are subject to variation in the event that the FIPB application is subject to security clearance or because of other administrative reasons. The status of the application can be tracked on the FIPB website.

As far as the CCI is concerned, the overall prescribed statutory time period to review the combination and pass final orders is 210 days from the date of filing of the application. The Combination Regulations further provide that the CCI shall endeavour to pass the final order within 180 days of filing the application. Further, the CCI must form a prima facie opinion on the likelihood of the combination resulting in an AAEC within 30 working days of filing the application. This is subject to 'clock-stops' on account of additional requests for information, extensions sought from parties, etc. The extent of overlaps relating to the combination, the sensitivity of the government towards the sector to which the combination relates and the existence or likelihood of the combination resulting in AAEC are factors that may determine the timeline for clearance. In most cases, the CCI has approved transactions within the 30 working day timeline (including clock stops).

The central government has exempted certain banking companies from the notification requirement to the CCI for a period of five years from the review process. There are no expedited or 'fast-track' options for the review process.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Where investment is through the approval route, prior approval must be obtained before the transaction is completed (paragraph 2.1.18, FDI Policy). If the parties complete the transaction before obtaining the relevant approvals or in a manner that contravenes the FEMA (or rule, regulation, notification, direction or order issued in exercise of the powers under the FEMA) or contravene any condition subject to which an authorisation is issued by the RBI, the parties shall, upon adjudication by the designated authorities of the Enforcement Directorate (Directorate), be liable to a penalty of up to three times the sum involved where such amount is quantifiable or up to 200,000 rupees where the amount is not quantifiable. A penalty of 5,000 rupees will be incurred for every day after the first day on which the contravention continues. Further, under section 14 of the FEMA, in the event of non-payment of the penalty within 90 days from the date the notice for payment of such penalty is served, the parties shall be liable to civil imprisonment.

Every combination requires the approval of the CCI prior to the consummation of the transaction. If a notifiable transaction is not notified, or if the parties take steps to implement the combination (or a part thereof) prior to the receipt of CCI approval, the CCI may impose penalties extending up to 1 per cent of the total turnover or assets (whichever is higher) of the combination. In the past, the CCI has imposed penalties of up to 50 million rupees. To date, the CCI has not exercised its power to impose the highest allowable penalty under the Competition Act.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Formal or informal guidance from authorities such as the FIPB or the DIPP can be obtained prior to a filing being made or during the time that the application is in process. An applicant can submit a clarification to the DIPP listing its query in the prescribed form. The FIPB is also open to pre-filing dialogues and meetings. The CCI, too, has put in place a mechanism for informal consultations, but it is not binding.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Experts and specialists are involved at the stage when policy decisions are being made for the purposes of receiving recommendations. Lobbying does not formally prevail in India. There is no informal procedure or mechanism available to facilitate clearance of any proposal. The process of granting approval is transparent and is solely considered on the basis of the FDI Policy. The applicant must meet all the legal requirements as prescribed for the approval to be granted. Applicants can track the status of their applications on the FIPB website on both a daily and a weekly basis.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

The FIPB and the RBI may review, challenge and unwind an approved transaction. In *Bycell Telecommunication India P Ltd v Union of India and Ors*, the FIPB, having previously granted approval to the petitioner, revoked it – after the Ministry of Home Affairs withdrew the security clearance of the petitioner – on the grounds that even if the petitioner had complied with requirements under the laws relating to foreign investment, lack of a security clearance is a valid ground to revoke an application. Further, under the provisions of the FEMA, the central government, by an order published in the Official Gazette, may appoint as many officers of the central government as it likes as the adjudicating authorities for holding an inquiry into the person alleged to have committed contravention of the FEMA. The Directorate is a specialised financial investigation agency under the Department of Revenue, Ministry of Finance, which has, under the central government, been accorded powers and is mandated with the task of enforcing the provisions under the FEMA.

The CCI may also review, challenge or unwind only notifiable combinations, namely transactions that meet the asset or turnover thresholds prescribed under the Competition Act. However, once consummated, the combination may be subject to further substantive review by the CCI for up to one year from the date of filing of the application. This does not preclude the CCI from penalising parties for failure to notify and for having consummated the combination without its approval.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The application made to the FIPB is reviewed in totality by the relevant ministries and the government, and to impart greater transparency to the approval process, guidelines have been issued that govern the consideration of FDI proposals by the FIPB. The onus of compliance with the sectoral or statutory caps on foreign investment and attendant conditions, if any, shall be on the company receiving foreign investment.

The substantive test for clearance adopted by the CCI is whether the combination causes, or is likely to cause, an AAEC in the relevant markets in India. The CCI considers a number of factors, including:

- the level of competition in the market, including the market shares of parties and their competitors;
- the degree of countervailing powers in the market; and
- the likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins.

The onus of demonstrating the absence of any AAEC is on the party or parties notifying the transaction.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

There is no obligation imposed by any statute or regulation on the authorities regulating or reviewing foreign investment to consult officials in other countries.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

The review of an application process is an internal process of the government and the FIPB itself consults the relevant government departments while considering any application before it. No other party, including the applicant, is given a hearing as a matter of process. However, the FIPB can seek clarifications or further information from the applicant while considering any application.

The CCI has the discretion to reach out to third parties (competitors, customers, suppliers, experts, etc) during the initial 30-working-day period.

Update and trends

The present government has continued its efforts to facilitate doing business in India and has further liberalised the FDI Regulations to attract more foreign investment in India. In this regard, the RBI has permitted FPIs to invest in unlisted non-convertible debentures (NCDs). Prior to this amendment, except for investment in NCDs issued by a company engaged in the infrastructure sector (as defined as per the requisite external commercial borrowing guidelines of the RBI) and certain other sectors, FPIs were permitted to invest only in NCDs that were either listed or to be listed. The RBI circular announcing the new regime lays down certain end-use restrictions, such as investment in real estate business, capital markets and purchase of land.

The RBI has permitted the following in case of share transfers between a resident buyer and non-resident seller or vice versa: payment of the total consideration on a deferred basis within a period not exceeding 18 months from the date of the transfer agreement, and creation of an escrow arrangement for an amount of not more than 25 per cent percent of the total consideration for a period not exceeding 18 months from the date of transfer agreement.

On 24 October 2016, the RBI announced a process of simplification for foreign direct investment in India that, inter alia, includes the following changes: imposition of a composite sectoral cap encompassing all types of foreign investment; prescriptions on total foreign portfolio investment; foreign investment in LLPs; and stipulations regarding foreign investment by swap of shares.

Further, the commencement of the National Company Law Tribunal Insolvency Code will increase the ease of doing business in India. India is expecting a stellar budget next month, where one would expect lowering of corporate tax rates and movements on the goods and services tax, which will be another leap towards making India the preferred destination for foreign investors.

It is likely that the FIPB will be abolished soon, as announced by the government of India on 1 February 2017. This may be one of most significant steps since 1992 (opening of the Indian economy) towards the liberalisation of foreign investment in India.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Pursuant to the provisions of section 37 of the FEMA, the Directorate has been mandated to enforce the investigative and punitive provisions of the FEMA. The Directorate has jurisdiction under the provisions of the FEMA as well as the Prevention of Money Laundering Act 2002, and draws its personnel from other investigative entities such as customs and central excise, income tax authorities, the police, etc, on deputation, as well as through direct recruitment of personnel(www.enforcementdirectorate.gov.in/organisational_history.html?p1=1141115141865483 7603). Further, under section 13 of the FEMA the RBI can impose penalties if any person contravenes the provisions of FEMA or rules and regulations made under it (section 13(1), FEMA) or in the case of a contravention of any condition subject to which an authorisation has been issued by the RBI (section 13(1), FEMA). Upon adjudication, the monetary penalty that can be imposed for the instances described above is three times the sum involved in the contravention, if such amount is quantifiable, or a penalty of up to 200,000 rupees it is not quantifiable. Further, if the contravention is ongoing, an additional penalty can be imposed of up to 5,000 rupees for every day the contravention continues (section 13(1)).

As indicated above, the CCI may modify or even prohibit a transaction if it determines that such transaction causes or is likely to cause an AAEC in the relevant market in India.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

There are no specific guidelines or rules pursuant to which a transaction can be remedied or an objection avoided by submitting undertakings. However, we have seen instances where the RBI has directed Indian companies to provide an undertaking and declarations from their chartered accountants with respect to the confirmation on the pricing of the shares being transacted or confirmation on the investment being in compliance with the FDI Policy.

The parties to a combination are permitted to voluntarily provide undertakings or modifications to a transaction during the initial

30-working-day period, to address any competition concerns that the CCI may have. In the more detailed investigation phase, the CCI can direct modifications, which the parties can review and then have the opportunity to submit a counter-proposal to the CCI.

21 Can a negative decision be challenged?

If the FIPB application is rejected, the applicant may write to the FIPB requesting reconsideration of the proposal.

The CCI's decision to approve or reject a combination is subject to appeal before the Competition Appellate Tribunal, with a subsequent right of appeal to the Supreme Court of India.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The applicant can, in its application to the FIPB or the relevant government authority, insist that the information submitted is confidential.

The CCI treats only price-sensitive data, proprietary business information, trade secrets and any other information, the disclosure of which is likely to cause commercial harm to the parties, as confidential. An application to maintain confidentiality is required to accompany the notification and all subsequent submissions to the CCI.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

In its order dated 23 June 2016 (combination registration number C-2016/04/392), the CCI approved the acquisition of the IT and IT enabled services business (the target business) of Dell Inc (Dell) by NTT Data International LLC (NTT). In India, the target business involves the activities of Dell Business Process Solutions India Private Limited (DBPS) and Dell International Services India Private Limited (DIS). DIS would transfer assets and employees related to the target business to DBPS, which would be subsequently acquired by NTT as part of the proposed combination. The CCI considered the horizontal overlaps of the parties in the IT and IT enabled services market in India. Although the CCI observed that the IT and IT enabled services businesses could be sub-segmented further, the CCI noted that the definition of relevant market could be left open as the market share of the parties was insignificant, both prior to and post the proposed combination.

In its order dated 4 August 2016 (combination registration number C-2016/04/394), the CCI approved the acquisition by UltraTech Cement Limited (UltraTech) of the undertakings of Jaiprakash Associates Limited (JAL) and its subsidiary Jaypee Cement Corporation Limited (JCCL) that are engaged in the sale of cement at certain plants, including integrated units and grinding units, with a total capacity of 21.2 million tonnes per annum. Since the parties are primarily engaged in the manufacture and sale of cement, in order to define the relevant product market, the CCI considered the extent of demand-side substitutability between the various types of cement. The CCI observed that the different varieties of grey cement are largely substitutable and determined that the relevant product market for competition assessment is grey cement. Based on the location of the cement plants identified as part of the combination, the CCI delineated the relevant geographic markets for assessment using the Elzinga-Hogarty Test (EH Test) and catchment area analysis. On the basis of the EH Test, the parties proposed that the relevant geographic market would comprise the states of Andhra Pradesh, Madhya Pradesh, Uttar Pradesh, Uttarakhand and Himachal Pradesh. The CCI considered this definition too wide and not reflective of the relevant competitive constraints. It independently applied the EH Test to identify the areas forming part of the relevant geographic markets. The CCI concluded that although the proposed combination allows Ultratech to consolidate its position in terms of installed capacity, it would continue to be constrained by the presence of LafargeHolcim and would be in a better position to more effectively compete in the post-combination state. The CCI also took note of the fact that the proposed combination has been initiated at the instance of JAL's lenders given its mounting debt and that UltraTech intends to introduce and utilise its processes and core competence to increase the capacity utilisation. Accordingly, the CCI concluded that the market would benefit from the overall economic efficiency in production and increase in quantity of cement. The CCI decided that the combination was not likely to cause an AAEC in the relevant markets and approved the combination. AZB represented UltraTech before the CCI in this transaction.

On 21 September 2016, the FIPB at its meeting (F. No. 7(8)/2016, which involved the FIPB, the Indian Government, the Ministry of Finance and the Department of Economic Affairs (FIPB Unit)), approved M/s Saet India Pvt Ltd's proposal for transfer of shares from a non–resident to another non–resident for a share price of 732.6 rupees per share. On 21 October 2016 in another recent case, (F.No. 7(9)/ 2016) the FIPB Unit rejected the proposal of M/s Packt Publishing Services (India) Ltd to allot 99.9 per cent of its equity shares to its holding company M/s Packt Publishing Limited, UK while being engaged in the publishing sector.

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Italy

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

From a number of standpoints, Italian legislation on foreign investments is liberal. In particular, there are no exchange controls in Italy. Residents of Italy may hold foreign currency and foreign securities of any kind, within and outside Italy. Non-residents may invest in Italy and may export credit instruments and securities, in both foreign currency and euros, representing shareholdings, dividends, other asset distributions and the proceeds of disposition without restrictions other than those outlined below.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The two main sets of rules designed to protect Italian companies from foreign direct investments are the reciprocity rule and the golden power rules, summarised below. Therefore, for the purposes of clarity, comments made in this chapter may, from time to time, refer to the different rules.

Reciprocity

'Reciprocity' is the general principle governing foreign investments in Italy. According to article 16 of the general part of the Italian Civil Code, a foreign person or company is allowed to enjoy the civil rights granted to Italian citizens on a reciprocity basis and subject to the provisions of the Italian Civil Code. In this regard, reciprocity means that the state of origin of the foreign individual or entity would grant to Italian citizens the same or similar rights as the foreign national intends to exercise in Italy. According to Legislative Decree 286 of 1998 issued on 25 July 1998, the following subjects are, per se, given the same rights of Italian citizens and are thus exempted from the reciprocity test:

- EU citizens and the citizens of EEA countries (Iceland, Liechtenstein and Norway);
- non-EU citizens residing in Italy and holding the permit of stay or job permit;
- a stateless person resident in Italy for at least three years; and
- political refugees resident in Italy for at least three years.

It is also generally accepted that the reciprocity test may be avoided in respect of citizens of a country that has entered into a bilateral agreement with Italy upon investments. It is worth noting that the reciprocity principle is further detailed in sectorial rules of law, concerning, inter alia, banks and financial institutions, insurance companies, telecommunications, gambling and tourism sectors.

From golden share to golden power

Originally, the golden share protection was provided for and regulated by Law Decree 332 of 1994, issued on 31 May 1994, ratified and amended by Law 474 of 1994, dated 30 July 1994, as subsequently amended by Law 350 of 2003, dated 24 December 2003. According to this legislation, the Italian government had the right to designate and remove directors and auditors as well as to exercise special powers in those companies that it used to control, should such previously state-owned companies be operating in strategic sectors (ie, defence, transport, telecommunication, energy and public services). These special powers included the veto on the acquisition by third parties of a relevant stake in the company or on the execution of a shareholders' agreement, the veto on important company's resolutions and the right to designate a non-voting director. The criteria for the exercise of the special powers were provided for by a Ministerial Decree issued in 2004, and were numerous and potentially undetermined.

Following formal criticism from the European Union (EU), Italy has enacted new rules by means of introducing Law Decree 21 of 2012 (Law Decree 21/2012), dated 15 March 2012 (which came into effect on 16 March 2012), as subsequently amended and ratified by Law 56 of 2012, dated 11 May 2012.

The provisions contained in this Law Decree introduce a new set of 'golden powers' of the Italian government in relation to defence and national security sectors and to strategic assets in the energy, transport and communications industries.

The new rules aim at providing potential investors with a higher degree of certainty by removing or otherwise limiting the elements of administrative discretion.

Law Decree 21/2012 establishes two distinct sets of powers: one for the defence sector and one for the energy, transport and communications sectors (other golden power sectors). Specific regulations were also required in order to better define the scope of the Law Decree 21/2012. As regards the defence sector, Ministerial Decree 108 of 2014 was adopted on 6 June 2014 and Ministerial Decree 85 of 2014 (Ministerial Decree 85/2014) was adopted on 25 March 2014 to regulate the other sectors. Both Ministerial Decrees specifically identify the transactions within the respective sectors, subject to golden power legislation.

In addition, Ministerial Decree 86 of 2014 (Ministerial Decree 86/2014) was adopted on 25 March 2014 in order to regulate the enforcement procedure of golden power rules.

The new legislation sets forth a comprehensive investment control regime, which is now objective and non-discriminatory, in the protected sectors, imposing prior notices to the government and waiting periods. The prior authorisation regime will particularly effect, although not exclusively, investments by a non-EEA person.

If correctly and proportionally applied, the new regime is likely to turn into an effective instrument for providing legal certainty for foreign investments in Italy.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Reciprocity

As mentioned in question 2, the reciprocity general principle has been further detailed in a number of laws concerning strategic sectors. Among such sectors, the most noteworthy are as follows:

- for banks and financing institutions the principle at stake has been detailed in Law 385 of 1993 issued on 1 September 1993 (the Banking Law) and in Decree 58 of 1998 issued on 24 February 1998 (the Finance Law);

- for insurance companies, article 28 of Decree 209 of 2005 issued on 7 September 2005 imposes the establishment of an operating branch in the European territory for any non-European insurance group willing to do business in Italy. Article 25 of Legislative Decree 259 of 2003 issued on 1 August 2003 has established this same mandatory EU establishment rule in the telecoms sector for non-European broadcasting groups willing to do business in Italy;
- the gambling sector is also subject to this territorial principle, according to article 24 of Law 88 of 2009 issued on 7 July 2009; and
- the tourism sector is also specifically affected by the reciprocity rule, which has been detailed in article 4 of Legislative Decree 79 of 2011 issued on 23 May 2011.

In all such sets of norms, the transactions relevant to the prohibition at issue are those through which a foreign group would ultimately result in control of a given strategic business (ie, incorporation of a new company or acquisition of control over an already operating one).

Golden power

The transactions relevant to golden power protection are those through which a non-public (or non-EEA, in the case of the other golden powers sectors) entity would acquire a stake in a protected company, such as to ultimately result in the possibility of compromising national security (or, in the case of the other golden power sectors, a controlling stake). Also subject to the golden power rules are the extraordinary resolutions and deliberations taken by Italian companies operating in the protected sectors, such as mergers, demergers, transfers of registered offices, variations to the corporate purpose, liquidations, transfers of know-how, businesses and business branches and amendments to by-laws concerning voting rights limitations. However, the spectrum of special powers and cases for their application are subject to stricter and more objective limitations than before, under the previous set of rules, and are defined ex ante. Also, the application of the rules is limited to exceptional circumstances that are likely to cause serious and irreparable harm to the fundamental interests of the state.

4 How is a foreign investor or foreign investment defined in the applicable law?

Italian law does not provide a specific definition of 'foreign investment' or of 'foreign investor'. As mentioned in question 2, the general definition of a 'foreign person' is contained in article 16 of the general part of the Italian Civil Code and in Decree 286 of 1998 issued on 25 July 1998.

The rules applicable to the other golden power sectors are triggered whenever the foreign entity is a non-EEA one.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Not applicable.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The government's decisions over a merger or acquisition affecting a company operating in defence and national security and strategic sectors must be adopted by the Prime Minister's office, in representation with the Italian government.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

Whenever an Italian authority is entitled to apply the 'national interest' test to evaluate a given transaction, it has broad discretion.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Reciprocity

Not applicable.

Golden power

According to Law Decree 21/2012, special powers are granted to the Italian government to protect companies operating in the defence sector and the other golden power sectors, irrespective of size, turnover and other financial parameters. Where one of the transactions or deliberations, falling within the framework of the golden power rules is executed or adopted, as the case may be, then filing is mandatory, in order to activate the relevant procedure.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

Reciprocity

Usually, a pre-closing filing will be necessary in order to legally complete a given transaction.

Golden power

Pursuant to Law Decree 21/2012 and Ministerial Decree 86/2014, the government must be notified with complete and exhaustive information on any relevant transaction or resolution. In particular, notification of the relevant resolutions must be made to the government within 10 days from the date of deliberation, and in any event prior to their implementation, whereas notification of any purchase of interest in any relevant company must be sent to the government within 10 days from the acquisition: the respective implementation can be accomplished unless the government exercises its veto power within 15 days.

10 Which party is responsible for securing approval?

Reciprocity

The foreign investor is the sole responsible party for securing approval.

Golden power

Not applicable.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Reciprocity

There are no standard procedures.

Golden power

The review process takes about 15 days.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Reciprocity

The parties to a transaction subjected to this rule may close the respective transaction before reciprocity has been confirmed, but, if the requirement is not finally met, the foreign investor will not be allowed to exercise the economic and administrative rights connected to the investment.

Golden power

Pursuant to Law Decree 21/2012, the government must be notified of any relevant resolution or acquisition prior to its implementation.

Any resolution, action or transaction adopted or passed in violation of this process is null and void, and the government may order that the pre-existing conditions and status be restored. In the case of irregular acquisitions, the voting rights are suspended and a fine may be imposed in an amount ranging from 1 per cent of the turnover of the entities involved in the year immediately preceding that of the irregular transaction to double the transaction value. If consent is eventually denied by the government, then the stake so acquired shall have to be sold within one year from completion of the non-consented transaction.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The foreign investor or the Italian target company, or both, may always request (and this frequently occurs) an informal opinion from the competent Italian authorities on the transaction.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Public affairs or lobbying specialists very often support the foreign investor during the review of a transaction by the Italian authorities. There are no standard procedures and the level of respective formality can widely vary.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

See question 12.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

With the defence sector, the substantive test focuses on a prejudicial effect that might be caused to national defence and security interests. In carrying out its evaluation, the government will also consider the strategic importance of the protected entity, the ability to ensure the security of military information, the financial and economic adequacy of the bidder in view of the full maintenance of the protected entity's going concern and the non-existence of relationships with non-democratic countries.

As for the other golden power sectors, the substantive test focuses on extraordinary threats that might result in a wide prejudice to the public interest concerning the security and operation of grids or the continuity of supplies. In this case, the government will consider the financial and economic adequacy of the bidder in view of the full maintenance of the protected entity's going concern and the non-existence of relationships with non-democratic countries.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

It is customary for the Italian authorities to promote informal meetings with their foreign counterparts and to ask them for non-binding opinions during the substantive assessment. Nevertheless, such consultation is not mandatory and its procedural rules are not fixed.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Reciprocity
Third parties have no specific rights in the review process. However, especially in public bids, competitors can always intervene in the acquisition process through counter offers. Italian authorities are also used to holding hearings that are open to consumers in all cases where the relevant transaction might be prejudicial to them.

Golden power
Not applicable.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Reciprocity
The Italian authorities have great power to influence a transaction. After a negative review, the investor will not be allowed to exercise the voting rights or to otherwise enjoy monetary rights attached to the participation held in the target company, thus discouraging the investment.

Golden power
With reference to transactions or deliberations, or both, made and taken in respect of entities operating in both the defence sector and the other golden power sectors, the Italian government may impose specific conditions aimed at securing the protection of the national interest or even veto the respective transaction or deliberation.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Reciprocity
As mentioned in question 12, a negative decision at the end of the process review has clear and strong consequences, which the investor cannot remedy even by taking temporary undertakings.

Golden power
Not applicable.

21 Can a negative decision be challenged?

As a general principle applicable also to the matters discussed herein, a negative decision can always be challenged by appealing to the Italian administrative courts.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Italian general rules of law protect confidential information in business transactions from being disseminated. Nevertheless, there are no ad hoc instruments to prevent the breach of such a confidentiality obligation.

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Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Avio: acquisition by GE

Italy's Avio is one of the world leaders in the design, development and production of components and systems for aerospace propulsion and a portion of its business relates to defence. Following the decision of its controlling shareholder, a private equity fund, to liquidate the investment, a sale process has been commenced in which a number of entities have participated. An IPO process was also commenced, but eventually abandoned. During the entire process, there was pressure from public opinion for control of Avio to be maintained in the hands of an Italian group. To this end, expressions of interest were put forward by Fondo Strategico Italiano, a state-backed private equity fund, focusing on the development and protection of Italian groups operating in strategic industries such as defence. At the end of the sale process, a compromise was eventually found without formally resorting to the exercise of the veto powers granted under the golden share rules, and Avio resolved to sell its non-defence business, retaining the defence business.

Piaggio Aero: acquisition by Mubadala Development Company

Piaggio Aero is one of the Italian leaders in the design, development and production of aircraft, aviation components and systems for aerospace propulsion, and a portion of its business relates to defence as it designs and develops innovative unmanned aerial systems and advanced multirole patrol aircraft. In 2014, Mubadala Development Company, the strategic investment company of the government of Abu Dhabi, acquired from the existing shareholder Tata a shareholding equal to 40.5 per cent of Piaggio Aero corporate capital, increasing its participation to 98.058 per cent. The Italian government exercised its prerogatives under golden power rules through the approval of such transaction under specific conditions aimed at safeguarding and improving Piaggio Aero's technological, industrial and business development, with particular reference to unmanned aerial systems, which are military strategic assets.

Merger of 3 Italia and Wind

3 Italia and Wind are two of the Italian leaders in telecom business; both offer integrated mobile services and provide 4G and 3G technology. 3 Italia is majority owned by Hutchison Asia Telecommunications, a wholly owned subsidiary of the Hong Kong based CK Hutchison, whereas Wind is owned by Vimpelcom, an Amsterdam-based JV between Alfa Group and Telenor. After months of negotiations, shareholders of mobile telephone companies agreed to form a 50-50 joint venture pooling their telecom businesses in Italy. This merger, one of the biggest in Italy since 2007, has created one of the national market leaders in the TLC market. The Italian government decided not to use its golden power to block the proposed merger because the combined entity will deliver major investments into Italy's digital infrastructure, bringing benefits to consumers and businesses; however, it recommended the two partners to secure the maintenance of the management and security functions within the Italian territory.

Japan

Nobuo Nakata and Koki Yamada

Hibiya-Nakata

Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Direct inward investment into Japan by foreign investors has been free, in principle, for more than a decade since the Foreign Exchange and Foreign Trade Act (the Forex Act) was amended in 1998. In general, the only requirement for foreign investors making investments in Japan is to submit an ex post facto report to the relevant ministries. The purpose of imposing a reporting requirement is to make a statistical record resulting in no ex post facto review or investigation conducted by the government.

However, the Forex Act requires prior filing for certain limited investments involving particular areas of businesses and particular geographic areas or countries. The business-related restrictions are imposed on, among others, investments on business related to:

- national security (eg, weapons, airplanes, nuclear power or space development);
- public infrastructure (eg, electricity, gas, water, telecommunications or railways);
- public safety (eg, vaccine manufacturing or private security service); and
- domestic industry protection (eg, agriculture).

The area-related restrictions are imposed on, among others, investments concerning countries with which Japan has not executed a treaty on foreign direct investments (eg, North Korea) and certain activities involving the Iranian government, entities, individuals or groups.

If the investment falls into such an exceptional category, the party who intends to make such an investment is required to submit prior notification of the intended investment to the relevant ministries. The relevant ministries will then review the filed report in principle within 30 days from filing. After reviewing, the relevant ministries may order for a suspension or amendment of the filed investment if they find the investment is likely to:

- impair the national security;
- impede public order;
- hamper the protection of public safety; or
- have a significant adverse effect on the smooth management of the Japanese economy.

It should be noted, however, that it is extremely rare for the ministries to issue such an order. In fact, there has been only one case where the ministries have actually issued an order for suspension of investments under the present Forex Act.

Since 1980, when the present Forex Act was enacted, the first and only order for suspension of the investment was issued in 2008 when The Children's Investment Master Fund (TCI), a UK-based activist fund, intended to purchase up to 20 per cent stakes of J-Power, an electric power wholesaler owning core infrastructures in the Japanese electricity supply such as nuclear plants and electric lines. The relevant ministers announced in their press release that, upon their review, including a series of interviews with TCI, they found risks of impairing the financial condition of J-Power, reduction of future capital expenditure or maintenance spending on fundamental infrastructures and a negative effect on construction and maintenance of the Ohma nuclear plant (an important plant for Japanese nuclear fuel recycling) if TCI became a holder of 20 per cent shares in J-Power. An official of the Ministry of Finance stressed in an article describing the position of the Japanese government in this instance that this case was exceptional since all other foreign investments (760 filings were made from 2006 to 2008) were approved since the present Forex Act was enacted in 1980.

To provide a comprehensible overview, the answers to the following questions are based on the assumption, except where otherwise specified, that the foreign investments are made through either acquisition of shares or equities or establishing subsidiary, branch or other offices, which are the most popular options usually considered by foreign investors to enter into the Japanese market.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The main law is the Forex Act along with supplemental regulations.

Further, the following laws involving specific areas of businesses regulate investments by foreign nationals or set the upper limit of holding ratio by foreign nationals:

- the Broadcast Act;
- the Radio Act;
- the Civil Aeronautics Act;
- the Consigned Freight Forwarding Business Act;
- the Mining Act;
- the Ships Act; and
- the Act on Nippon Telegraph and Telephone Corporations.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Forex Act is applied for foreign investments conducted by foreign investors in the form of, among others:

- the acquisition of 10 per cent or more of shares of listed companies;
- the acquisition of shares of unlisted companies;
- the transfer of shares from a non-resident individual to a foreign investor (where a non-resident acquired such shares while a resident);
- establishing a branch, factory or other business offices (excluding a representative office) in Japan or substantially changing the type or business objectives of such a branch, factory or other business office, excluding those with the business objectives of:
    - banking;
    - foreign insurance;
    - gas;
    - electricity;
    - certain types of securities;
    - investment management;
    - foreign trust;
    - fund transfer;
- extension of loans to Japanese corporations exceeding certain thresholds; and

- acquisition of private placement bonds issued by Japanese corporation exceeding certain thresholds.

As stated previously, acquisitions of the minority interests, except for acquisitions of less than 10 per cent of the shares of listed companies, are generally covered by the Forex Act.

Investment in certain sectors, such as investment in the weapons manufacturing business, may fall into the categories in which the prior notifications are required as explained in question 1. Once the prior notification is required, the authorities will review the transaction from the view of whether the investment is likely to impair national security, impede public order or hamper the protection of public safety. There are no rules or regulations requiring special scrutiny for any particular sectors in such reviews by the authorities.

4 How is a foreign investor or foreign investment defined in the applicable law?

Under the Forex Act, a foreign investor is defined as the following type of individual or entity;

(i) non-resident individuals;
(ii) corporations, partnerships, associations or other entities established under foreign jurisdictions or having their principal offices in foreign countries;
(iii) corporations established under Japanese law of which the ratio of the sum of the voting rights directly or indirectly (through entities of which the ratio of the voting rights held by those listed in item (i) or (ii) is 50 per cent or more) held by those listed in item (i) or (ii) is 50 per cent or more; and
(iv) corporations, partnerships, associations or other entities in which the majority of either the officers (ie, directors or similar) or the representative officers are non-resident individuals.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no specific rules for investments made by SOEs or SWFs.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Minister of Finance and the minister with jurisdiction over the targeted business are the competent authorities to review mergers or acquisitions under the Forex Act. While the decision-making authorities are such ministers, all of the application or reports must be submitted through the Bank of Japan.

The examples of the jurisdictions of the ministers are follows;

- the Prime Minister: banks, trusts, security business, insurance businesses and investment advisers;
- the Minister of Finance: import and export of precious metals and import and export of alcohol;
- the Minister of Agriculture, Forestry and Fisheries: agriculture and fishery and the manufacture of food or drink;
- the Minister of Health, Labour and Welfare: pharmaceutical matters and medical devices; and
- the Minister of Economy, Industry and Technology: the manufacture, sales, import and export of aircraft and the manufacture, sales, import and export of weapons and electricity.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

For those transactions only requiring ex post facto reports, the authorities will not have any discretion to either approve or reject the transactions as the ex post facto reports are required mostly for the purpose of statistical analysis.

On the other hand, in reviewing the transactions subject to the prior notifications, the authorities (the Minister of Finance and the minister with jurisdiction over the targeted business as shown in question 6) have, theoretically speaking, relatively broad discretion under the Forex Act.

However, as a matter of practice, the Japanese government has been hesitant to intervene in the economic activities by foreign investors. As explained in question 1, there has been only one case where the ministries have issued an order for the suspension of investments since 1980 when the regime under the present Forex Act was established.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

As explained in question 1, the Forex Act imposes prior notification requirements on investments into certain limited areas of businesses and investments involving certain geographical regions.

As long as the intended investment falls into one of these categories, the filing is mandatory and there are no numerical thresholds such as turnovers, asset size or investment amounts for exemptions. Even in cases where the business triggering the prior notification is relatively small as to the size of the overall business, the filing could be triggered. For instance, if a part of a battery being sold by an electric manufacturer happened to be used in satellites, then the prior notification could be required. As a waiting period of prior notification (see question 11) could delay the whole process, careful review of the targeted business is highly recommended, especially when a targeted company conducts a wide range of business activity such as electrical manufacturers.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

An application must be submitted to the Minister of Finance and the minister with jurisdiction over the targeted businesses via the Bank of Japan. Forms for application are available at the website of the Bank of Japan. There are no filing fees.

An application of the prior notification will be reviewed by the relevant ministers. The authority may require hearings, written responses for its inquiries and submission of additional documents.

10 Which party is responsible for securing approval?

An investor is responsible for securing approval. Therefore, if the investment falls into the category triggering the prior notification, it is strongly recommended in practice to make a filing of an application for the prior notification to the relevant authorities and a lapse of the relevant waiting period (see question 11) as conditions precedent to the consummation of the investment.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Under the Forex Act, an investor may not make an investment, for which prior notification is required, for a period of 30 days after the acceptance of the application by the Bank of Japan. However, such a waiting period will be normally shortened to two weeks from the acceptance in accordance with the relevant ordinance. According to the Ministry of Finance, more than 95 per cent of applications have been so shortened. Moreover, with an aim to facilitate more inward investment in Japan, the Ministry of Finance and other relevant ministries have implemented expedited fast-track options for green field investment (ie, certain investments involving a wholly owned Japanese subsidiary), rollover investments (ie, certain investments, the same type of which were previously filed within six months by the same investor) and passive investments (ie, certain investments that the investor undertook so as not to proactively participate in the management or to take control of the company). If the fast-track option is applied, the waiting period will be further reduced to five business days.

On the other hand, if the authority finds that there needs to be a review procedure on whether the investment is likely to impair the national security, impede public order or compromise public safety, the waiting period can be extended up to five months.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

As explained in question 11, an investor may not make an investment for which prior notification is required for the relevant waiting period. If an investor makes an investment in violation of such a time restriction, the investor will be subject to criminal penalties including imprisonment of up to three years or a fine, or both, of up to three times the amount of the investment or ¥1 million, whichever is higher.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

The Bank of Japan accepts general inquiries in relation to filing procedures under the Forex Act via the telephone.

The Ministry of Finance and other relevant ministries are generally open for pre-filing consultation if there are any substantive inquiries. Although such a pre-filing consultation is voluntary, it is recommended for an investor to conduct pre-filing consultations, especially if there is any ambiguity in terms of the application of relevant laws and regulations.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

As explained in question 9, applications of prior notifications will be reviewed by the Ministry of Finance and the minister with jurisdiction over the targeted businesses. As there has only ever been one case where the order for suspension of the investment was issued, the utilising of government relations, public affairs lobbying or other specialists to support the review of the transaction is uncommon. Other than cooperating fully with the review process by the authority, such as providing necessary information that is requested or promptly providing answers to the inquiries, there are no other informal procedures to facilitate or expedite clearance.

Again, it should be noted that the waiting period will be expedited as a default rule set by the ordinance as described in question 11.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

There are no post-closing or retroactive powers granted to the authorities to review, challenge or unwind a transaction that was not otherwise subject to review.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

An investment subject to prior notification will be reviewed by the authority who will assess whether the investment is likely to impair national security, to impede public order, to compromise public safety or to have a significant adverse effect on the smooth management of the Japanese economy. For example, the Ministry of Finance and Ministry of Economy, Trade and Information issued an order to suspend investment by the TCI as there was a likelihood that the investment might compromise public safety.

The onus is on the investor to show that the transaction does not fall into any of the above-mentioned categories.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The Japanese authorities have continually stressed that restrictions imposed on foreign investments by the Forex Act are consistent with international standard rules such as the OECD Codes of Liberalisation of Capital Movements and of Current Invisible Operations.

As for a substantive assessment of a specific case, there is no official data or information suggesting that the Japanese authorities will consult or cooperate with officials in other countries.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Before issuing an order to suspend or change the content of an investment, the relevant ministers are required to hear opinions from the Council on Customs, Tariff, Foreign Exchange and other Transactions (the Council). The Council shall be comprised of academic experts nominated by the Minister of Finance. Competitors or customers may not be involved in the review process. There are no procedures allowing the complainants to participate. Therefore, the complainants have no rights and standing.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Minister of Finance and the minister with jurisdiction over the targeted business have the power to order investors to suspend or change the content of the investment, but only upon the refusal by the investor for the recommendation made by the relevant ministers to suspend or change the content of the investment.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

There are no ways of avoiding the authorities' recommendations or orders that object to a transaction within the review process under the Forex Act, other than regular advocating activities. It should be noted, however, that the decision by the authority can be challenged as explained in question 21.

21 Can a negative decision be challenged?

A negative decision can be challenged. A party can make an appeal to the relevant ministry challenging the orders rendered by the authority to sustain or change the content of the investment. The ministry receiving a motion of appeal is required to hold a public hearing after giving a reasonably lengthy advance notice.

The party who is dissatisfied with the decision by the relevant ministry in the appeal procedure may opt to bring an action to court.

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22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Under the National Public Service Act, government officials owe a confidentiality obligation for the confidential information of which the officials become aware in the course of their duties. As such, any confidential information provided to the government officials in the foreign investment review process will be subject to such an obligation. If an official breaches his or her confidentiality obligation, he or she can incur a criminal penalty of imprisonment for up to one year or a fine of up to ¥500,000. The party may claim for damages against the Japanese government, incurred by the dissemination of confidential information, as long as the required elements under the State Redress Act, for example, an intentional act or an act due to the negligence of an official, can be established.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

As explained in question 1, there has been only one instance since the enactment of the current Forex Act in 1980 where the order to sustain the investment was actually issued, although hundreds of prior notifications of the direct inward investment have been filed each year (see question 1 for the details of the order for the suspension of the investment issued in 2008 against the proposed investment by TCI in J-Power).

Jordan

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The basic premise of the laws governing investments in Jordan is that a foreign investor will be treated in the same way as local investors and will be allowed to invest without restrictions in all economic sectors; except in those sectors where there is national interest in placing restrictions on such foreign investment. Furthermore, Investment Law No. 30 of 2014 (the Investment Law) provides that there are no limitations on the percentage of ownership by foreign nationals in activities conducted in any of the Jordanian Free Zones or Special Economic Zones established pursuant to the Investment Law.

In practice, these restrictions are not (to date) enforced on companies listed on the Amman Stock Exchange.

Additionally, there are certain investments and development projects that are reserved for companies established by Arab sovereign funds and Arab and foreign investment corporations.

If an investment meets certain 'economic concentration' tests and thresholds, then competition clearance would also be necessary.

National security concerns are indirectly and unofficially handled during review of the incorporation application and supporting documentation of new companies and during the licensing process for certain activities.

Although the Central Bank of Jordan has the power by law to control foreign currency payments and exchanges, there are currently no restrictions except that the Central Bank controls the exchange rates of the Jordanian dinar against foreign currencies.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The following are the main bodies of law that regulate the approval and review of local and foreign investments in Jordan:

- Companies Law No. 22 of 1997 (the Companies Law);
- the Investment Law and Regulations issued pursuant to it, mainly (i) the Regulation for Regulating Non-Jordanian Investment No. 77 of 2016 (NJIR) and (ii) Investment Window Regulation No. (32) of 2015 (the Investment Window Regulations);
- Competition Law No. 33 of 2004 (the Competition Law); and
- Jordan Investment Fund Law No. 16 of 2016 (the Investment Fund Law) including all regulations and instructions issued pursuant thereto.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Companies Law

Any foreign investor wishing to undertake any type of commercial activity in Jordan must register an entity pursuant to the Companies Law by submitting an application accompanied by identification documents and draft constitutional documents to the Companies Control Department at the Ministry of Industry and Trade (CCD). The CCD has a dual role of acting as a companies registrar as well as a reviewer of the investment and registration process and, in this latter role, has significant power to allow or prevent the incorporation of, and investment in, Jordanian companies. The CCD is the main authority that checks the following:

- whether the investment violates any of the foreign ownership limits set by the NJIR;
- whether the investment has the necessary preliminary approvals by the relevant sector regulators; and
- whether the investor clears any national interest restrictions.

The Investment Law

The Investment Law provides for:

- the basic protections afforded to foreign investors in Jordan;
- regulating the benefits afforded to investments in certain geographical areas or industry sectors; and
- establishing a one-stop shop for the registration and licensing of investment activities.

The NJIR is drafted in a general manner to allow unlimited foreign investment in all economic activities without prejudicing national security, public policy, morality, and public health. The NJIR defines 'economic activities' as covering industrial, agricultural, tourism, media, craftsmanship and service activities (including information technology). There is no clear definition of public policy and morality under Jordanian laws. Therefore, jurists have determined that the main principle underpinning public policy and morality is public interest, whether such interest is political, economic, social, or moral or ethical in nature.

As set out in question 1, there are certain 'economic activity' sectors where restrictions apply. The restrictions apply in accordance with the following categories:

- Projects in which foreign ownership is completely prohibited (such as bakeries of all types, security services, trading, importing and maintenance of firearms, ammunition and trading and importing fireworks).
- Projects in which foreign ownership is limited to a maximum of 50 per cent (such as retail and wholesale including distribution, import and export services, engineering consultation and services, ship management services, and certain passenger and cargo transportation services).
- Projects in which foreign ownership is limited to a maximum of 49 per cent (sports clubs, maintenance of television and broadcasting equipment, and the purchase of land for the establishment of residential apartments).

These limits do not apply to economic activities conducted in the Free Zones and Special Economic Zones established pursuant to the Investment Law.

The legislator has used the word 'projects' when allowing or restricting foreign investments. This broad term is used to capture foreign investments not only in shares of companies registered in Jordan, but in joint ventures, unincorporated partnerships and consortia.

Despite the foregoing, foreign ownership restrictions do not apply to foreign companies that are 50 per cent owned by Jordanians unless such foreign companies are public shareholding companies or the investment relates to projects where foreign ownership is completely prohibited. Additionally, Jordan has entered into a number of bilateral and multilateral treaties with various countries that offer nationals of such countries the same treatment offered to the nationals of Jordan and removes foreign ownership restriction on such nationals. Moreover, ownership in companies and projects beyond the percentages listed above is still permissible for certain economic activities if approved by the Council of Ministers, based on the recommendation of the Minister of Industry and Trade.

National security, public policy and morality

The NJIR restricts foreign investment whenever there is a national security, public policy or public morality concern. This is implemented during the registration of the relevant company or transfer of shares therein by the CCD. The CCD liaises with the Ministry of Interior and other security and government departments before issuing any registration certificate or allowing any share transfer based on a list of 'national interest' suspect nationalities or sectors. This is to determine whether the investor, investment or the project itself is or may be harmful to national security or is or may be in contravention of public policy and morality. It is difficult to clearly specify which sectors the government and other security departments exercise special scrutiny over given that such scrutiny is highly dependent on the sector and nationality of the investor and changes from time to time.

The Competition Law

Competition clearance pursuant to the Competition Law for certain investments may need to be procured for transactions (ie, acquisitions or investments) that satisfy the economic concentration tests. These clearances need to be procured from the Minister of Industry and Trade prior to concluding these transactions.

The CCD (or any relevant economic sector regulator) does not check on the satisfaction of any competition clearances at the time of approval of the share transfer or subscription of shares in Jordanian entities. Separate applications to obtain such clearances need to be made. The Competition Law grants the Minister of Industry and Trade the power to take any action necessary if no application has been made. Therefore, the Minister of Industry and Trade has the discretion to reverse the transaction.

Any activity resulting in full or partial transfer of ownership or beneficial interest in properties, rights, shares or obligations of one establishment to another in a way that enables such establishment to control, whether directly or indirectly, another establishment shall be considered an economic concentration. The approval of the Minister of Industry and Trade would be required to complete an economic concentration if:

- the economic concentration would affect competition (noting that there is no threshold and accordingly even minor effects could trigger the requirement); and
- the total market share of the entity or entities involved exceeds 40 per cent (noting that the requirement is that either entity or both entities together satisfy the threshold, as opposed to the threshold being exceeded as a result of an economic concentration).

The language used in the Competition Law is wide enough to cover investment in Jordanian entities whether directly or indirectly through the acquisition of any of its shareholders. Additionally, any acquisition or change of ownership in minority interests in the Jordanian entities that already enjoy a market share of 40 per cent may trigger the competition clearance approval requirement.

The Investment Fund Law

The Investment Fund Law established the Jordan Investment Fund. Rights of ownership, investment, development and operations of certain projects are exclusive to the Jordan Investment Fund. These include national railway projects and electricity connection projects with Saudi Arabia. The Jordan Investment Fund has reserved these projects for companies established by Arab sovereign funds and Arab and foreign investment corporations (see question 1).

4 How is a foreign investor or foreign investment defined in the applicable law?

Applicable laws do not use the term 'foreign investor', but rather use the terms 'investor', 'non-Jordanian investor' and 'foreign capital'. The Investment Law defines 'investor' as 'the natural person or legal entity that exercises an economic activity in Jordan in accordance with the provisions of the law'. The NJIR further defines the 'non-Jordanian investor' as 'the natural person who holds a non-Jordanian nationality or a legal entity who has been established and registered outside Jordan'. 'Foreign capital' is also defined in the Investment Law, and covers what non-Jordanians invest in Jordan in the form of cash, in-kind contributions, or rights with financial value.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

In general, there are no special rules for investments made by foreign state-owned enterprises or sovereign wealth funds. However, there are certain projects that are reserved for companies established by Arab sovereign funds and Arab and foreign investment corporations (see question 1). The Investment Fund Law indicates that there are also special rules for the establishment, governance and regulation of such companies. These special rules should be set out in regulations to be issued pursuant to the law. To date, no such regulations have been issued.

There are no clear definitions of SOEs or SWFs within the laws and regulations of Jordan.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The CCD and, in the case of public companies, the Jordanian Securities Commission are the 'gatekeepers' for checking whether any merger or acquisition requires national interest clearance. The CCD and the Jordanian Securities Commission liaise with the relevant government department or security directorate to obtain the relevant clearance. These clearances are discretionary and heavily depend on the sector, nationality and identity of the investor.

For projects to be undertaken by companies established pursuant to the Investment Fund Law, it is still unclear which regulatory bodies will be responsible for reviewing mergers and acquisitions on national interest grounds. This is because the implementing regulations have not yet been issued.

If competition clearance is required, the Competition Directorate and the Minister of Industry and Trade are required to examine, review and issue the requisite approval or reject the application (see question 3).

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The relevant government department or security directorate have wide discretion in approving or rejecting transactions on national interest grounds.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

There are no particular thresholds that trigger a review or clearance. Any non-Jordanian entity or individual wishing to carry out business in Jordan should register with the CCD, whether by acquiring part or all of an existing Jordanian company or by incorporating a new one. Depending on the sector in which the relevant Jordanian company carries out its activities, there may be certain limitations on the investor's contemplated investment (see question 3).

An investor should submit the required documentation to the CCD for filing in the relevant company's folder. Such documents include the relevant share transfer forms and corporate documents and authorisations (for corporate investors) and personal identification documentation (for individual investors). If 'national interest' clearance is required, the CCD would liaise with the relevant government or security department to obtain such clearance, the department may request further information from the relevant investor.

As for competition clearances, the approval of the Minister of Industry and Trade may be required if the transaction is deemed an economic concentration that may affect competition in the Jordanian market or if the total market share of the entities involved exceeds 40 per cent. In such an event, submission of certain information or documentation to the Competition Directorate is required as part of the application for the approval.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

Upon submitting an application for incorporating or investing in a Jordanian company, the CCD may, depending on the sector and the nationality of the investor, seek the approval of certain security departments (usually, the Ministry of Interior) as well as any other relevant regulatory body (for technical and other purposes). Typically, such approvals are sought simultaneously, whereby a letter is directly issued by the CCD to such authorities and completion of the registration procedure will be stalled pending receipt of the necessary approvals.

The parties are not required to fill out any particular standard forms other than those required for registration with the CCD. Certain authorities may, at their discretion, request additional information to be provided by the relevant investor.

With respect to obtaining a competition clearance, the investor and the target shall submit an application (in the form adopted by the Ministry of Industry and Trade) to the Competition Directorate within 30 days of the date of execution of the economic concentration agreement (ie, the share purchase agreement, merger agreement, etc), attaching thereto the necessary documentation or information.

The Competition Directorate has the right to request in writing any further information or documentation in connection with the economic concentration agreement and the parties involved. Such request must be made within 60 days of the date of submission of the application mentioned above. The Competition Directorate shall then be obliged to issue a notice confirming completion of submission of the information and documentation provided that such issuance shall not prejudice the Competition Directorate's right to request further information or exercise its supervisory authority. In the event that the information and documentation were complete at the time of submission of the application, the Competition Directorate must issue the notice confirming completion of submission of the information and documentation within 60 days of the date of the application.

The Competition Directorate shall, at the applicants' cost, announce the submitted application of the economic concentration in two local daily newspapers. The publication must describe the subject matter of the application and invite any person with interest to provide his or her opinion within 15 days of the date of publication. The Minister may, after consultation with the relevant authorities and parties, take any precautionary procedures until the issuance of a decision on the submitted application.

The Minister may, upon the recommendation of the Competition Directorate's manager, issue a reasoned decision on the submitted application within 100 days of the date of issuance of the notice for completion of submission. The Minister shall attach to his or her decision a report containing a summary of the economic concentration and its impact on the competition in the market, including the economic impact and the terms and conditions of the obligations assumed by the parties (if any). Such decision and summary shall be published in at least two daily local newspapers.

Other than the usual fees and stamp duties for the registration of companies or, as the case may be, the transfer of shares in companies, there are no specified national interest filing fees for any of the above clearances.

10 Which party is responsible for securing approval?

The investor submits the application to the CCD. Although any national interest approvals are coordinated internally between the relevant authorities, it is the investor's responsibility to provide the required documentation or information and to follow up with such authorities.

Both the investor and target may be required to secure competition approval.

Update and trends

Enacted in 2016, the NJIR repealed the Regulation for Regulating Non-Jordanian Investment 54 of 2000. The NJIR introduced a new concept by treating foreign companies that are 50 per cent or more owned by Jordanians in the same way as any other local investor, and removed all foreign ownership restrictions on investments made by such entities (with minor exceptions). The NJIR has also played a role in further encouraging foreign investment in Jordan by removing all minimum investment requirements that were set out in the old regime. The NJIR is still a new regulation and certain implementing instructions are yet to be issued.

Additionally, in 2016, Jordan adopted the Investment Fund Law. The Investment Fund Law has created further restrictions on investments in Jordan by reserving certain projects to companies established by Arab sovereign funds and Arab and foreign investment corporations. The application of the Investment Fund Law is still not clear as implementing regulations and instructions are yet to be issued.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Approvals sought from authorities other than security departments are typically provided within five to seven business days.

Approvals from security departments are procured on a case-by-case basis and certain factors such as the nationality of the investor, and any of its related parties could trigger different levels of scrutiny and timelines.

There are no exemptions or expedited 'fast-track' options. However, in practice, the investor, or its authorised representative, may directly follow up with the relevant authorities in order to inquire on the status of the process and push for the quick issuance of the approvals.

The Competition Law provides that a formal application to the Competition Directorate can take up to 160 days before the Minister of Industry and Trade issues a decision approving a transaction for competition purposes.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Given that registration can only take place before the CCD, the transaction cannot be closed prior to the procurement of the approval letters.

As for the competition clearance, the approval of the Minister of Industry and Trade should be obtained prior to completing the transaction. However, if the parties implement the transaction before the clearance is obtained, the Minister may take any procedures he or she deems appropriate (which may include reversing the transaction) with respect to any economic concentration where no application has been submitted or if it violates the provisions of the Competition Law. Each party may, also, be required to pay a fine of no less than 10,000 and not more than 50,000 dinar.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Some public officials may give informal guidance on the review process via pre-filing dialogues or meetings. However, such guidance may not be entirely accurate. Certain authorities refuse to give any form of guidance prior to filing an official application.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

There are no such specialists.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

None, other than the powers granted to the Minister of Industry and Trade to take any action necessary if his or her approval is not sought prior to closing a transaction in contravention of the Competition Law.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

There is no clear substantive test for the review on the basis of national security or interest generally. However, for the purposes of competition clearance approvals (if required), the entity wishing to conclude the economic concentration transaction should apply to the Competition Directorate and provide, inter alia, sufficient evidence that:

- the transaction will not negatively affect competition in Jordan; or
- the transaction's positive economic benefits outweigh its negative effect on competition.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

We are not privy to this information.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

We are not privy to this information.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The authorities have the power to reject a transaction.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

We are not privy to this information with respect to national security. However, with respect to competition clearance approvals (if required), the Minister of Industry and Trade has the discretion to approve an economic concentration transaction subject to certain conditions. By implication, this means that it is possible for the authorities to accept an undertaking in this respect.

21 Can a negative decision be challenged?

Depending on the type of decision and the reasons for rejections, final administrative decisions may be challenged before the Administrative Court.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

There are no clear confidentiality and data protection laws in Jordan. Certain laws refer to the requirement to keep confidential certain information. According to the Investment Window Regulation all representatives of official bodies are obliged to maintain confidentiality of the following documents: information related to the type of technology utilised in a certain economic activity and its management, the budget and financing of economic activities, private agreements related to economic activities, any and all information related to the investor and accompanying shareholders, and any information labelled confidential by the investor in writing .

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

We are unaware of any recent cases where transactions were rejected. If transactions are rejected, information is not typically disclosed to the public.

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The economic policies of the federal government of Nigeria have been geared towards creating a private sector-driven free-market economy, which encourages indigenous participation while promoting foreign investments. Foreign nationals may invest freely in any enterprise in Nigeria (except those listed on the negative list), and thereafter freely repatriate capital, interest, profits or dividend in freely convertible currency. Nigerian laws also provide guarantees against nationalisation, expropriation or compulsory acquisition of a foreign investor's company or assets, provide incentives for investments, and create effective dispute resolution process (investor-state arbitration) not subject to local courts.

While foreign investment is encouraged in most sectors of the economy, there are conscious attempts aimed at developing and promoting indigenous participation in key sectors like information and communication technology (ICT), and oil and gas. The local content policy prefers Nigerians and Nigerian companies in these sectors while not totally eradicating opportunities for foreign companies. The policy also requires multinational companies that are operating in these sectors to have a local content development plan for job creation and the development of local human capital.

In 2016, the Central Bank of Nigeria (CBN) put in place several polices aimed at preventing the dollarisation of the Nigerian economy and strengthening the value of the naira. These measures include a tightening of the monetary policy and exchange rate controls, imposing a ban on the use of foreign exchange for importing 41 different goods considered available in Nigeria and limiting the use of Nigerian-issued payment cards abroad. On 15 June 2016 the CBN introduced a single market foreign exchange structure where the official exchange rate of the naira will be determined by market forces. Proceeds of the flexible foreign exchange (FX) brought into Nigeria (such as foreign investment inflows and international money transfers) will be purchased by authorised dealers at the daily interbank rates. The flexible foreign exchange regime further introduces OTC FX futures. OTC FX futures sold by authorised dealers to end users must be backed by trade transactions (visible and invisible) or evidenced investments. Settlement amounts on OTC FX futures may be repatriated for foreign portfolio investors (FPIs) with CCI.

The OTC FX futures opened a window for investors with a CCI to hedge their foreign exchange risks.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

There are laws of general application that regulate acquisitions and investments and give consideration to national interest, including:
- the Companies and Allied Matters Act (CAMA);
- the Nigerian Investment Promotion Commission (NIPC) Act;
- the National Office for Technology, Acquisition & Promotion (NOTAP) Act;
- the Foreign Exchange (Monitoring and Miscellaneous provisions) Act (FEMMPA);
- the Investments and Securities Act;
- the Central Bank of Nigeria Act; and
- the Companies Income Tax Act.

Other laws are sector-based and include:
- the Petroleum Act;
- the Nigeria Oil and Gas Industry Content Development Act;
- the Coastal and Inland Shipping Act;
- the Nigerian Mining and Minerals Act;
- the Nigerian Communications Act; and
- the Electric Power Sector Reform Act.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The following laws are relevant to foreign investment.

The CAMA

The CAMA regulates the incorporation and operation of companies in Nigeria. It provides that every foreign company with the intention of carrying on business in Nigeria, shall incorporate a Nigerian company for that purpose and until it does so, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company.

Exemptions from incorporation may be given on application to the President, where the foreign companies were invited to Nigeria to execute any project on behalf of the FGN, a donor country or international organisation, or where they are foreign government-owned companies engaged solely in export promotion activities, etc.

The NIPC Act

The NIPC Act establishes the Nigerian Investment Promotion Commission (NIPC) to encourage and promote foreign investment in the Nigerian economy. The NIPC Act assures foreigners of the freedom to invest and participate in the operation of any enterprise in Nigeria (except those enterprises on the negative list, ie, businesses whose objects entails the production of arms, ammunition, military and paramilitary clothing and equipment, narcotic drugs and psychotropic substances, etc) and to acquire the shares of any Nigerian enterprise in any convertible foreign currency. The NIPC Act requires companies with foreign participation to register with the NIPC before commencing business. There are, however, proposals to amend the NIPC Act to give a minimum investment threshold for enterprises that are wholly owned by foreign nationals.

The benefits of registration with the NIPC include guarantees of unconditional transferability of capital, profits, dividends and repayments under loan obligations to foreign lenders; guarantees against nationalisation, expropriation or compulsory acquisition; investor-state arbitration for the settlement of disputes between the foreign investor and the Nigerian government as may be agreed between them or, failing agreement, referral to the International Centre for Settlement of Investment Disputes Rules. Any compulsory acquisition may only be done in the national interest or for a public purpose and subject to the payment of fair and adequate compensation. The NIPC also negotiates incentive packages for the promotion of investments.

In addition, the NIPC maintains a One Stop Investment Centre whereby it provides comprehensive support services to investors in line with the objectives of the NIPC Act.

The NOTAP Act

The NOTAP Act was enacted to monitor, on a continuing basis, the transfer of foreign technology to Nigeria. The NOTAP Act empowers NOTAP to register technology transfer agreements. A certificate of registration is issued upon registration of a technology transfer agreement, without which no payment can be made to a foreign company under a technology transfer agreement by or on behalf of the Federal Ministry of Finance, the CBN or any licensed bank in Nigeria.

However, if the director of NOTAP is of the view that the contract to be registered is for the purpose of transferring technology freely available in Nigeria, he or she may refuse registration. The purpose of the NOTAP Act is to allow development of Nigerian technology, acquisition of technology skills by Nigerians and to ensure that the consideration given by Nigerians is commensurate with the value of technology transferred. The NOTAP Act also facilitates the remittance of payments under technology transfer agreements for services provided by foreign investors.

The FEMMPA

The FEMMPA guarantees the free transferability of capital and accretions therein by foreign investors. The Act provides that any person may invest in any enterprise or security in Nigeria with foreign currency or capital imported through an authorised dealer (a bank or a licensed non-banking corporate). An authorised dealer through which the foreign currency or capital for the investment is imported is required to issue a certificate of capital importation (CCI) to the investor within 24 hours of the importation and shall, within 48 hours, make returns to CBN giving such information as the CBN may require from time to time.

An investor is guaranteed unconditional transferability of dividends, profits and capital upon presentation of the CCI on repatriation.

Further to the decision by the CBN to introduce the flexible foreign exchange regime market, the CBN has also issued the Revised Guidelines for the Operation of the Nigerian Inter-Bank Foreign Exchange Market 2016 and the Guidelines for Primary Dealership in Foreign Exchange Products 2016.

The changes have not affected the requirements that apply to a foreign investor making an investment in Nigeria. The requirements and documentation for the issuance of CCIs remain the same and all existing CCIs remain valid. Such investors are still required to obtain a CCI for their investments subject to providing appropriate documentation and this forms the basis on which they will be entitled to repatriate proceeds from their investment out of Nigeria. On a positive note, foreign investors are now able to convert their capital into naira at a market-determined exchange rate and no longer at a CBN-determined rate.

Furthermore, it is also noteworthy that the CBN has commenced the automation of CCIs from issuance to repatriation in a renewed effort to align with international best practices and also to improve service delivery and efficiency.

Investments and Securities Act

In order to foster economic development and ensure the integrity of the capital market is maintained, the Investment and Securities Act (ISA) establishes the Securities and Exchange Commission (SEC) as the apex regulatory authority for the Nigerian capital market. The ISA, together with the Rules and Regulations made pursuant thereto (the SEC Rules), regulates the capital market to ensure the protection of investors, maintain a fair, efficient and transparent market and reduce systemic risk. The SEC is also empowered by the ISA to, among other things, keep and maintain a register of portfolio investments, and regulate cross-border securities transactions carried out within Nigeria. The ISA also provides an investor protection fund for foreign and indigenous investors to compensate investors who suffer losses as a result of defalcation committed by a dealing member or insolvency, bankruptcy or negligence of a dealing member of a securities exchange.

The Petroleum Act

The Petroleum Act reiterates the provision of the Companies and Allied Matters Act to the effect that a licence or lease under the Act may only be granted to a company incorporated in Nigeria under the Companies and Allied Matters Act or any corresponding law.

In addition, the Petroleum Act provides that the Minister of Petroleum may revoke any oil prospecting licence or oil mining lease, if the licensee or lessee becomes controlled directly or indirectly by a foreign company or person who is incorporated in or a citizen of a country whose laws do not permit citizens of Nigeria or Nigerian companies to acquire, hold and operate petroleum concessions on conditions that are commensurate with the terms granted to those citizens in Nigeria. The Petroleum Act thus tries to foster reciprocity in the award of or holding of licensees and leases by foreign investors. The Petroleum Act also tries to enhance the participation of Nigerians in the oil and gas sector by mandating a larger role for senior and management-level employment of Nigerians in oil and gas companies.

Recently, the federal government of Nigeria abolished the payment of cash calls under its joint venture arrangements with international companies. Going forward, all joint venture operations shall be subjected to a new funding mechanism that allows for cost recovery in a manner similar to that which is obtainable under a production sharing contract.

The Nigerian Oil and Gas Industry Content Development Act

The Nigerian Oil and Gas Industry Content Development Act (the NOGICD Act) further enhances the level of participation of Nigerians and Nigerian companies in the oil and gas industry. The NOGICD Act provides that:

- Nigerian companies shall be given first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which the contract is to be awarded in the Nigerian oil and gas industry; and
- exclusive consideration to Nigerian indigenous service companies that demonstrate ownership of equipment, Nigerian personnel and capacity to execute work on land and swamp operating areas.

The NOGICD Act also provides that certain activities in the oil and gas sector must be performed in Nigeria, and maintenance of bank accounts in Nigeria by operators, contractors and subcontractors where at least 10 per cent of their income shall be retained.

The Coastal and Inland Shipping Act 2003

The Coastal and Inland Shipping Act 2003 (the Cabotage Act) was enacted to enhance the participation of Nigerians and Nigerian companies in the commercial transportation of goods and services within Nigerian coastal and inland waters. The Cabotage Act restricts the use of foreign vessels in domestic coastal trade and reserves such trade to vessels flying the Nigerian flag and wholly owned and manned by Nigerian citizens.

Notwithstanding the restriction of foreign participation in Nigeria's domestic coastal trade, many opportunities still exist for foreign investments as the Minister of transportation may grant waivers to non-Nigerian vessels where he or she is satisfied that there is no wholly Nigerian owned vessel that is suitable and available to provide the services or perform the activity described in the application.

The Electric Power Sector Reform Act of 2005

The Act established the National Electricity Regulatory Commission (NERC) and empowered it to oversee the issuance of licences to operate in the electricity market and to make rules and regulations for the development of the Nigerian electricity market. The NERC approves mergers and acquisitions in the electricity sector taking cognizance of the general interest of the Nigerian public and to forestall potential abuse of market powers. To this extent, while foreign investment is encouraged in this sector, Nigerians and Nigerian companies are to be given first consideration in areas relating to project execution, employment and professional services. In addition, technological base knowledge is to be progressively transferred to Nigerians by foreign companies operating in the industry.

The Nigeria Minerals and Mining Act 2007

The exploration and exploitation of solid minerals is another area where opportunities abound for foreign investors in Nigeria. This Act is foreign-investor friendly and provides for the maintenance of an equitable balance between foreign and indigenous interest in the exploitation of mineral resources as well as the creation of an enabling environment for both foreign and indigenous investors. In addition to other relevant Nigerian laws, the Act guarantees free transferability through convertible currency of payments to service foreign loans and remittance of capital and earnings by a foreign investor.

The Nigerian Communications Act 2003

This Act seeks to encourage local and foreign investments in the Nigerian communications industry. The Act encourages foreign investment but ensures that there is fair competition amongst Nigerian and foreign investors. The intent of the Act is also to encourage the participation of Nigerians in the ownership, control and management of communications companies and organisations. To this end, a local content policy for the telecommunications sector has been developed to serve as a framework for the deliberate build-up of a reservoir of indigenous technological capabilities. Local content aims to achieve the development of local skills, technology transfer, use of local manpower and local manufacturing.

While giving preference to Nigerians and Nigerian companies in targeting the growth of Nigerian participation in the IT sector, the ICT local content policy makes a concerted effort not to disenfranchise foreign investors but rather to see them as enablers and partners and to create a competitive environment that will help foreign companies active in the Nigerian market to unlock hidden potential and improve their capacity to innovate.

The Insurance Act 2003

The Act regulates the business of insurance in Nigeria. It stipulates that for an entity to participate in insurance business in Nigeria, it needs to establish a Nigerian company. Elaborate provisions are made for amalgamation and transfer of an insurance business between existing or new entities.

The Act, however, prohibits any insurance or reinsurance business transaction with a foreign insurer or reinsurer in respect of any life, asset, interest or other properties in Nigeria business classified as domestic insurance unless the company is registered under the Act.

4 How is a foreign investor or foreign investment defined in the applicable law?

The definition of a foreign investor or foreign investment depends largely on the relevant law. Generally, under the NIPC Act, 'foreign investment' is understood to be an investment made to acquire an interest in an enterprise operating within the economy of Nigeria. In addition, the NIPC Act defines 'foreign capital' as convertible currency, plant, machinery, equipment, spare parts, raw materials and other business assets, other than goodwill, that are bought into Nigeria with no initial disbursement of Nigerian foreign exchange and are intended for the production of goods and services related to an enterprise to which the NIPC Act applies. Thus foreign investments in Nigeria can be carried out by any or a combination of the following modes: foreign direct investment; portfolio investment; and unregistered exempted companies.

Most sector-specific laws (eg, in the oil and gas, and ICT sectors), define 'Nigerian company' to mean a company incorporated in Nigeria or a company controlled directly or indirectly by citizens of Nigeria. The key consideration in construing foreign investor is the quantum of shareholding as well as the element of control foreigners have on the Nigerian company.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no special rules for investments made by foreign-owned SOEs or SWFs in Nigeria. Generally, a foreign SOE or SWF will be treated as a foreign entity for the purpose of investing in Nigeria. Except in transactions or circumstances where the SOE or SWF is exempted from registration by virtue of Section 56 of CAMA, there is a need for the SOE or SWF to incorporate a separate entity in Nigeria for the purpose of carrying on business in Nigeria.

A state-owned enterprise or company is defined by the Fiscal Responsibility Act 2007 as a statutory corporation, government agency and a company in which the government has a controlling interest. Generally, there is no definition of an SWF under the Nigerian law, however, Nigeria recognises and adopts the definition in the Santiago Principles by the International Working Group of Sovereign Wealth Funds, which considers an SWF as a special purpose investment fund or arrangement, owned by the government and created for macroeconomic purposes. It holds, manages or administers financial assets to achieve financial objectives, and employs a set of investment strategies, which include investing in foreign financial assets.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

There are no particular regulatory agencies carved out to review mergers or acquisitions on national interest grounds, and review of applicable transactions is carried out regardless of the nationalities of the entities involved. Generally, the competent authority to review mergers or acquisitions in Nigeria is the SEC. In the case of a merger or acquisition involving a regulated entity, the sector regulator will also review and approve the merger. Such regulators include the Nigerian Communications Commission, the Department of Petroleum Resources, the National Insurance Commission, the National Pension Commission, the CBN and other sector regulators, as may be applicable. The Nigerian Stock Exchange is also involved for quoted companies. Competent authorities would, however, consider national interest in their review of the transaction.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The competent authority may approve or reject a transaction when it considers it not to be in the national interest. A regulator must exercise its administrative functions fairly and judiciously and in the public interest and may not approve a transaction if it is not in the public interest to do so. In this regard, some laws specifically provide that approval may not be given to certain divestments or acquisitions if it is not in the public interest. For instance, the Minister of Petroleum may not give his or her consent to an assignment of an oil licence or lease or any interest therein or thereunder unless satisfied that the proposed assignee is in all other respects acceptable to the federal government. In addition, the CBN has the statutory power to reject any merger or acquisition in the banking sector, when it considers such a merger will not be in the best interest of the banking sector.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The SEC Rules divide mergers into small, intermediate and large mergers. The threshold for a small merger is 1 billion naira of either combined assets or turnover of the merging companies; the intermediate threshold is between 1 billion naira and 5 billion naira; and the upper threshold is above 5 billion naira. The determination of the threshold is the combination of assets or turnover or the combination of both turnover and assets in Nigeria.

Where the sector in question has a specific regulator or is subject to specific licensing, any assignment of such licence or any right, power or interest in such licence triggers regulatory review. In addition, some regulators require that their consent be obtained for any transfer or issuance of a certain threshold of shares of the licensee.

Filing is mandatory for an intermediate and large merger, but is not mandatory for a small merger, although the merging entities for a small merger must notify the SEC upon conclusion of the merger. The SEC may also request that filing be made for a small merger. In addition, holding companies acquiring shares solely for the purpose of investment and not to cause or attempt to cause substantial restraint of competition or monopoly need not make a merger filing.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

There are no specific procedures for obtaining national interest clearance of transactions and other investments in Nigeria. Where clearance of a transaction is required, it is required as a matter of general application to foreign and local investors alike. Where such clearance is required, the relevant authority will require the submission of an application, information detailing the rationale for the transaction and other relevant documents to provide more detail about the entities behind the transaction and their financial and technical competence.

When it is a merger, acquisition or other form of business combination, the SEC Rules require a pre-merger notice to be filed for evaluation. The SEC Rules provide standard forms to be filed as well as an extensive list of documentation required to enable the evaluation. Confirmation is also required from the industry regulator of the relevant entity that they have no objection to the transaction. Finally, depending on whether the transaction will be carried out by way of a scheme of arrangement, the sanction of the court may be required.

The SEC Rules (and the relevant rules and guidelines of a sector where applicable) provide a long list of documents and information required. The information is mainly to provide the identities of the merging entities, their business sector, market projection and rationale for the transaction to enable the competent authority to take a view as to the impact of the transaction on competition and public interest as a whole. Appropriate filings will also be required at the Corporate Affairs Commission to provide updated details of the relevant companies as the case may be.

If notification is not required, the authorities may nonetheless intervene by asking the concerned entities to notify them or make the necessary filings.

There are typically filing fees for mergers and acquisitions in Nigeria and this would generally depend on the sector where the merger or acquisition is taking place and the value of the transaction. Apart from standard filing fees, there may be additional consent fees, which may be ad valorem.

10 Which party is responsible for securing approval?

Typically, where the transaction is in respect of a regulated entity, the regulated entity is responsible for obtaining the consent of its regulator.

Where the transaction is subject to the approval of the SEC, parties to the transaction will be required to make separate and joint applications for approval to the relevant authorities such as the SEC, the Corporate Affairs Commission, the Federal High Court (FHC) and the Nigerian Stock Exchange (in the case of quoted companies) and any other sector regulator such as the CBN, NAICOM, etc when the entity is carrying out business in a sector supervised by them.

It is, however, not unusual in Nigeria to find that responsibility for securing approval has been contractually passed to a party that the parties generally feel is in a better position to secure that consent, where possible.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Where general mergers and acquisitions are concerned, the Investment and Securities Act provides that within 20 working days of parties notifying the SEC by filing all required documents at the SEC, the SEC is required to carry out a review of the proposed merger transaction. However, the SEC is allowed to extend the period in which to consider the merger by a single period not exceeding 40 working days, in which case, it must issue an extension certificate to that effect.

Neither the ISA nor SEC Rules and Regulation made pursuant to its provisions provide for any form of exemptions, or any expedited or fast-track options.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

The review must be completed before the parties can close the transaction. Failure to obtain requisite approvals from the authorities may lead to the transaction being voided. The SEC Rules provide for imposition of penalties in respect of mergers, acquisitions, external restructuring and other forms of business combination. Penalties are imposed for every day of continuing default. The competent authority may also nullify the said transaction from the date of consummation of the transaction.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Yes, formal and informal guidance from the authorities can be obtained prior to filing being made. In addition to the enabling laws, some regulating authorities have taken steps to promulgate rules to guide parties involved in the filing process. Rules and guidelines are usually fairly detailed and contain a list of information required and procedures to be followed, sufficient to enable parties to understand and meet filing obligations.

While it is not mandatory for parties to approach authorities for pre-filing dialogue or meetings, this occurs fairly frequently and is actively encouraged and the SEC Rules provide that if in doubt about any of the provisions of the SEC Rules, clarification should be sought from the SEC.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The laws governing merger and acquisition transactions carried out in Nigeria do not provide for the use of government relations, public affairs, lobbying or other specialists. Typically, facilitation will be done by the financial advisers of the parties who are usually registered with and regulated by the SEC, and it is usually one of the duties in the relevant mandates to facilitate or expedite clearance.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

When the SEC determines that a company resulting from such transaction constitutes a restraint to competition or creates a monopoly in a particular industry, the SEC may order the break-up of the company, even though the filing was not subject to review. In addition, the SEC can revoke a merger scheme when it is based on incorrect information for which a party to the merger is responsible, or the approval was obtained by deceit, or a company concerned in the merger has breached an obligation attached to the decision. This power extends to even small mergers, where the merging entities shall not be required to notify the SEC at the commencement of the merger.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for clearance of a merger is whether it falls within the monetary threshold of combined assets or turnover in Nigeria. Onus for showing that a transaction does or does not satisfy the test is on the merging entities. The review standard considers the net turnover or assets of the parties in Nigeria. It also looks at whether or not the transition stifles competition. Assessment of whether or not it is in the national interest is the responsibility of the regulator.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The rules and guidelines that govern substantive assessment are contained in acts and subsidiary legislation enacted by the national assembly. In carrying out substantive assessment, regulatory authorities are subject only to Nigerian laws and are not required to consult or cooperate with officials in other countries. However, in the exercise of its discretionary powers when authorised to do so by the enabling law, the authority is permitted to look to best international practices that can be distilled from consultation with officials in other countries. The

International Organization of Securities Commissions, which is the umbrella body for all securities and exchange commissions throughout the world, serves as a platform for the SEC and other members to exchange information about their experience at both global and regional levels, in order to assist the development of Nigerian markets, strengthen market infrastructure and implement appropriate rules and regulations in Nigeria.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

The SEC is the primary regulatory body involved in the review process. The regulator for a regulated entity is the starting point in the review and must typically issue a letter of 'no objection' before the SEC commences its own review. In addition, registered trade unions of employees or the employees themselves or their representatives (if there is no registered trade union) are allowed a say in the review of intermediate and large mergers.

In a merger transaction, dissenting shareholders of any of the merging parties are allowed to intervene in the court proceeding before the FHC seeking to sanction the scheme. Consequently, the FHC will make an order for the compulsory acquisition of dissenting shareholder's shares.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In a proposed merger transaction, the SEC is empowered by section 127 of ISA to prohibit or revoke a merger or grant conditional approval to the scheme of merger. This will be done when the parties have obtained or sought to obtain approval based on incorrect information for which a party to the merger is responsible, an approval obtained by deceit and breach of an obligation attached to the merger by any of the merging parties. In addition to these powers, the SEC has the power to order the break-up of a company, if it forms the opinion that it may be in the public's interest to break up a company whose business practices are found to substantially prevent or lessen competition. The power granted to the SEC to prohibit or interfere with a transaction is not barred by any time limit stipulated under the Act.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Under the relevant regulatory laws, there are no express provisions to remedy or avoid the authorities' objections to a transaction by giving undertakings. Upon an objection by the authority, the parties are allowed to take steps to regularise their application to conform with the required standards. The SEC, however, has the discretion to ask for undertakings depending on the nature of its objections.

21 Can a negative decision be challenged?

Yes, a negative decision can be challenged. For instance, section 289 of the ISA 2007 provides that a person aggrieved by any action or decision of the Commission, may institute an action in the Investments and Securities Tribunal or against such decision within the period stipulated by the Act. Also note, as mentioned above, foreign investors that have registered with the Nigerian Investment Promotions Council are entitled, in a dispute with the Nigerian government, to investor-state arbitration without recourse to courts or to International Centre for Settlement of Investment Dispute Rules.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The ISA, which established the SEC, requires the Commission to keep the contents of an application confidential, any document or report accompanying an application and any information given to it pursuant to a transaction except as may be necessary for the purpose of any consultation in respect of the transaction. Dissemination of merging entities' information contrary to the use for which they were provided is contrary to the Commission's charter and will be actionable by an aggrieved party.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Not applicable.

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

There are no generally applicable Swiss acts (such as catch-all rules in foreign trade legislation) that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest regardless of the industry sector. Hence, foreign investments are, in principle, not hampered by significant barriers and there are no substantial discriminatory effects on foreign investors or foreign-owned investments in Switzerland. Thus, foreign investors do not generally need formal approval for their investments in Switzerland, and no special office or governmental authority oversees, screens or monitors foreign investments.

However, foreign investments in companies engaged in certain regulated industries and sectors in Switzerland (such as banking services or owning or operating real estate properties) might require governmental permission or approval. Apart from that, no overall restrictions apply to the percentage of equity that a foreign shareholder may hold in such companies.

For state-licensed undertakings and services, no distinctions are generally made between foreign and domestic applicants. However, with respect to certain state-licensed undertakings and services such as the telecommunications or nuclear energy sectors (see question 3), granting a state licence to a foreign undertaking (or to an undertaking with foreign investors) may, among other things, depend on whether reciprocal rights are granted in the country of the respective undertaking or investor. In addition, it should be noted that certain local permissions and authorisations are issued on a cantonal (state) level and that it needs to be assessed on a case-by-case basis as to whether the grant of, for example, a cantonal licence in a given sector might depend on the nationality or foreign residence or domicile of the applicant.

With regards to currency regulations and exchange controls no controls exist on inbound investments or the repatriation of profits and capital on disinvestments.

In light of Switzerland's rather relaxed policies of benevolent non-interference towards foreign investment and because of its economic and political stability, transparent and fair legal system, reliable and extensive infrastructure and efficient capital markets, it is fair to say that Switzerland is a highly attractive destination for foreign investors. The Swiss government has traditionally welcomed foreign direct investment.

The fact that Switzerland is frequently used as a location for international headquarters, trading companies and other entities coordinating international functions and sales (principal companies, shared services and logistics centres, R&D facilities, etc) is evidence that the above-mentioned liberal policy in relation to foreign investments is attractive. Such firms are, in principle, treated in the same way as Swiss companies, but can often benefit from special tax incentives. The federal government allows all the 26 cantons (states) to set their own foreign investment attraction policies within a set framework. For practical project support, investors may appreciate the assistance given by the cantonal economic development agencies.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

As mentioned in question 1, there are no generally applicable Swiss acts that prohibit or require a specific screening of foreign investments in Switzerland on the basis of national interest, regardless of the industry sector. The main laws generally governing (foreign and non-foreign) investments in Switzerland are:

- the Swiss Code of Obligations; and
- the Swiss Federal Act on Cartels and Other Restrictions of Competition (the Cartel Act) and the Ordinance on the Control of Concentrations of Undertakings (together with the Cartel Act, the Competition Law).

Other important laws specifically addressing foreign investments in specific sectors include the following:

- the Swiss Federal Law on Acquisition of Real Estate by Persons Resident Abroad (the Lex Koller);
- the Swiss Federal Banking Act (the Federal Banking Act);
- the Swiss Federal Act on Telecommunications (the Telecommunications Act) and the Federal Ordinance on Telecommunication Services;
- the Swiss Federal Nuclear Energy Act (the Nuclear Act);
- the Swiss Federal Act on Radio and Television (the Radio/TV Act); and
- the Swiss Federal Aviation Act (the Aviation Act).

Generally state-licensed sectors, where all (foreign and non-foreign) applicants for a state licence are subject to review by the Swiss government and authorities are, among other things, the following:

- postal services;
- the rail industry;
- commercial vessels;
- the aviation industry;
- power installations; and
- radio and television broadcasting.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

So far most Swiss laws concerning investments or transactions in Switzerland make no general distinction between foreign and domestic investments or transactions. Most of the above sectors (see question 2) are regulated industries and, thus, any (foreign and non-foreign) investment may be subject to a review and possibly an approval requirement. Given that there is no generally applicable Swiss act that prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest regardless of the industry sector, in question 3 we will describe the main scenarios in the above-mentioned industries (see question 2) where the national interest, in general, can decide whether or not a transaction or investment is approved by the competent authority.

The Lex Koller

The acquisition of real estate in Switzerland by foreign investors or foreign-controlled companies is subject to rather strict restrictions under the Lex Koller, in particular where residential and other non-commercial property is concerned. Hence, the qualification of real estate from a Lex Koller standpoint is important, since commercial properties (such as offices, manufacturing facilities, warehouses and storage areas, shopping centres, shops, hotels or restaurants) can be acquired with few (or no) restrictions, while residential properties can only be acquired if an authorisation is issued. In practice, authorisations to foreign investors or foreign-controlled companies to acquire residential properties are granted on rather limited grounds. Restrictions affecting the acquisition of real estate assets used for commercial purposes concern commercial premises that are empty, that contain residential parts or areas, or that are acquired in anticipation of a company's expansion in the short or medium term (but with no concrete plans to build at the time of the acquisition).

The main goal of the Lex Koller is to prevent the acquisition of residential real estate by foreign or foreign-controlled undertakings. Both direct investments in real estate and the acquisition of even a single share in a residential real estate company are generally not allowed. Thus, the concept of an 'acquisition' under the Lex Koller is defined broadly and extends also to mortgage financings granted by foreign investors and banks. However, in practice there still exist ways that investments in residential real estate can be achieved by foreign investors (eg, in collaboration with a Swiss partner in the context of a joint venture, who would retain effective control over the joint investment). There are ongoing discussions, however, about tightening this up.

EU and EFTA nationals with residence in Switzerland or other third-country nationals with a valid residency authorisation (C permit) can acquire residential property without any restriction.

Finally, note that the Swiss Federal Council is required to prohibit a transaction involving real property if such acquisition would endanger the national policy interests. While no statistics regarding actual prohibition by the Swiss Federal Council are available (since this is very sensitive and confidential information), the Swiss Federal Council exerts its broad discretion judiciously in that respect and does not reject a transaction unnecessarily.

Banking law

If foreign nationals directly or indirectly hold more than half of the voting rights of, or have, otherwise, a controlling influence on, a bank incorporated under the laws of Switzerland, then the granting of the banking licence is subject to additional requirements. In particular, the corporate name of a foreign-controlled Swiss bank must not indicate or suggest that the bank is controlled by Swiss individuals or entities and the countries where the owners of a qualified participation in a bank have their registered office or their domicile must grant 'reciprocity', that is:

- Swiss residents and Swiss entities must have the possibility to operate a bank in the respective country; and
- such banks operated by Swiss residents are not subject to more restrictive provisions compared to foreign banks in Switzerland.

The reciprocal requirement is subject to any obligations to the contrary in governmental treaties and it is thus, in particular, not applicable to the member states of the World Trade Organization (WTO). Furthermore, the Swiss Financial Market Supervisory Authority (FINMA) may request that the bank is subject to adequate consolidated supervision by a foreign supervisory authority if the bank forms part of a group active in the financial sector.

If a bank incorporated under the laws of Switzerland becomes foreign-controlled as described above or if, in the case of a foreign-controlled bank, the foreign holders of a direct or indirect qualified participation in the Swiss bank change then a new special licence for foreign-controlled banks must be obtained prior to such event (see article 3, paragraph 2 of the Federal Banking Act).

For the purposes of the Federal Banking Act, a 'foreigner' is:

- an individual who is not a Swiss citizen and has no permanent residence permit for Switzerland; or
- a legal entity or partnership that has its registered office outside of Switzerland or, if it has its registered office within Switzerland, is controlled by individuals as defined above.

a participation is deemed to be a 'qualified participation' if it amounts to 10 per cent or more of the capital or voting rights of the bank or if the holder of the participation is otherwise in a position to significantly influence the business activities of the bank. In practice, FINMA often requires the disclosure of participations of 5 per cent or more for its assessment of whether or not the requirements of a banking licence are continuously met.

The Telecommunications Act

According to article 23, paragraph 2 of the Telecommunications Act and subject to any international obligations to the contrary, the licensing authority may refuse to grant radio communication licences to companies incorporated under foreign law unless reciprocal rights are granted to Swiss citizens or Swiss companies by the respective foreign states.

The Nuclear Act

Similar to the situation under the Telecommunications Act, subject to any international obligations to the contrary, the licensing authority may refuse to grant general licences to companies incorporated under foreign law unless reciprocal rights are granted to Swiss citizens or Swiss companies by the respective foreign states (see article 13, paragraph 2 of the Nuclear Act). In addition, a foreign company must have a registered subsidiary in Switzerland.

The Radio/TV Act

In the absence of any international obligations to the contrary, a legal person controlled from abroad, a domestic legal person with foreign participation or a natural person without Swiss citizenship may be refused the broadcasting licence if the corresponding foreign state does not guarantee reciprocal rights to a similar extent to Swiss natural persons and companies (see article 44, paragraph 2 of the Radio/TV Act).

The Aviation Act

Similar to the situation under the Telecommunications Act, the licensing authority may refuse to grant licences for the professional transport of passengers or goods to companies incorporated under foreign law unless reciprocal rights are granted to Swiss citizens or Swiss companies by the respective foreign states (see article 29, paragraph 3 of the Aviation Act).

Further, regarding the licence to operate an undertaking headquartered in Switzerland and engaged in the aviation business for the professional transportation of passengers and goods, the Swiss Federal Council may determine to what extent such undertaking needs to be under the control of Swiss citizens (see article 27, paragraph 1 of the Aviation Act). Following article 103, paragraph 1, littera b of the Swiss Aviation Ordinance – and subject to intergovernmental agreements pursuant to which Swiss and foreign individuals or companies are to be treated equally – it is required that a Swiss headquartered undertaking is under actual control of Swiss citizens and that a majority share of such undertaking is owned by Swiss citizens. Where an aviation undertaking organised in the form of a Swiss stock corporation is concerned, more than half of the share capital has to exist in the form of registered shares of which the majority is owned by Swiss citizens or by other Swiss-controlled trading companies or cooperatives – again subject to intergovernmental agreements pursuant to which Swiss and foreign individuals or companies are to be treated equally (see article 103, paragraph 1, littera c of the Swiss Aviation Ordinance).

While – as shown above – there are various industries in which the foreign ownership of an acquirer is to be taken into account when a particular transaction or investment is reviewed, in none of these industries or sectors is national interest the sole decisive criteria for the permissibility of such a transaction or investment (except under the Lex Koller where the main goal is actually to avoid the 'selling off of the Swiss homeland' and where the Swiss Federal Council may, in its discretion, take into account national policy interests). As it would go beyond the scope of this overview to answer the following questions with respect to all industries and sectors we focus on those industries and sectors (namely the banking and the real estate industry) which we believe are those where the most foreign investments occur.

4 How is a foreign investor or foreign investment defined in the applicable law?

There is no definition of 'foreign investor' or 'foreign investment' that is generally applicable under Swiss law. Rather, each Swiss act that refers to these (or similar) terms and concepts, in the vast majority of the cases, contains a specifically applicable definition, which fits the purpose of the relevant Swiss act.

The Lex Koller

Foreigners (individuals as well as companies) resident or based abroad or companies based in Switzerland controlled by foreigners are considered 'persons abroad'. Foreigners resident in Switzerland who are not citizens of a member state of the EU or the EFTA, or persons who do not have a valid Swiss residency authorisation (C permit) are also considered as such. The law also applies to a buyer that is itself not subject to the Lex Koller but who wishes to buy real estate on behalf of a 'person abroad' according to the Lex Koller.

Banking law

See question 3 for the determination as to when Swiss banks qualify as 'foreign-controlled'.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

No specific regulation exists for investments made by sovereign wealth funds or foreign state-owned enterprises in Swiss legislation.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

In light of the fact that there is no generally applicable Swiss act which prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest grounds, regardless of the industry sector, there is no single competent Swiss authority to review mergers or acquisitions on national interest grounds. The competence of a specific authority rather depends on the industry or sector in which the merger or acquisition takes place.

If, for example, a bank incorporated under the laws of Switzerland is concerned, the competent authority is FINMA. If, for example, real estate property is acquired, the Lex Koller provides that each canton has its own approval authority responsible for the granting of authorisations to acquire real estate located in the corresponding canton by 'persons abroad' (see question 4 for the respective definition). Furthermore, the Swiss Federal Council may, upon request of the cantonal government, order an exemption (and authorise an acquisition which would otherwise be prohibited) or deny an acquisition by a person abroad on grounds of public policy.

While the Cartel Act does not contain any specific review or filing requirements that would be triggered on national interest grounds, it should be noted that any transaction (including statutory mergers of previously independent enterprises, acquisition of control over a previously independent enterprise and acquisition of joint control over an enterprise) which meets the respective thresholds must be notified to the Swiss Competition Commission (the ComCo).

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The prerequisites for obtaining a licence or approval from the Swiss government or competent Swiss authorities are exhaustively set out in the respective laws and regulations. The Swiss government and the competent Swiss authorities retain, however, a certain degree of discretion to determine if all of the individual prerequisites are sufficiently met and, as a consequence, to approve or reject a request for a licence or authorisation, among others, on national interest grounds.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Again, in light of the fact that there is no generally applicable Swiss act that prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest (regardless of the industry sector), there are no generally applicable thresholds that trigger a review. The relevant Swiss acts – whose applicability does not necessarily depend on national interest grounds – do contain specific thresholds and triggering requirements.

The Lex Koller

Any acquisition (or actions that qualify as an 'acquisition' within the broad meaning of the Lex Koller) of residential real estate assets in Switzerland is subject to the Lex Koller if the acquiring person qualifies as a 'person abroad' according to the Lex Koller (see question 4). The filing of an application for authorisation is mandatory. Failure to file an application and to obtain an authorisation for the acquisition may, among other things, lead to the acquisition being declared null and void.

Banking law

Each individual or legal entity must notify FINMA prior to acquiring or selling a direct or indirect 'qualified participation' in a bank organised under Swiss law. This notification duty also applies if a foreigner increases or reduces its 'qualified participation' and thereby attains, falls below or exceeds 20, 33 or 50 per cent of the capital or voting rights in the bank. The bank itself is also required to notify FINMA of any changes triggering the notification duty of the shareholders once it becomes aware of such a change.

In the case of a foreign-controlled bank, prior to any change of a foreign holder of a 'qualified participation' (see question 3), the bank must apply with FINMA for a special licence. In its application, the bank has to demonstrate all the facts based on which FINMA may assess whether the conditions for the special permit are fulfilled.

The Competition Law

The test applied to mergers (see question 6 for a definition of mergers) under the Competition Law is based on turnover (but not on national interest grounds). The thresholds to be met are that, for the last business year prior to the merger, the enterprises concerned must have reported an aggregate turnover of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs, and at least two of the enterprises involved in the transaction must have reported individual turnovers in Switzerland of at least 100 million Swiss francs. In the case of banks, the turnover is calculated on gross income, and in the case of insurance companies, the gross annual insurance premium is relevant.

In addition, once the ComCo has established that a specific enterprise holds a dominant market position, each merger transaction involving that enterprise in the market in which it holds a dominant market position (or an adjacent market or in a market upstream or downstream thereof) is subject to the notification requirement.

If one of the above thresholds is met, merger filings are mandatory.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

As mentioned above, there is no general national interest clearance of transactions or other investments that is generally required in Switzerland regardless of the concerned industry sector; hence, no standard notification procedure is applicable.

The Lex Koller

The application must be filed with the competent cantonal approval authority in the canton where the real estate asset is located. Predominantly, an application must contain any relevant information with respect to the acquisition and the underlying real estate asset. Since the cantons are entrusted with the responsibility and power to apply and ensure compliance with the Lex Koller, the required format and content of Lex Koller filings depend on the local practice of the competent canton.

Banking law

Each individual or legal entity must notify FINMA prior to acquiring or selling a direct or indirect 'qualified participation' in a bank organised under the laws of Switzerland. Further, in the case of a foreign-controlled bank, prior to any change of a foreign holder of a qualified participation, the bank must apply with FINMA for a special licence (see also question 8).

10 Which party is responsible for securing approval?

The Lex Koller

The acquiring 'person abroad' under the Lex Koller is responsible for securing the approval of the acquisition by the competent authority.

Banking law

The individual or legal entity acquiring or selling a direct or indirect 'qualified participation' in a bank organised under the laws of Switzerland must notify FINMA prior to such acquisition or sale. The bank itself is also required to notify FINMA of any changes triggering the notification duty of the shareholders once it becomes aware of such a change. In the case of a foreign-controlled bank, prior to any change of a foreign holder of a qualified participation, the bank must apply to FINMA for a special licence (see question 3).

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The duration of the review process depends on the specific industry (see below for further information). What is true, in principle, for all filings with Swiss authorities is that all information needed for a specific filing is submitted to the competent authority when the actual filing is first made. Thereby, the review process is speeded up as the clock for any applicable review period typically starts running only when the filing is complete.

The Lex Koller

With respect to the Lex Koller, the duration of the review process varies from canton to canton and largely depends on the complexity of the subject matter of the acquisition, the composition, organisation and the workload of the competent cantonal approval authority in charge of the decision. The availability of 'fast-track' options must also be checked separately for every canton.

Banking law

The timing of the approvals or statements by FINMA, in principle, largely depends on the workload of FINMA. The process for a special banking licence in the case of a foreign-controlled bank may take three months. If, however, the country of domicile or residence of the foreigner is not a member state of the WTO, the process may take much longer. In such a case, FINMA will have to assess whether the respective country grants the right of reciprocity.

If the acquirer is not a foreigner, there is no formal approval or licence required and, thus, a statement from FINMA is available within a shorter time frame.

The Competition Law

The ComCo is required to notify the involved enterprises within one month after the date of receipt of the complete notification as to whether it intends to initiate an investigation. If within such period no notification is made by the ComCo, the merger can be completed. In practice, it is possible to shorten the one-month period in less complex filings if, prior to the filing of the formal notification, a draft filing is submitted to the ComCo for review, thereby enabling the ComCo to communicate its position before the lapse of the one month period.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

As a general rule, the review must be completed before the parties can close the transaction, unless the applicable act provides otherwise.

The Lex Koller

The review of an acquisition under the Lex Koller must be completed before the parties can consummate the transaction; an acquisition without the necessary authorisation becomes null and void. Further, actions to reinstate and enforce the legal status or actions aiming at the dissolution of a legal entity by authorities may be brought against the parties of the acquisition (see question 15). In addition, financial penalties and imprisonment are possible.

Banking law

While the acquisition of a 'qualified participation' in a bank by a Swiss individual or entity triggers, in theory, only notification obligations, a foreign-controlled bank must apply with FINMA for a special licence (see question 3) in the case of any change of a foreign holder of qualified participation. If the respective special licence is not obtained prior to the closing of the transaction, the potential penalties and consequences for non-compliance can be severe; if, for example, the required notification to FINMA is intentionally not made, the person who should have filed can be punished with a monetary fine of up to 500,000 Swiss francs. Further, under the Financial Market Supervision Act, FINMA has various enforcement rights available to it that may consist, among other things, of opening an investigation, the confiscation of any profit that a supervised person or entity or a responsible person in a management position has made through a serious violation of the supervisory provisions, the revocation of the licence of a supervised person or entity, or the withdrawal of its recognition or cancellation of its registration if it no longer fulfils the requirements for its activity or seriously violates the supervisory provisions. If FINMA has reasonable grounds for suspecting an offence, it may file criminal complaints with the Legal Service of the Federal Department of Finance.

The Competition Law

As a general rule, the consummation of a merger is prohibited until the lapse of the review period (see question 11). Such provisional ban does not apply if, prior to the lapse of such one-month period, the ComCo notifies the enterprises that it regards the concentration as compliant with the Competition Law. Enterprises may face a fine of up to 1 million Swiss francs if they do not comply with the provisional ban. Further, such non-complying enterprise may be required to take measures to reinstate effective competition (eg, by unwinding the transaction or by ceasing to exercise effective control).

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Swiss authorities are typically responsive to requests for informal guidance, in particular in those cases where the supervised or regulated enterprise has an existing relationship with the competent authority already. Formal guidance on which one can rely is in most cases not available. While there is no specific requirement to have pre-filing dialogues or meetings, in more complex transactions in particular early information is appreciated by the competent authorities.

Update and trends

The Corporate Law Reform presented by the Swiss Federal Council on 23 November 2016 (which was submitted to the Swiss parliament) contains, among other things, numerous changes to 'traditional' corporate law. For example, it permits a share capital denominated in foreign currency, a minimum par value below 1 cent, a 'capital band' to give companies more flexibility to increase and reduce their share capital, and it clarifies the requirements for distributions out of capital reserves and interim dividends. While these changes are not specifically targeted to boost foreign investments, they certainly should enable Switzerland to maintain its attractiveness to foreign investors.

Along with the Corporate Tax Reform III adopted by the Swiss parliament but subject to a public vote, ordinary corporate income tax rates are expected to be reduced significantly in the next couple of years. In addition, under this reform Switzerland is expected to introduce an IP-Box regime, notional interest deduction on equity and the possibility for a super deduction on research and development expenses.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Usually, neither government relations nor public affairs or lobbying specialists are made use of. Lobbying is, however, not prohibited under Swiss law. The key element is that the applications with the competent authorities are accurate and complete when filed and that attorneys in charge of the filing have a good working relationship with the respective authorities.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

If the specific Swiss acts (such as the Federal Banking Act, the Telecommunications Act, the Cartel Act, etc, see question 3) applicable to a transaction do not require a review of a particular transaction, then there is no general Swiss act that would permit the review of such transaction based on national interest grounds.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The grounds on which a transaction may be cleared, restricted or prohibited differ depending on the industry sector concerned. Swiss authorities are, by law, required to establish the facts of the case ex officio and generally obtain evidence by means of the following: official documents, information from the parties, information or testimony from third parties, and inspections and expert opinions. While the involved parties do not have the burden of proof, the parties may, of course, file additional documents and provide further information together with their application.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Swiss authorities are by law required to establish the facts of the case ex officio (see question 16). While the Federal Act on Administrative Procedure does not contain any general applicable rule as to when authorities may and shall consult and cooperate with officials in other countries, there are rules contained in specific acts that deal with such questions. The Federal Act on the Swiss Financial Market Supervisory Authority (article 42, paragraph 1) provides, for instance, that FINMA may ask foreign financial market supervisory authorities to provide information in order to implement the financial market acts. In addition, the agreement between Switzerland and the EU concerning cooperation on the application of their competition laws provides for a framework for closer cooperation of their respective enforcement activities. See question 22 in relation to applicable safeguards to protect confidential information.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

In general, Swiss authorities may take other parties' concerns into account when exercising their discretionary power; however, such other parties do not have any specific rights with respect to the proceedings unless the relevant act in question specifically sets out such rights. In a Swiss authority proceeding a person who – according to the Federal Act on Administrative Procedure – falls within the definition of a 'party' (being a person whose rights or obligations are intended to be affected by the ruling and other persons, organisations or authorities who have a legal remedy against the ruling) has a right to be involved in the proceeding (which, among others, includes the right to be heard, the right to inspect files, etc). In merger control cases, for instance, the ComCo will often send out questionnaires to customers and competitors soliciting their opinion on a filed merger.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers of the competent authorities to prohibit or otherwise interfere with a transaction differ among the various industry sectors. See questions 12 and 15.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

In general, a decision of a competent authority can be issued subject to certain conditions and requirements. Such conditions or requirements may also contain undertakings of the addressee of a ruling. While the competent authority has quite a wide discretion, it is required that a condition or a requirement is permitted by law (be it explicitly or implicitly) and complies with the principle of proportionality.

21 Can a negative decision be challenged?

As a general principle, any negative decision of a Swiss authority (being the first instance) may be challenged via the competent Swiss superior authority or the competent Swiss courts. In light of the fact that there is no generally applicable Swiss act that prohibits or requires a specific screening or approval of foreign investments in Switzerland on the basis of national interest regardless of the industry sector, it must be assessed under the specific act applicable to the industry or sector in question as to which authority is the superior authority.

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22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Confidential information transmitted to the competent authorities for review and clearance is generally protected under Swiss criminal law (article 320 of the Swiss Criminal Code); hence, such confidential information must not be disclosed to the public. Any person who discloses secret information that has been confided to him or her in his or her capacity as a member of an authority or as a public official, or that has come to his or her knowledge in the execution of his or her official duties, is liable to a custodial sentence not exceeding three years or to a monetary penalty.

Further, the confidentiality of secret official proceedings is also protected under Swiss criminal law (article 293 of the Swiss Criminal Code); any person who without authorisation publishes information from the files, proceedings or official investigations of a public authority that have been declared secret by that authority, in accordance with its powers, is liable to a fine.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

On 24 May 2016, FINMA published a press release notifying the public that BSI AG (until 1 November 2016 owned by the Brazilian group PTG Pactual) allegedly committed serious breaches of money-laundering regulations and 'fit and proper' requirements through business relationships and transactions linked to the Malaysian sovereign wealth fund 1MDB. This was the outcome of enforcement proceedings launched by FINMA. Among other measures, FINMA has ordered the disgorgement of profits amounting to 95 million Swiss francs. FINMA has also launched enforcement proceedings against two of the bank's former top managers. At the same time, FINMA announced its approval of the takeover of BSI by EFG International with the condition that BSI will be integrated and thereafter dissolved. BSI announced on 23 June 2016 that it has lodged an appeal with the Swiss Federal Administrative Court against FINMA's decision of 23 May 2016 regarding business relationships and transactions of BSI linked to the Malaysian sovereign wealth fund 1MDB. In its press release, BSI stated that it believed FINMA's procedure leading to the decision was flawed in many respects and, as such, FINMA's decision was disproportionate and incorrect. While this case does not relate to a rejection of a foreign investment, it illustrates well that FINMA is in a position to exert its supervisory power (and may be even more stringent where the supervised entity is under foreign ownership).

United Arab Emirates

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The United Arab Emirates has not implemented a specific and separate legal regime regulating the activities and oversight of foreign direct investment (FDI) in the country. Nevertheless, the federal government assumes an active role in shaping the framework of policymaking in this regard. This is further complimented by, and coordinated with, strategies pursued within the particular emirates.

The UAE encourages the increased participation of foreign investors in the economy through various initiatives. One significant initiative to promote FDI is the creation of over 40 specially designated free trade zones (free zones). These free zones, which may establish separate regulatory environments within their designated jurisdiction, are attractive to international investors due to clear and market-oriented regulations, the ability to incorporate wholly foreign owned entities and guaranteed tax holidays on all corporate taxes. The UAE does not impose foreign exchange control regulations either in or outside the free zones. Foreign investors from the member states of the Gulf Cooperation Council (GCC) enjoy a special status in the UAE and are largely exempt from foreign ownership restrictions.

Notwithstanding various initiatives to encourage foreign investment, the UAE maintains stringent foreign investment restrictions in relation to strategically important sectors, including the defence, and oil and gas sectors. Further, certain economic activity remains the exclusive domain of UAE nationals and companies wholly owned by UAE nationals. The country is not a party to the WTO Plurilateral Agreement on Government Procurement. Accordingly, government procurement is generally awarded to local companies and suppliers where possible. Further, outside of the free zones, all companies incorporated in the UAE must have majority UAE ownership (unless 100 per cent owned by GCC persons or entities).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

Given the absence of a centralised investment law in the UAE, FDI is regulated by a number of distinct legislative texts including but not limited to:

- Federal Law No. 2 of 2015, as amended (the Commercial Companies Law);
- Federal Law No. 18 of 1981, as amended (the Commercial Agency Law);
- Federal Law No. 4 of 2012, as amended (the Competition Law);
- Cabinet Resolution 37 of 2014 on the Regulation on Procurement and Warehouse Management in the Federal Government (the Government Tender Regulations);
- Dubai Law No. 7 of 2006 Concerning Land Registration in the Emirate of Dubai and similar laws enacted in other Emirates (the Property Law); and
- laws and regulations applicable in the various free zones.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The Commercial Companies Law stipulates that companies in the UAE must be 51 per cent owned by UAE nationals or companies wholly owned by UAE nationals, thus limiting foreign ownership to 49 per cent (the foreign ownership restriction). Branch offices of foreign companies are permitted without the participation of a UAE shareholding, but require the appointment of a UAE agent to conduct limited commercial activity in the country. There are, however, significant exceptions to the foreign ownership restriction, such as:

- GCC nationals and companies owned by GCC nationals are granted national treatment in respect of most commercial activities and are therefore exempt from the foreign ownership restriction;
- the foreign ownership restriction does not apply in respect of economic activity in free zones, enabling foreign investors to wholly own relevant entities established in free zones; and
- foreign companies may establish branch or representative offices to conduct limited amounts of economic activity in the UAE (however, these do not have a separate legal personality) (together, the foreign ownership exceptions).

The Property Law prevents foreign ownership of real property with the exception of areas designated by the respective governments of a particular emirate.

The Commercial Agency Law effectively excludes foreign investors from undertaking distribution and agency businesses in the UAE as it requires that distribution of a foreign principal's products must be conducted through an exclusive UAE agent, which in turn must be a wholly owned UAE entity or a UAE citizen. Exclusive agents may be appointed for the UAE or a particular emirate. Underlying agreements establishing commercial agencies may be registered by the agent (provided it is a UAE national or wholly owned by UAE nationals) with the UAE Ministry of Economy, and following such registration, can only be terminated by mutual agreement, notwithstanding the expiry or breach of such contract.

Under the Competition Law, the conduct of any form of economic activity or holding of intellectual property rights by a natural or legal person in the UAE that affects competition inside the UAE, or occurs outside the country but has the ability to affect competition in the country, requires the approval of the Ministry of Economy. This includes any transaction, including mergers and acquisitions that result in a dominant market position. Similar approvals must be sought in respect of transactions relating to particular industry segments, such as the banking sector, which is further subject to a 20 per cent profit tax. The Competition Law has only recently been enacted and its exact scope is still unclear.

The provisions of the Government Tender Regulations apply to all procurement operations and contracts of supply, execution of work and provision of services performed by UAE federal bodies, but exclude the following federal entities: the Ministry of Defence, the State Security apparatus, all military purchase transactions conducted by the Ministry of Interior and determined by a decision from the Minister of Interior and federal bodies bound by international agreements or obligations pertaining to the purchase transactions carried out by such bodies.

Lastly, free zones enable 100 per cent foreign ownership. However, companies established in a particular free zone are limited to conducting their business within the designated geographic area of the free zone and thus prevented from engaging in commercial activity in the UAE outside the relevant free zone.

4 How is a foreign investor or foreign investment defined in the applicable law?

Given the absence of a centralised investment law, there is no uniform definition of the terms foreign investor and foreign investment. However, a definition may be implied from the relevant legislation as including (an investment by) any non-UAE citizen or any corporate entity not wholly owned by UAE citizens. Except in specific areas of economic activity, GCC nationals are granted national treatment and therefore not considered to be foreign investors in the UAE.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no formal laws or regulations addressing FDI by SOEs or SWFs in the UAE.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The UAE does not have an independent FDI law, and there are no specific government agencies or authorities responsible for reviewing or authorising transactions on the grounds of national interest per se.

As discussed in question 3, the Competition Law Regulator scrutinises mergers or acquisitions that may result in a dominant market position within the UAE. Failure to seek the Ministry of Economy's approval in relation to such transaction will result in a fine of up to 5 per cent of annual turnover. Applications must be made at least 30 days prior to the proposed date of a relevant transaction taking place, after which the Ministry must respond to the request within 90 days or 135 days if additional information had been requested as part of the approval process.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The various economic departments of each emirate have fairly broad discretion to accept or reject any acquisitions of entities licensed by such departments. While national interest is not specified, a transaction may be rejected on this basis. There are, however, no regulatory rules or guidelines in this regard.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The Competition Law requires that entities seek merger clearance from the UAE Ministry of Economy if they are contemplating a transaction that:

- will result in the acquisition of a direct or indirect, total or partial interest or benefit in assets, equity, or obligations of another entity to which the Competition Law applies;
- will create or promote a dominant position; or
- may affect the level of competition in the relevant market.

In addition, the Competition Law prohibits entities from entering into agreements or arrangements (which should be broadly construed) the aim, object or effect of which is to restrict competition.

Various regulations enacted pursuant to the Competition Law (Cabinet Decision No. 37 of 2014, the 'Implementing Regulations' and Cabinet Decision No. 13 of 2016 and Cabinet Decision No. 22 of 2016, the 'Thresholds Regulations') set out the market share thresholds for the application of: (i) the de minimis exception (to the prohibition on restrictive agreements and abuse of dominant position); and (ii) merger control rules, as well as the criteria for identifying small and medium undertakings, which are exempted from the Competition Law. The Threshold Regulations set the market share threshold for establishing dominance at 40 per cent of the total transactions in the concerned market.

Certain entities and industry sectors are expressly exempted. These include:

- federal and local government entities and entities owned or controlled by the federal or emirate governments;
- entities operating in telecoms, financial services, pharmaceutical production and distribution, cultural activities, oil and gas, postal services including express delivery, electricity and water production and distribution, sewage and waste disposal, transportation and railways; and
- small and medium-sized entities (SMEs). The latter are defined in the Threshold Regulations into three defined sectors: trade, industry and services.

For the trade and services sectors, an undertaking will be considered an SME if it has 200 or fewer employees and annual revenues do not exceed 200 million dirhams. For industry sectors, the thresholds are 250 employees and 250 million dirhams.

Transparent thresholds are provided in respect of the banking sector, which requires approval for all proposed mergers within the banking sectors from the UAE Central Bank, and acquisition by banks of non-banking related shares exceeding 5 per cent of control. However, these thresholds do not trigger a review based on national interest, and merely represent the general requirement for approval.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

It is possible to apply for an individual exemption from application of article 5 (banning restrictive agreements) and article 6 (prohibiting abuse of a dominant position) of the Competition Law, through notifying the relevant agreement or practice to the Ministry of Economy's Competition Department by means of the relevant notification form. However, the Competition Department is not yet fully operational and the application forms for the purpose of individual exemption applications and merger control notifications are still to be issued. The procedure for seeking an exemption is set out in the Threshold Regulations and involves a written application to the Ministry of Economy seeking an exemption for a transaction. The entity seeking the exemption must provide copies of its constitutive documents and financial statements (for the past two financial years). In addition, it must submit an economic rationale for the transaction and its reasons for requesting the exemption. All documents submitted must be in Arabic, but may be accompanied by an English translation. The applicant may identify possible confidential information contained in the materials submitted to the Competition Department, and in this case must also submit a non-confidential summary of it. Further documents and information can be requested during the proceedings by the Competition Department. The Competition Department can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the request. To gather additional information and insight on the possible impact of the notified concentration on the market, the Competition Department can also hold interviews with the relevant undertakings and interested third parties in the course of the proceedings.

10 Which party is responsible for securing approval?

For exemptions, the relevant party seeking an exemption must apply. For other cases of notification (such as of dominant position), the interested parties are responsible for seeking and securing approval. As in the case of notifications for exemption, the Competition Department can request third parties that may possibly be affected by the concentration to submit their comments in this regard within 15 days from the approval request.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Unlike other international jurisdictions with clearly regulated review processes, the UAE's informal regulatory regime does not establish specific time frames for the approval of FDI transactions. These may vary

Update and trends

According to press reports, a new foreign investment law is currently under consideration that will allow for 100 per cent ownership of foreign investments in certain sectors. It is not clear which sectors would qualify for 100 per cent ownership, nor is there any timetable for implementation.

significantly, depending on the particular authority involved in granting required approvals.

A specific example of relevant time frames is the response to applications for approval from the Ministry of Economy under the Competition Law discussed previously, which will occur within 90 days (135 days if additional information is requested from the applicant). If the Minister of Economy does not issue a decision by the specified deadline, the transaction shall be deemed to be authorised.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Approvals must be sought and granted prior to engaging in a transaction. Heavy fines may be imposed for failure to wait for approval to be granted.

The Competition Law provides for potentially far-reaching penalties in the event of violation. These penalties include: fines of between 500,000 and 5 million dirhams for entering into restrictive agreements or abusing market dominance; and fines of 2 per cent to 5 per cent of the infringing entity's annual revenue derived from the sale of the relevant goods and services in the UAE for failure to notify a transaction that must be notified pursuant to the Competition Law. An entity violating the Competition Law also exposes itself to possible criminal sanctions.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

There is no formal review process of FDI transactions in the UAE, and relevant policy considerations inform the general approval process, which also considers economic and cultural objectives. It is common practice to seek informal pre-approval in relation to any transaction requiring government approval. Therefore, foreign investors should contact the relevant authority informally to discuss the envisioned transaction prior to making a formal application. As a result, they will be informally notified of particular aspects of a proposed transaction that, in the reviewing authority's opinion, will pose a concern. Such informal notification may also include information relating to national security or other concerns that could lead to the rejection of the proposed transaction.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

In general, the starting point is the department of economic development in the applicable emirate. Depending on the proposed business activities, other industry sector authorities may need to be approached.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

There is no legislative guidance with respect to retroactive powers in relation to the approval of foreign investments. However, the government generally enjoys broad powers in this regard and future changes to approve of FDI can occur on a policy basis under the current regulatory environment.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The Competition Department can take into account certain criteria listed in the Implementing Regulations, including:

- the real and potential competition level in the concerned market;
- how easy it is for new establishments to enter the concerned market;
- the extent of the potential impact on the prices of relevant commodities or services;
- the extent of the existence of legal obstacles affecting the entry of new competitors;
- the probability of emergence of a dominant position in the concerned market;
- the extent of the potential impact on creation, innovation and technical competence;
- the extent of contribution in the promotion of investment or export, or the enhancement of the national establishments' ability to compete internationally; and
- the extent of the impact on the interests of consumers.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

While there is no regulatory clarification available in this regard, the authorities will be free to cooperate with officials in other countries at their discretion.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

The Competition Department can start an investigation into a possible violation of competition provisions either of its own initiative or following a complaint.

Any interested party may file a complaint with the Competition Department by completing the relevant form (which is still to be issued). The complaint must identify, inter alia, the undertakings submitting the form and those that are alleged to have breached the Competition Law, and provide a description of the relevant conduct and of the provisions which are deemed to be violated, together with all available evidence.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The UAE government enjoys extensive powers to prohibit a particular transaction on a policy basis or put conditions in place with respect to a particular transaction.

Pursuant to the Competition Law, the Minister of Economy can withdraw a clearance that has already been granted if:

- the conditions and circumstances in light of which the clearance was issued in the meantime have changed;
- the company did not comply with the remedies imposed by the Minister in its decision; and
- it is determined that the information whereby the concentration was authorised was incorrect or misleading.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Specific shortfalls informally identified by the authorities may be rectified prior to submitting the final application for an approval. However, rectification of shortfalls subsequent to the making of a final decision by a government authority will be at the discretion of the relevant authority.

With the exception of conduct in breach of confidential provisions pursuant to article 15 of the Competition Law, the Minister may enter into a settlement with the companies that are deemed to have breached the Law, provided that:

- these companies pay a fine whose amount is no less than two times the minimum provided by the Competition Law; and
- the settlement is entered into before the filing of a criminal case.

Settlement becomes effective following the payment of the fine by the relevant company.

21 Can a negative decision be challenged?

See question 20.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

There are sophisticated laws relating to the protection of data and non-disclosure of private information. However, given the lack of transparency associated with the FDI approvals required, it is difficult to ensure absolute certainty in this regard.

With regards to applications submitted pursuant to the Competition Law, this law specifically requires the Ministry of Economy to take steps to maintain the confidentiality of sensitive information in relation to companies in the context of competition proceedings. Companies submitting documents to the Ministry will need to mark confidential information as confidential and also submit non-confidential summaries. The Competition Law also provides for a fine of between 50,000 and 200,000 dirhams in case of breach of the confidentiality obligations.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Not applicable.

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1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The basic policy position of the UK is to support and welcome investment from all sources worldwide. This continues a long tradition of the UK as a trading nation and a supporter of open markets. The basis of UK merger control is thus predominantly based on investment being allowed and mergers welcomed unless they pose competition problems in particular markets. The presumption is that such mergers should be permitted, except when there is a good market-relevant reason not to.

This permissive approach may be at risk. A broad public interest test going beyond the standard competition test (and whether it should apply to merger control) has recently been discussed in policy circles in the UK, and at the highest levels. Alex Chisholm, former CEO of the UK's Competition and Markets Authority (CMA) raised the point, after it was raised at Prime Minister's Questions during Pfizer's attempt to acquire Astra Zeneca. In summary, his comments firmly defended a competition-based approach to assessment, emphasising in particular the cost to economic growth that could result from decreased foreign investment and that foreign investment review could conflict with a competition-based approach, at the expense of growth. Moving towards a new foreign investment-based test would complicate the current permissive approach and has the potential to add uncertainty.

The current general position is set out below, followed by specific instances where exceptions have applied, and where thought needs to be given toward these broader public policy issues than arise in most mergers.

As a general rule in the UK as with the rest of the EU, national level merger control sits alongside EU level controls on mergers. As a one-stop shop, the European Commission (the Commission) only has exclusive jurisdiction to decide whether to clear a transaction on competition grounds (ie, not on other public interest grounds). Non-economic public interests are carved out of the EU Merger Regulation, and hence EU jurisdiction, and have no place in the substantive tests that apply under the Regulation. This recognises, if only by implication, that other public interests do arise; there is a process, contained in article 21 of the Merger Regulation, for member states to take 'appropriate measures' to protect other 'legitimate interests.'

Legitimate non-competition grounds for intervention have been considered by the UK government to be paramount in the middle of the financial crisis. For example, in 2008, Parliament approved intervention on a new public interest ground – the stability of the UK financial system – that was relied on to approve the *Lloyds/HBOS* banking merger against the competition-based advice of the OFT. The case has been criticised and referred to as a response to exceptional events. It is based on one of the currently recognised additional legitimate grounds for review under article 21 (prudential control) and, perhaps, should not be seen as part of a growing trend.

In the light of the *Lloyds* case and ongoing sensitivity over the nature and extent of the regulation of the financial sector, those advising on mergers of financial institutions should now check whether the entities concerned have been designated as systemically important financial institutions and comply with the relevant prudential controls.

Similarly, for network and information security organisations policy is headed toward similar controls. The Commission has proposed a further directive on network and information security, similarly based on the idea that certain activity provides critical infrastructure and entities operating in energy transport, banking, communications and healthcare should be subject to additional rules.

Policy toward critical national infrastructure in the European Union is rooted in the European Programme for Critical Infrastructure Protection. The definition of critical national infrastructure represents a consensus drawn from the inputs of member states. The definition is broad, such that a range of activities may fall within its boundary. It can be seen to be following a similar path to that taken by the United States in the amendments to its Committee on Foreign Investment in the US (CFIUS) regime.

Currently the general approach to merger control at national level in the UK is the UK's voluntary notification regime, which is aimed at assessing competition issues. Generally, the bodies that are notified and for which there is an established process to review an investment in a UK entity are the CMA and the Commission. Foreign entities considering investing in a UK entity should be aware of the following:

- The government may formally intervene in a transaction on public interest grounds, relating only to cases involving national or public security, the media or the prudential controls within the financial system (and in any other cases that the Secretary of State deems should be of 'public interest' for these purposes).
- Various UK government departments are consulted in the course of UK merger review, such as sectoral regulators with competition powers, and their views may determine the outcome. (The CMA's initial findings in the BT acquisition of EE were, for example, heavily reliant on material and opinion from Ofcom, the UK's telecommunications regulator.)
- There are rules requiring that any entity operating an airline within the European Economic Area (EEA) is majority owned and effectively controlled by EEA states or their nationals.
- The UK government holds golden shares in a small number of UK companies active in the defence sector, which, depending on the rights attaching to those shares, it may use to prevent a foreign investor from acquiring more than a certain percentage shareholding in the company, or to veto any arrangement that results in unacceptable influence or control over the company.

This chapter focuses on the public interest issues referred to in the first point above. Those considering the investment in an airline that operates in the UK should refer to *Getting the Deal Through – Air Transport 2016*. Persons considering investment in entities active in the UK defence and security sectors should also consider whether consent is required from the Ministry of Defence (the MoD) to assign or novate any contracts the target has with the MoD.

Where sectoral regulators have jurisdiction such as with relation to water, electricity, gas and energy generally as well as telecommunications they may have an important influence over the outcome of merger review, particularly where they have concurrent powers that may be relevant to remedies. This is outside the scope of this chapter. Given that it applies to many sectors of the economy it will need to be specifically investigated with relation to mergers or investments affecting that sector and the policy objectives established by the sectoral regulator.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

In addition to the usual controls that apply to all public bodies under the UK's general administrative law, the laws specifically addressing intervention on public interest grounds are:
- the Enterprise Act 2002 (EA02) (as amended);
- the EU Merger Regulation (EUMR);
- article 346 of the Treaty on the Functioning of the European Union (TFEU); and
- the Takeover Code (in relation to certain public companies).

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The UK government can intervene in four categories of transaction on public interest grounds:
- public interest mergers – deals within the UK merger control regime that raise public interest considerations (section 42(1) and (2) EA02);
- special public interest mergers – deals within the UK merger control regime (though not necessarily meeting the same jurisdictional thresholds) and raise public interest considerations (section 59 EA02);
- UK legitimate interest mergers – deals that qualify for notification to the Commission under the EUMR but affect a legitimate interest of the UK (article 21(4) EUMR mergers); and
- transactions that qualify for notification to the Commission under the EUMR but affect the essential interests of the UK's security (article 346 TFEU mergers).

A summary of the types of transaction caught in each case is provided below. Transactions relating to certain public companies may also be subject to the Takeover Code and any relevant public interest considerations. This Code is not covered in detail below but can be a consideration for investors.

UK public interest mergers

The Secretary of State can intervene in public interest mergers but must have reasonable grounds for suspecting that it is or may be the case that:
- the UK merger control regime is applicable;
- the jurisdictional thresholds are met; and
- one or more 'public interest considerations' are relevant and need to be considered with relation to the deal (section 42(1) and (2) EA02).

Applicability of UK merger control

For a deal to fall within UK merger control, at least two enterprises need to be brought under common ownership or control (sections 23 and 26(1) EA02). Enterprises are activities (see section 129 EA) or part of the activities of a business (section 129(1) EA02). There is extensive case law on the definition and recent cases provide clarification about when a transaction is one that involves bare assets to which the regime would not apply and when it would not. The regime applies to the acquisition of 'material influence' over the target (section 26(3) EA02), and again whether a transaction will be likely to result in material influence will depend on the facts and such things as the control rights attaching to minority shareholdings or the extent of investor protections in strategic investments will need to be investigated to determine whether the regime could apply.

The CMA publishes extensive guidance. Pre-notification discussions are possible and may be helpful in certain circumstances.

Many types of transaction may fall within the merger control provisions, which are intentionally designed to ensure that transactions are scrutinised when material influence or control changes so that the economic effects of bringing different entities together are scrutinised.

In its Annual Plan 2016/17, the CMA indicated that it will review its policy and procedure in relation to accepting undertakings in lieu of a Phase 2 investigation. If there is any change, there will be a consultation on revised guidance.

Thresholds

The UK merger control procedure will be triggered where:
- as a result of the merger, the combined enterprise will supply or acquire 25 per cent or more of any goods or services in the UK or a substantial part of the UK, or an existing share of supply of 25 per cent or more will be enlarged (section 23 EA02); or
- the value of the turnover in the UK of the enterprise being taken over exceeds £70 million (the turnover test; (section 23 EA02).

Public interest considerations

Public interest considerations may be varied from time to time by the Secretary of State by amending, removing or adding to the considerations listed by way of an order (section 58(2) EA02). At the time of writing the public interest considerations that have been identified include:
- defence: the interests of national security, including public security (section 58(1) and (2) EA02);
- accurate news and free expression: the need for accurate presentation of news and free expression of opinion in newspapers (section 58(2A) EA02);
- plurality of the media (defined as being where reasonable and practicable, for a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK (section 58(2B) EA02): in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience (section 58(2C)(a) EA02);
- broadcasting: for the availability throughout the UK of a wide range of broadcasting that (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests (section 58(2C)(b) EA02);
- media standards: for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003 (section 58(2C)(c) EA02); and
- prudential regulation in the interest of maintaining the stability of the UK financial system (section 58(2D) EA02).

UK special public interest mergers

Before the Secretary of State intervenes in a UK special public interest merger, the transaction must fulfil the following conditions:
- the structure is of the type to which the UK merger control rules apply (section 59(1) EA02); and
- immediately before implementation, at least one of the enterprises concerned was carried on in the UK or by or under the control of a body corporate incorporated in the UK and a person carrying on one or more of the enterprises concerned was a relevant government contractor (ie, a person who has been notified by the Secretary of State that he or she, or his or her employees, hold information relating to defence and of a confidential nature (section 59(3B) EA02)); or
- the person or persons by whom one of the enterprises was carried on supplied at least 25 per cent of all newspapers of any description, or all broadcasting of any description, in the UK, or a substantial part of the UK (section 59(3C) and (3D) EA02); and
- one or more public interest considerations is relevant to a consideration of the transaction (section 59(2)).

Unlike UK public interest mergers there is no requirement for the transaction to satisfy the jurisdictional thresholds for an investigation, though the transaction must otherwise fall within the UK merger regime. The public interest considerations are the same as for UK public interest mergers.

Legitimate interest mergers under article 21(4) EUMR

To intervene in this type of merger, section 67(1) and (2) EA02 provide that the transaction must satisfy the jurisdictional thresholds of both UK and EU merger control and the Secretary of State must:
- have reasonable grounds for suspecting that it is or may be the case that: the transaction structure would fall within both UK and EU merger control;

- be considering whether to take appropriate measures in relation to the transaction to protect a legitimate interest of the UK under article 21(4) EUMR (section 67(1)(c) EA02); and
- believe that it is or may be the case that one or more public interest considerations are relevant to a consideration of the transaction (section 67(2) EA02).

Legitimate interests under article 21(4) EUMR include public security, plurality of the media and prudential rules. The public interest considerations applicable in article 21(4) EUMR mergers are those listed above in relation to UK public interest mergers and UK special public interest mergers.

Article 346 TFEU mergers (national security cases)

Article 346 TFEU provides that, in relation to transactions caught by the EUMR, the UK government may:

- instruct a company not to supply information to the Commission under the EUMR where it considers that disclosure of such information is contrary to the essential interests of the UK's security; and
- take measures it considers necessary for the protection of the essential interests of the UK's security that are concerned with the production of or trade in arms, munitions or war material.

4 How is a foreign investor or foreign investment defined in the applicable law?

Foreign investor or foreign investment is not defined in the EA02, the EUMR or article 346 TFEU; the rules do not distinguish between foreign and domestic investors.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no special rules, however, from time to time, 'back-door nationalisation' has been raised as a political issue where the state-owned entity is the acquirer.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

In the case of media mergers, the decision-maker is the Secretary of State at the Department for Culture, Media and Sport. In all other cases, it is the Secretary of State for Business, Energy & Industrial Strategy. The CMA also plays a part in the review process (see question 9).

In late 2010, this shift in jurisdiction in media mergers came about following the involvement of the then Secretary of State for Business, Vince Cable, in the acquisition of BSkyB by NewsCorp. The acquisition was approved by the Commission, at which time the only barrier to proceed could have come about in the form of intervention by Mr Cable. At or around that time, however, he was reported to have 'declared war' on NewsCorp founder and then CEO Rupert Murdoch. Decision-making powers for media merger matters thereafter were transferred to the Secretary of State for Culture, Media and Sport.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

As a basic element of the rule of law the government must have a legal basis for any intervention and a legal basis for any action that it takes. In principle, it cannot therefore intervene in transactions on national interest grounds except where it can demonstrate that it is operating within the laws set out above.

Three points are worth noting here, because they add an element of flexibility in more controversial cases, requiring careful management. First, the definition of what is or is not within the scope of the existing legal basis may be broad enough to cover intervention directly. Secondly, influence over the standard merger control process is possible and may be effected either by government department or through sectoral regulators in ways that may not explicitly be recorded as public interest interventions. Thirdly, new public interest grounds may be swiftly added to the list set out in section 58(1)-(2D) EA02 or any consideration may be removed or amended (section 58(3) EA02). This occurred at the height of the financial crisis to allow through the *Lloyds/HBOS* merger referred to in question 1, which raised potential competition concerns, but was allowed because of concerns for financial stability had the merger not proceeded.

The Secretary of State may also intervene in transactions on the basis of a consideration that is not specified but which, in the opinion of the Secretary of State, ought to be so specified. The Secretary of State must then, as soon as practicable, take such action as is within his or her power to ensure that it is contained in an order laid before both Houses of Parliament and approved within 28 days from the day the order was made (sections 42(7), 42(8)(b) and 124(7) EA02). The UK government can also ask the Commission to recognise other legitimate interests not set out in article 21(4) EUMR. Such additional interests will be assessed against the general principles and other provisions of EU law.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Jurisdictional thresholds for merger notification to the CMA are detailed in question 3. The EU thresholds for turnover are crossed where the combined aggregate worldwide turnover of all undertakings concerned is more than €5 billion and the aggregate EU wide turnover of at least two of the undertakings is more than €100 million.

An alternative threshold is where the combined aggregate worldwide turnover of all undertakings concerned is more than €2.5 billion and the aggregate EU-wide turnover of at least two of the undertakings is more than €250 million, and the combined aggregate turnover of all undertakings is at least €100 million in at least three member states and in at least three of these member states the aggregate turnover of each of at least two of the undertakings is more than €25 million.

Notification to the CMA of a transaction is not compulsory. Notification to the Commission is compulsory if the relevant thresholds are met.

For the Secretary of State to intervene in UK public interest mergers or in special public interest mergers, they must have reasonable grounds to believe that the transaction satisfies the jurisdictional thresholds of the UK merger control regime (see question 3) and satisfies the relevant test for public interest or special public interest set out in the Enterprise Act 2002 (see question 3).

In article 21(4) interventions, the Secretary of State must have reasonable grounds to believe that both the EU merger control regime jurisdictional thresholds and the UK jurisdictional thresholds are met. In such cases, there is mandatory EU notification but no mandatory notification to the UK.

In article 346 TFEU interventions, which are based on national security considerations, the Secretary of State must have reasonable grounds to believe that the transaction fulfils the jurisdictional criteria set out in the TFEU. Any such transaction would meet EU merger control trigger thresholds and therefore require notification to the Commission subject to any restrictions that the Secretary of State may impose on notification or the provision of information.

Following the publishing of the Panel Statement 2016/9 on 14 December 2016, which is the most recent relevant Statement, those public companies to which the Takeover Code is relevant, must submit a series of documents and forms, including a firm offer announcement, to the Takeover Panel.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

In both public interest and special public interest cases, the CMA will undertake investigations at Phase 1. The Secretary of State is able to issue a public interest intervention notice or special intervention notice at the stage at which he or she has reasonable grounds to suspect that the respective public interest tests are fulfilled. The CMA will then report to the Secretary of State on jurisdiction and market definition issues and then take the decision on clearance, clearance with undertakings or referral to Phase 2. The Phase 2 review is, similarly, undertaken first by the CMA and then considered by the Secretary of State. The standard CMA fees will apply to public interest mergers. There is no fee for special public interest mergers.

In mergers with the relevant EU dimension, the Secretary of State may issue a European intervention notice at the stage at which he or she has reasonable grounds to suspect that the relevant jurisdictional thresholds are met. This has the effect of the UK authorities assuming control of the merger investigation. At that stage, the CMA will investigate and report to the Secretary of State on jurisdiction, and give a summary of representations from parties of a public interest nature and its views on whether the transaction will or is likely to operate contrary to the public interest. Other government organisations may be consulted, such as Ofcom in media mergers. If the test is met a referral to Phase 2 will be made. The CMA will then investigate and report to the Secretary of State who will take a decision on whether to make a finding that the transaction would be adverse to the public interest.

In article 346 mergers, the Ministry of Defence should be consulted prior to filing to the Commission. The Secretary of State will then provide instructions to the parties if the matter is not to be notified or if information is to be withheld from the Commission before or after notification. If there are aspects of the transaction that are not notified to the Commission, the CMA will investigate those aspects of the merger as a UK public interest investigation. There is no filing fee for article 346 mergers but CMA fees may apply for aspects of the investigation that require investigation by the CMA as a public interest matter.

10 Which party is responsible for securing approval?

There is no rule on who should secure approval in the UK but, in practice, the acquiring party tends to take the lead and this may be provided for in contractual agreement between the merging parties. The EU regime provides that certain parties to the transaction are responsible for notification of the transaction. In public bids, this is the bidder, in acquisitions, the acquirer, and in mergers, parties must file jointly on behalf of all parties.

Parties should also be aware that merger control in other jurisdictions where the acquirer or target have assets or do business might also apply. This usually does not apply to other EU jurisdictions, if the EU Merger Regulation pre-empts national jurisdiction. It should be noted that there is scope for a 'reference back' under article 9 of the Merger Regulation where impact on a distinct national market leads national authorities to petition the Commission to refer the case back to them.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The usual CMA or EU timescales will or may apply to parts of the review. Both Phase 1 and Phase 2 reviews are subject to timetables (though extensions or suspensions are allowed in certain circumstances). The Secretary of State's involvement, however, can significantly extend the review process. The effect of the intervention on the timetable will depend on at which stage the Secretary of State chooses to intervene (when he or she has reasonable grounds for doing so). Broadly speaking, intervention by the Secretary of State can significantly extend the review process as the Secretary of State must consider the CMA's position before it can make final decisions.

The Secretary of State has the power (as does the CMA in standard merger reviews) to expedite a Phase 1 review and proceed straight to a Phase 2 referral, provided the transacting parties agree and provided that it is likely that the criteria for Phase 2 referral is likely to be met. This fast-track procedure requires parties to waive some of their procedural rights under the Phase 1 process.

Various factors determine the timeline of a review, including: the complexity; the flow of information between the authorities and the parties in question; the number of 'interested' parties; and whether and at what stage undertakings or remedies are proposed.

In practice, it would be prudent for transacting parties to engage with the CMA, Commission and relevant UK government departments at the earliest stage possible (and in many cases, prior to notification). Early discussions, informal advice, and well-considered and drafted undertakings or remedies may help expedite clearance.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Transactions under review at a national level do not, subject to contractual agreements between parties to the contrary, need to receive clearance before the transaction can close. Parties should, however, proceed with caution if the thresholds will be (or are likely to be) met as the regulatory authorities can intervene following closure of the transaction.

If the Secretary of State were to intervene in a merger on public interest grounds, this would not be a bar to the transaction completing. The Secretary of State and the CMA can impose separate obligations on the transacting parties to prevent integration of the parties or impose obligations to undo integration that has already occurred. There is relatively wide scope for them to do this and there is detailed guidance on what considerations the CMA or Secretary of State must take into account when following such a course of action.

At the EU level, for most acquisitions, clearance must be obtained before the transaction is put into effect (article 7(1) EUMR). Breach of this provision carries heavy penalties; fines can be up to 10 per cent of group worldwide turnover (article 14(2) EUMR). There is an exception to this in the case of public bids that have been duly notified to the Commission – these can proceed, but only on the basis that the transaction is notified to the Commission without delay.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Both the CMA and the Commission welcome pre-notification discussions, but these are not mandatory. The CMA is able to offer informal advice and encourages pre-notification discussions, provided there is a realistic prospect that the transaction can or will go ahead. There are strict confidentiality requirements on any pre-notification discussions and any positions taken in such pre-notifications are not binding on the ultimate position of the CMA. Early discussions can assist in identifying any potential competition concerns and could assist transacting parties in the notification process as they may be able to provide information at the notification stage that deals with competition concerns raised in initial discussions. Furthermore, if competition concerns are identified, early and detailed proposals for remedies (which have already been discussed with the regulator) can help speed up clearance.

In transactions likely to satisfy the public interest or special interest test or the article 21(3) test, it may be prudent for the parties to engage with the relevant UK authorities (or Secretary of State) in the early stages. In article 346 cases, the Secretary of State should be notified prior to notification to the Commission in any event.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The employment of lobbying or other specialists is not common but specialists may be consulted case by case. Transacting parties may use external specialists to undertake reviews, reports or case studies that can be submitted to the reviewing authorities.

Early informal advice or discussions may expedite clearance and, in those cases where a Phase 2 referral is likely, early consideration of and discussions on undertakings are likely to be of value. Where undertakings may involve third parties (such as divestment undertakings), it can be valuable to include those in the discussions from an early stage. Both the Commission and the CMA (and the Secretary of State) can delay a decision if the transacting parties (or in some cases relevant third parties) do not provide full and correct information during the course of their investigations.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

The Secretary of State may refer a UK public interest merger or an article 21(4) EUMR merger to the Phase 2 investigation up to four months after the transaction completes or the material facts are made public, whichever is the later. The Secretary of State may also accept undertakings in lieu of a reference in the same time period.

In article 346 TEFU merger cases, the UK government can only intervene before the Commission makes its decision and there is therefore no retrospective intervention in such cases.

Furthermore, non-compliance with the Takeover Code may result in sanction by the Panel, the FCA, and any regulatory body to which the non-compliant organisation belongs.

Update and trends

No specific proposals currently exist that might change the above position. However, there have been hints that the tide might very slowly be turning in relation to the predominance of competition-based review, in favour of approaches that might be very slightly more interventionist. It is notable that two recent speeches by the Prime Minister, Theresa May, have displayed a soupçon of scepticism in relation to a relentlessly competition-based approach, and that greater emphasis might be placed on industrial strategy alongside competition-based review. Whether these small hints turn into anything more substantive remains to be seen, and it seems unlikely that the UK would abandon its long-standing welcoming posture to foreign investment. Nonetheless, a marginal change away from the utterly predominant competition-based approach seen in recent decades might yet be seen.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for clearance depends on the basis for which there is intervention. For UK public interest mergers, the test for referral to Phase 2 is whether the Secretary of State believes the transaction falls within the UK merger regime and that it operates or may be expected to operate against the public interest (section 45(2-5) EA02). Following the Phase 2 investigation, the test for a negative decision is whether the Secretary of State believes the same test to have been met.

The Secretary of State must, in his or her consideration, accept the CMA's findings on anticompetitive outcomes (whether negative or positive) but then must also consider whether the relevant public interest considerations outweigh any anticompetitive effect. There is limited guidance on how that decision must be taken.

For UK special public interest mergers, the test for referral to Phase 2 investigation is whether the Secretary of State believes that the relevant criteria, set out under question 3, are (or may be) met and, taking into account only the relevant public interest considerations, the transaction operates or may be expected to operate against the public interest (section 62(2) and (3) EA02). Similarly, the substantive test for a negative decision following a Phase 2 reference is whether the Secretary of State decides that this test is met (section 66(2) EA02).

For article 21(4) mergers, the test for referral to Phase 2 investigation is whether the Secretary of State believes that the relevant criteria, set out under questions 3 and 8, are (or may be) met and, taking account only of the relevant public interest considerations, the transaction operates or may be expected to operate against the public interest (section 5(2) and (3) of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (PLIO)). The substantive test for a negative decision following a Phase 2 reference is whether the Secretary of State decides that this test is met (section 12(2) PLIO).

Article 346 TFEU mergers (national security)

In article 346 TFEU mergers, any aspects of the transaction that are not notified to the Commission but that fulfil the criteria of a UK public interest merger or a UK special public interest merger will be assessed against the substantive tests outlined above for those types of transaction. Under article 346 TFEU, any measures taken by the Secretary of State must be necessary for the protection of the essential interests of the UK's security and connected with the production of or trade in arms, munitions and war material. Any non-military aspects of the transaction that have been notified to the Commission will be subject to its usual merger control review.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Formal and official guidance here is unavailable. From practical experience it is known that the competition authorities have many opportunities to discuss cases with each other in the course of their regular meetings. (See, for example, the ICN meetings among competition authorities.) Meetings also occur between the EU and US authorities pursuant to intergovernmental cooperation treaties. Cross-agency discussions can and do occur with relation to defence issues pursuant to intergovernmental cooperation treaties. It is advisable to ensure that the respective government departments are briefed with relation to the issues within their concern.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Competitors, significant competitors, interested parties, industry working groups, economists and other experts may be consulted by the decision-making body.

The rules on standing are set out in the respective regulatory legislation or guidelines.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Secretary of State can prohibit a UK public interest, special public interest or article 21(4) merger if, following a Phase 2 CMA report, he or she has made an adverse public interest finding and considers that such action is reasonable and practicable to remedy, mitigate or prevent any of the adverse public interest effects that have resulted from, or may be expected to result from, the transaction (sections 55(2) and 66(6) and Schedule 8 EA02, and section 12(7) PLIO).

In a limited number of public interest cases, the Secretary of State has the power to make a reference to the CMA for a Phase 2 investigation, where the CMA has not done so. The Secretary of State is bound by the CMA's Phase 1 findings on competition issues, but not on any views expressed about the public interest consideration.

If the Secretary of State believes he or she may wish to use his powers under article 21(3) of the EU Merger Regulation to protect legitimate interests, he or she can issue a European intervention notice. This requests that a transaction that fulfils the EU threshold be nevertheless considered by the UK authorities. This obliges the CMA to make a report to the Secretary of State, and enables the Secretary of State to make a Phase 2 reference. The Secretary of State is also able to take enforcement action.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

The Secretary of State can accept undertakings to remedy public interest concerns or competition concerns identified by the CMA in public interest cases. Undertakings can be offered after an intervention notice has been issued, and, if agreed by the Secretary of State and fulfilling the relevant criteria, clearance can be gained despite the public interest grounds for intervention. Undertakings or remedies can also be offered at Phase 2 and can involve third parties.

In public interest cases, undertakings will be reviewed by both the Secretary of State and the CMA for applicability to public interest concerns and to competition concerns respectively. The Secretary of State can also clear transactions that may otherwise cause competition concerns where it has been decided that the public interest outweighs such concerns.

21 Can a negative decision be challenged?

UK decisions taken by the CMA and the Secretary of State's decisions can be challenged in the Competition Appeal Tribunal (CAT). Subject to judicial leave to appeal, CAT decisions can 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, as applicable, or, in certain circumstances, the UK Supreme Court. An appeal can deal with the merits of the decision being challenged.

The Secretary of State's decision may also be subject to judicial review by the High Court. The grounds for judicial review are general limited to errors of law and procedure, and judicial review is not an appeal on the merits.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Generally, the CMA insists on confidentiality in any pre-notification requests for advice or meetings, subject to material being shared between the transacting parties. Both the CMA and Commission publish decisions, communications and submissions, subject to the removal of confidential information or business secrets, and may share documents with other interested parties. Claims to confidentiality must be substantiated and non-confidential versions of documents can be required for publications. The Commission publishes guidelines on such claims for confidentiality.

In cases where the Secretary of State has intervened in the EU merger control procedures, the Secretary of State has discretion to restrict the flow of information in the public interest. For article 346 mergers, the UK can prevent the notification of mergers to the Commission and can prevent the transacting companies from providing certain information to the Commission insofar as the member state considers that the disclosure of such information is contrary to the essential interests of its security.

It should be noted that the CMA and Secretary of State may be required to update their procedure for dealing with confidential information when the EU publishes its proposal to replace the E-Privacy Directive in 2017.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

21st Century Fox/Sky

In December 2016, 21st Century Fox announced that it would pursue a takeover of the UK satellite broadcaster, Sky. The deal resurrects an earlier attempt by another part of the same media empire, News Corporation, to purchase Sky. The earlier News Corporation deal was approved by the European Commission, but ultimately fell apart under considerable political pressure in relation to the question of whether News Corporation fulfilled the requirement for media proprietors to be 'fit and proper' persons under the public interest test as applied to media mergers. A range of remedies were proposed to strengthen editorial independence, notably in relation to board membership, but were not ultimately agreed.

It is important to emphasise how unusual the context was giving rise to these concerns. The concerns stemmed from allegations of ethical issues in the running of News Corporation newspapers, especially in relation to the use of telephone hacking. The case thus represents a very rare example of politics intruding into the normal competition-based analysis under very specific and unusual circumstances. It remains to be seen whether the presence of Fox in the deal will alter this outcome, and whether the concerns felt in relation to News Corporation will carry over to Fox and if so whether the concerns that led to the abandonment of the News Corporation deal are still current.

An early indication of the likely issues in the case can be seen in the 9 February 2017 letter signed by many of the main protagonists in the case against the 2010 deal. These signatories include Sir Vince Cable, the Liberal Democrat leader closely associated with the case mounted against the 2010 deal, and the erstwhile Labour Party leader Ed Miliband.

The letter pushes for Ofcom to open a new inquiry into the question of whether alleged improprieties at News International undermine the case that Sky is a fit and proper broadcast licence holder: in other words, the letter seeks to revisit the 2012 inquiry that found that Sky was a fit and proper licence holder because the Murdoch stake was a minority stake, and because James Murdoch had stepped back from an executive role at Sky despite what the report described as 'conduct [that] in various instances fell short of the standard to be expected of the chief executive officer and chairman'.

In seeking to reopen this question, the letter provides the first salvo in the UK investment law question as to whether the bid will be conditioned for media plurality reasons. This is a developing question, and it will remain to be seen whether the concerns in the letter and the lobby it represents will predominate, or whether other considerations that point away from conditioning will prevail. Either way, a detailed analysis of the legal framework and the factual context of the 2010 and 2016 bids will be called for on the part of those looking to predict or alter the outcome.

Kraft Foods/Cadbury

Kraft Foods, at the time the second-largest US food company took over Cadbury, a profitable UK food and confectionery company in 2009 following a hostile takeover bid. It emerged following the takeover that Kraft had purchased Cadbury to achieve the scale necessary to separate its operations in the confectionery and snacks markets respectively. In doing so, it announced a Cadbury closure programme, contrary to representations it had made in the run-up to the bidding process.

There were significant criticisms of the UK takeover regime following the Kraft takeover. Many parties were critical of the takeover and the fact that there was no legitimate public interest basis for the Secretary of State to intervene. A parliamentary select committee concluded that the merger control procedures were open and transparent and that the Secretary of State was correct in not intervening. The evidence given to the committee made it clear that there was scope for improvement in the processes under the UK merger control but that any additional powers of intervention should be approached cautiously in view of the significant economic benefits that could attach to investment in the UK from foreign entities.

A number of changes were introduced in the Takeover Code in 2011 following the *Cadbury/Kraft* takeover. Predominantly these acted to strengthen the position of the target companies by improving transparency, giving greater recognition to employees and giving shareholders the ability and duty to look at a bid in the long term and not simply on price. In doing so, the intentions of the parties communicated in the lead-up to the bid could become reasonable considerations to shareholders and competition authorities alike.

Despite proposals to do so, no additional ministerial powers of intervention were included in the change and the public interest test for ministerial intervention was not broadened at that time. No specific provisions were made in merger regulation for foreign investment, but the Takeover Code was amended to improve disclosure of information at the pre-bid stage. That information could later be relied

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on in shareholder actions. Care will therefore be needed in drafting statements to select committees, parliamentary committees and in responses to questions in the takeover process in addition to those representations made concerning employees and shareholders.

Pfizer/AstraZeneca

In May 2014, it was announced that Pfizer, a US based pharmaceutical company intended to make a bid for the UK company, AstraZeneca. Significant competition concerns were raised during the pre-bidding stage, one of which being that the takeover would be detrimental to a number of aspects of the UK pharmaceutical industry, including in particular the research and development carried out by AstraZeneca.

The bid was ultimately abandoned after being the subject of extensive public and government debate. The public interest test for intervention was again examined in detail and proposals were made for further changes to the Takeover Code to distinguish between commitments made by bidding companies into whether they 'intended to' or 'committed to' certain actions.

It is an open question whether statements made in the course of the bid would have been actionable because the bid was abandoned.

United States

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The United States has had mechanisms in place to track and review foreign direct investment since 1975, when President Ford established the inter-agency Committee on Foreign Investment in the United States (CFIUS). While those mechanisms were formalised and strengthened by statute in the 1980s, the current US approach regarding government oversight of foreign investment in the United States clearly stems from the events of 11 September 2001.

With the attacks on the World Trade Center, Americans were confronted with the reality that they were vulnerable to terrorist assaults on US soil, and the US government was faced with the policy choice of how to balance the economic need for open foreign investment with the national security need to protect US assets, particularly critical infrastructure. Politics and policy met head on a few years later, with the 2006 acquisition by Dubai Ports World, a company owned by the government of Dubai, of a firm that ran terminal operations at six US ports.

The prospect of having a government-owned company from the Middle East, even one from as strong a US ally as the United Arab Emirates, created a political firestorm in Washington, as did the approval of the acquisition by CFIUS. The US Congress responded with two years of intense debate that resulted in a 2007 law overhauling the process by which the United States reviews the national security implications of US foreign investments. That law, the Foreign Investment and National Security Act of 2007 (FINSA), required CFIUS to apply heightened scrutiny to certain types of investments, particularly those that could result in foreign control over US critical infrastructure, broadly defined, or those that could result in control of a US business by a foreign government.

While US law does not, in many respects, indicate exactly which investors should be scrutinised, guidance to the regulations implementing FINSA suggests that the questions of 'who' and 'what' do matter greatly. According to the regulatory guidance issued by CFIUS, the determination of 'National Security Risk is a function of the interaction between threat [whether the foreign person has the capability or intent to cause harm] and vulnerability [whether the nature of the US business or some weakness in the system creates a susceptibility to harm], and the consequences of that interaction for US national security.' More specifically, in making that calculation, the government reviews transactions case by case in the context of all facts and circumstances, but specifically looks to factors that relate, in part, back to post-9/11 concerns, such as US defence production requirements, the effect on US critical technologies and critical infrastructure, international technological leadership in areas affecting national security, US energy requirements, the potential control of a US business by a foreign government and the foreign country's potential for diversion of military technology and cooperation with US anti-terrorism efforts, among others.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The primary vehicle for reviewing foreign acquisitions of US businesses on the basis of national security is section 721 of the Defense Production Act of 1950, as amended by FINSA. Under this law, the US President may review the national security implications of acquisitions of or investments in US businesses by foreign persons and may block or unwind such transactions when they threaten US national security. These national security reviews have been delegated to CFIUS, an inter-agency committee chaired by the US Treasury Department. CFIUS has the authority to review any such transaction that could result in foreign control of any person engaged in interstate commerce in the United States.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

CFIUS reviews cover only acquisitions or investments that could result in foreign control over a US business, and 'control' is the overriding factor in determining CFIUS jurisdiction. The law, however, provides CFIUS with broad discretion to determine whether an investment involves a change of control. CFIUS can find that a foreign investor has acquired control over a US business through either a majority or a minority interest. CFIUS will consider the size of the investor's interest but will also evaluate a number of other factors, including whether the interest is voting or non-voting, any board representation, formal or informal arrangements to act in concert with other investors, and any means by which an investor can make or influence key corporate decisions. Such key corporate decisions include, but are not limited to, the following:

- the sale of assets;
- the reorganisation of the US business;
- the closing or moving of business facilities;
- major expenditures or investments;
- the entry into or termination of significant contracts;
- the hiring or firing of senior management; and
- the amendment of the organisational documents of the US business with respect to these types of matters.

Additionally, CFIUS will consider an investment through which a minority investor acquires veto rights over key corporate decisions to involve a change of control by virtue of the investor's negative control over the US business.

The CFIUS regulations carve out a limited 'safe harbour' for certain minority investments. They exclude from CFIUS jurisdiction transactions that result in 'a foreign person holding 10 per cent or less of the outstanding voting interest in a US business' if 'the transaction is solely for the purpose of passive investment'.

Investments are made solely for the purpose of passive investment where the foreign person 'does not intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with passive investment'. The CFIUS regulations also identify certain typical minority shareholder protections that are not considered, by themselves, to confer control over a US business. These include, among others, the power to prevent the sale of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation; and the power to prevent an entity from entering into contracts with majority investors or their affiliates.

CFIUS reviews cover sales of both shares and assets, to the extent that such shares or assets constitute a US business. Joint ventures are covered to the extent that a US business is contributed as part of the joint venture and a foreign person gains control over the US business as part of that transaction. CFIUS will assert jurisdiction over the acquisition of one foreign company over another, but only to the extent that the target has assets considered to be a US business.

While the CFIUS regulations do not point to specific sectors for which the filing of a CFIUS notice is required, they do provide special considerations for acquisitions or investments in sectors that could be considered 'critical infrastructure'. Critical infrastructure is defined as 'a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security'. Sectors such as energy, telecommunications, transportation and information technology certainly fall within this definition, as do many others. The regulations take 'critical infrastructure' into account in a number of ways. For example, a second-stage 45-day CFIUS investigation is mandatory for transactions resulting in control of critical infrastructure by a foreign person if CFIUS determines the transaction could impair national security. In conducting its national security analysis, US law requires CFIUS to examine, among other things, 'the potential national security-related effects of the transaction on US critical infrastructure, including [physical critical infrastructure such as] major energy assets'. In addition, transactions directly or indirectly related to the defence industry have always been a key focus of CFIUS scrutiny, especially if the US business holds US government contracts related to defence or homeland security, or makes products subject to the requirements of the International Traffic in Arms Regulations.

4 How is a foreign investor or foreign investment defined in the applicable law?

The term 'foreign person' is defined as 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. The term foreign entity is defined broadly to include any branch, partnership, group or subgroup, association, estate, trust, corporation or division of a corporation, or organisation organised under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges, unless it is shown that a majority of the equity interest in such an entity is ultimately owned by US nationals.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Transactions that could result in the control of a US business by foreign governments or entities controlled by foreign governments were a key focus of the 2007 FINSA amendments. CFIUS national security reviews begin with an initial 30-day review, followed by an additional 45-day investigation in certain cases. Under FINSA, a full 45-day investigation is required when the 30-day review reveals the potential for a transfer of control over a US business to a foreign government or an entity controlled by a foreign government. There is a limited exception when the Secretary of the Treasury and the head of the lead agency for the initial review determine that the proposed transaction would not impair national security, but such a determination must be made at the deputy secretary level, and cannot be delegated to lower-level officials. Given the political sensitivity surrounding certain types of foreign investments, and congressional interest in the CFIUS process, such waivers are not likely in any review that could in any way be considered controversial, including investments made by foreign government-controlled entities from nations that are not considered natural US allies. Interestingly, CFIUS in its regulations rejected the suggestion by some commentators that it adjust this rule for investments made by government-controlled entities that operate on a purely commercial and market-driven basis, noting that FINSA makes no such distinction.

The CFIUS regulations define the term foreign government controlled transaction as 'any covered transaction that could result in control of a US business by a foreign government or a person controlled by or acting on behalf of a foreign government'. They further define foreign government as 'any government or body exercising governmental functions, other than the United States government or a subnational government of the United States'. As such, the term foreign government includes, but is not limited to, national and subnational governments, including their respective departments, agencies and instrumentalities. The terms SWF and SOE are not specifically defined in the CFIUS regulations but fall within the definitions discussed above.

Investments by SWFs and SOEs have received a great deal of attention in the United States in recent years, and members of the US Congress, as well as commentators and members of the media, have at times called for more stringent controls on their investments in the United States. Among the concerns raised is the possibility that an SWF or SOE could use its interests in US businesses as a basis for political rather than market-based decisions. CFIUS is sensitive to such considerations and commentary.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The national security reviews authorised by US law have been delegated to CFIUS. The US Treasury Department, which chairs CFIUS, maintains a permanent CFIUS staff in its Office of Investment Security and works with a number of other agencies that are, by statute, members of CFIUS. These include the Departments of Homeland Security, Commerce, Defense, State, Energy and Labor, as well as the Attorney General, the Director of National Intelligence, and the heads of any other executive department, agency, or office the President determines appropriate. In 2008, President Bush added the US Trade Representative and the Director of the Office of Science and Technology Policy as full CFIUS members. The Secretary of the Treasury appoints a lead agency for each CFIUS review, based on the issues at play in that particular review and the expertise of the agency.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The President has wide discretion in determining whether a transaction threatens US national security. Specifically, the President may block a transaction if he or she finds that there is 'credible evidence' that leads him or her to believe that the 'foreign interest' proposing to acquire a US company 'might' take action that 'threatens to impair the national security'. Neither the statute nor the CFIUS regulations explicitly define 'national security', but the term is interpreted broadly and includes those issues relating to 'homeland security', including its application to critical infrastructure.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Under the CFIUS regulations, 'any branch, partnership, group or subgroup, association, estate, trust, corporation or division of a corporation [...] or assets' operated as a business that is engaged in interstate commerce in the United States is considered a US business. FINSA gives companies involved in cross-border acquisitions or investments in US businesses the opportunity to voluntarily obtain a clearance of the transaction by filing a notice thereof with CFIUS at no cost to the parties.

Although this clearance process is voluntary, CFIUS can initiate its own investigation of a transaction if the parties do not choose to file a voluntary notice. Without CFIUS clearance, the President retains the power to block or unwind a transaction indefinitely, such that a transaction is open to potential unravelling at any time. If successful, a CFIUS review results in a 'no-action' letter from CFIUS insulating the transaction from subsequent presidential action. If, in the course of the review, CFIUS determines that the transaction as presented is not subject to its jurisdiction, it will notify the parties, concluding the CFIUS process.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

As part of the CFIUS review process, both foreign investors and the US target company must submit a range of business information to CFIUS, including information about the foreign investors and their parents, the US targets of the investment or acquisition, and detailed information about the transaction. There is no standard form for the filing, nor is there a filing fee, but all information required by the statute and regulations governing CFIUS reviews must be included with the filing, so in that respect the required information is well defined, if not in a standardised form. The specific information required by the CFIUS regulations includes, but is not limited to, detailed information on the transaction, the US business and the foreign person. Following the initial filing and throughout the process, CFIUS can ask questions and require additional information even if it is not specified by the regulations.

While the process is voluntary, CFIUS can initiate its own investigation and has notified parties after it has identified a transaction of interest.

10 Which party is responsible for securing approval?

Notices filed with CFIUS are filed jointly by the foreign investor and the US target. Parties to the transaction are required to submit to CFIUS all information called for by the regulations, and CFIUS may reject notices at any time that do not fully comply with these regulatory requirements, or for which parties do not respond in a timely fashion to follow-up questions from CFIUS. Parties also must provide a final certification to CFIUS attesting to the accuracy of the information that has been submitted. In rare cases, such as a hostile takeover situation, the notice can be filed by one party but it is extremely difficult to meet all the information requirements.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The initial CFIUS review takes 30 days, at the end of which CFIUS will either issue a 'no-action' letter clearing the transaction or will initiate a second-stage investigation, which lasts an additional 45 days. CFIUS will undertake a second-stage, 45-day investigation if any CFIUS member agency believes at the end of the initial 30-day review that the transaction under review threatens to impair US national security and that the threat has not been mitigated. In addition, the second-stage investigation is mandatory for transactions involving foreign-government controlled transactions and transactions resulting in control of critical infrastructure by a foreign person if CFIUS determines that the transaction could impair national security. As noted, CFIUS may waive these requirements of a 45-day investigation with the consent of certain high-level officials in the agencies chairing a CFIUS review. At the end of the 45-day second-stage investigation, CFIUS has another opportunity to conclude its review of the transaction and issue the parties a 'no-action' letter. If CFIUS cannot clear a transaction during this second stage due to national security concerns raised by one of its member agencies, CFIUS will send a recommendation regarding the transaction to the President, who has 15 days to decide whether to block or unwind the transaction or to allow it to proceed.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

While there is no obligation that parties refrain from closing a transaction prior to obtaining CFIUS approval, it is prudent to do so if there is any chance that CFIUS may not approve the transaction. Without CFIUS clearance, the President retains the power to block or unwind a transaction indefinitely, such that a transaction is open to potential unravelling at any time, even months or years after closing. CFIUS has, on a number of occasions in recent years, required parties to make a CFIUS filing after the transaction had already closed.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

CFIUS will generally agree to meet with parties to discuss potential transactions, even in cases in which the parties do not plan to make a formal CFIUS filing or are unsure about how to proceed. While CFIUS makes it clear in such meetings that they do not give formal advisory opinions, CFIUS officials are usually willing to meet informally to hear about pending transactions. In addition, the CFIUS regulations formalised the process of providing CFIUS with a pre-notice filing, something that had been followed in practice prior to that. While CFIUS will not comment on the likelihood of approval in this pre-filing process, it will indicate whether the draft meets the requirements to initiate a review.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Typically, the clearance process is handled by the parties' legal advisors, who specialise in national security reviews. Public affairs specialists and lobbyists, as well as industry experts and other specialists, are also sometimes used as part of a CFIUS clearance effort in cases in which a CFIUS filing could be controversial or in which there is considerable interest on the part of the US Congress. In a number of recent cases, there has been a considerable amount of negative press about some foreign acquisitions of US businesses, and in such cases the status of CFIUS reviews often becomes a matter of speculation. In such cases, there are, at times, antagonists trying to influence the media, for political or financial reasons, and it is therefore critical for the US business and the foreign investor to balance the equation either through internal public affairs officers or an outside public-relations firm. A press strategy should be developed before the story gets out of hand, as it is often difficult to counter factual inaccuracies once they are in the media and on the internet. In such instances, it is also important to make contact with the members of Congress who sit on the committees of jurisdiction on CFIUS matters, as well as their staff. It is also important to recruit congressional supporters of such foreign investments, for example, those who represent areas where there might be job creation as a result of an investment – and to identify potential opponents of the investment. In some cases involving the acquisition of a US business with cutting edge or complex technology, it is helpful to involve industry analysts who can help explain the nature of the technology to CFIUS.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

Without CFIUS clearance, the President retains the power to block or unwind a transaction indefinitely. Only a 'no-action' letter from CFIUS, issued as part of a formal CFIUS filing, guarantees that a foreign acquisition of a US business is insulated from future action by CFIUS or the President. It is also possible that a post-closing change in ownership or other material terms that could result in a change of control from one foreign person to another could create the need for a new CFIUS filing, but that would, in effect, represent a new transaction.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The President may take action to block or unwind a transaction only when he or she finds that there is credible evidence that a foreign interest exercising control over a US business might take action that threatens to impair the national security of the United States, and provisions of other laws do not provide adequate and appropriate authority to protect the national security. Neither the statute nor the CFIUS regulations explicitly define 'national security', but the term is interpreted broadly.

The legal burden is not on the parties to show that a transaction does not present a national security threat, but rather the parties are obligated to provide CFIUS with all the information required by statute and regulation and to answer all questions posed by CFIUS so that CFIUS may make a recommendation to the President. As part of the formal filing, there is an opportunity for parties to argue that a transaction serves a legitimate purpose and is therefore in the national interest, and parties in controversial cases usually meet with CFIUS and its member agencies to explain the purpose of a transaction and what safeguards are in place to make sure that there is no national security threat, but otherwise there is no legal burden on the parties.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

There is no specific provision in either the statute or regulations for consultations between CFIUS and officials in other countries.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

CFIUS consists, by statute, of the following member agencies, all of which to some extent take part in consideration of those transactions being reviewed: the Treasury Department; the Department of Homeland Security; the Commerce Department; the Defense Department; the State Department; the Justice Department; the Energy Department; the Labor Department; and the Director of National Intelligence. The President may also appoint the heads of any other executive department, agency or office, as appropriate, on a case-by-case basis. A CFIUS national security risk assessment is based on confidential business information provided by the parties as part of the formal CFIUS process, as well as public sources and various government sources, including a classified national security threat assessment provided by the US Director of National Intelligence.

While there is no provision permitting competitors or customers to formally get involved in a review, the formal and protected CFIUS process does take place in a highly charged political environment in which members of Congress and local public officials regularly make their views known. For example, in some cases, members of Congress have introduced resolutions in opposition to CFIUS approval of a particular transaction. In others, members of Congress have introduced proposed amendments to the statute governing CFIUS in response to a CFIUS decision or a proposed investment. As part of this political process, competitors and other interested parties weigh in with members of Congress and express their opinions in the press. Newspapers write editorials about proposed investments, and local officials lobby Congress if they believe that there could be an effect on employment in their localities.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Once the President determines that there is credible evidence that a foreign investor might take action that threatens national security, he or she is authorised by statute to take action to suspend or prohibit that investment by directing the US Attorney General to seek such relief in a US federal court.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

CFIUS may condition clearance on parties entering into an agreement with the US government to address or mitigate national security concerns. FINSA authorises CFIUS or the lead agency for any particular transaction to negotiate such agreements, as well as set conditions for monitoring and enforcing them. The contents of such 'mitigation agreements' will vary depending on deal- and industry-specific concerns raised by CFIUS or government agencies. Typical mitigation provisions could include:

- the requirement that a US citizen be appointed as a security officer for the US business;
- periodic government reviews of export control and security policies and procedures in place at the US business;
- the isolation or ring-fencing of certain businesses or assets so that foreign persons do not have access to them;
- the requirement that notice be given to the government of changes in officers or top management at the US business;
- an agreement prohibiting foreign parties from having access to certain US technology; and
- an agreement to put in place a cybersecurity plan; an agreement that only US persons will sit on certain committees, such as security committees. CFIUS may also address through the terms of a mitigation agreement any increased risk if the foreign acquirer were to have a greater ownership interest in the US business.

CFIUS is most likely to impose such requirements in deals involving critical technologies such as telecommunications or energy, particularly when the US business is connected to the telecommunications or energy grids. While there are no limits to the sectors that can be subject to such an agreement, a decision by CFIUS to pursue a mitigation agreement must under the statute be based on a written risk-based analysis of the threat to national security of the proposed transaction, and the measures imposed must be believed to be reasonably necessary to address that risk. In cases in which there is a breach of a mitigation agreement, CFIUS may apply penalties of up to US$250,000 or the value of the transaction against parties in cases of intentional conduct or gross negligence, or may reopen the investigation in cases of an intentional, material breach of the agreement. A mitigation agreement may also include provisions establishing liquidated damages for violations of the agreement. Only a small percentage of all reviewed transactions result in mitigation agreements.

21 Can a negative decision be challenged?

Neither the decision by the President that there is a national security threat nor the decision to prohibit an investment is subject to judicial review. Most parties facing a potentially negative decision from CFIUS choose, instead, to request that their CFIUS notice be withdrawn, and such requests are generally granted. Parties may refile at a later date. As noted above, however, a federal court recently ruled that parties to a CFIUS review have certain due process rights during the process leading up to a presidential decision, including being given access to the unclassified information on which CFIUS is relying in making its recommendation to the President.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

All information submitted to CFIUS as part of the filing process is by statute considered confidential business information that cannot be released to the public and is not subject to disclosure under the US Freedom of Information Act. These protections also apply to information provided to CFIUS during the course of a withdrawal or as part of pre-notice consultations, even if the parties to those consultations do not ultimately file a notice. CFIUS may refer violations of these provisions to the US Justice Department. Convictions for wrongful disclosure can lead to fines or imprisonment under US law.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

CFIUS reviews are confidential and neither the outcome nor the reasoning is released to the public, so any discussion of recent cases is limited to information that has been publicly discussed by parties or media accounts based on public or confidential sources.

Dubai Ports World

Although not a recent case, perhaps the best-known and most controversial CFIUS review of a foreign acquisition is, ironically, one that CFIUS actually approved, and which led to important changes in US law governing CFIUS reviews. In January 2006, CFIUS approved the acquisition of Peninsular and Oriental Steam Navigation Company, a British firm that ran terminal operations around the world and at six US ports, by Dubai Ports World (DP World), which is wholly owned by the government of Dubai. Coming about four years after the 9/11 attacks, the approval of the transaction by CFIUS sparked intense media coverage and outrage among some members of the US Congress, who complained that they had not been consulted about the deal and that the deal should not have been approved because of the vulnerability of US port operations, and the fact that the acquiring company was a government-owned entity from the Middle East.

Resolutions disapproving of the CFIUS decision were introduced in both the US House of Representatives and the US Senate, as was legislation requiring the matter to be reopened. In the end, DP World ultimately decided to divest the US port operations to a US company. That avoided a messy confrontation between the US Congress and the Bush Administration, but it did not put to rest the intense scrutiny of the CFIUS review process in either the Congress or the press. For the next two years, the US Congress considered a range of CFIUS reform legislation, including relatively draconian measures, ranging from the outright prohibition of certain foreign investments at US ports or involving US critical infrastructure, to moving CFIUS from the US Treasury Department, with its focus on foreign investment, to the US Department of Homeland Security, which was perceived by some in Congress as being more focused on national security than the Treasury Department. That two-year process ended with enactment of FINSA, which was generally viewed as a good compromise balancing the need to promote foreign investment in the United States with the need to ensure a thorough process for national security reviews. DP World demonstrated that seemingly non-controversial investments can easily become embroiled in politics and, once the press takes notice, quickly spiral out of control.

The lesson for investors is that the CFIUS process should always be taken seriously, and in many cases both foreign investors and US targets need to consider the potential effect of the investment in the press and Congress before making a CFIUS filing.

First Gold Corp

In 2009, Northwest Non-Ferrous International Company Limited, a Chinese mining company ultimately owned by the Shaanxi Province government, proposed to acquire 51 per cent of First Gold Corp, a Delaware corporation that owns and leases mining exploration and development properties in Nevada. The transaction was notified to CFIUS, which undertook both a 30-day review and a second-stage 45-day investigation. Shortly before the end of the second-stage investigation, CFIUS reportedly informed the parties that it had identified serious and significant national security risks associated with the proposed investment. Specifically, CFIUS was concerned about the proximity of the First Gold properties to the US Fallon Naval Air Base and associated training facilities, as well as other sensitive and classified security and military assets CFIUS could not identify to the parties. CFIUS reportedly could find no acceptable mitigation to the risks posed by the transaction, including a reduction in ownership level or the exclusion of any of the properties at issue. CFIUS informed the parties that it would recommend that the President block the transaction if it were not abandoned. As a result, the parties abandoned the transaction. While CFIUS does not publicly discuss its decision-making process or rationale, it does set out in its regulations the factors it examines and the basic calculation it makes – weighing the threat posed by the foreign investor with the vulnerability of the assets. It seems clear that CFIUS had very concrete concerns about the location of the mining facility. What is less clear is whether the decision was equally motivated by the identity of the foreign investor, an enterprise ultimately owned by the Chinese government, and whether CFIUS would have decided differently had the investor not been a state-owned company or was from a country about which the US government has less heightened national security concerns.

Ralls Corp

Under FINSA, neither the findings of the President with respect to a national security threat nor the President's decision to block a transaction are reviewable by federal courts. In 2014, however, a federal appeals court ruled that this prohibition does not extend to the CFIUS review process. This ruling led to the settlement of a lawsuit brought against CFIUS by the Ralls Corp, a US corporation owned by two Chinese nationals affiliated with China's Sany Group. The settlement put off until a later date important issues involving the extent to which CFIUS will revisit its decisions based on court-ordered transparency and whether CFIUS has the authority to issue orders prohibiting implementation of a transaction prior to a decision by the President. The settlement does, however, indicate an aversion by CFIUS to have a court rule on the extent of its authority, and the case itself has opened a small crack into the heretofore less-than-transparent CFIUS process. It has also given foreign investors at least some ability to challenge the assumptions on which CFIUS decisions are made.

CFIUS had opposed the 2012 sale of companies developing four wind farms located in the state of Oregon to Ralls because of the proximity of the wind farms to US Navy restricted airspace. Based on this recommendation, the President concluded that the transaction posed a national security threat and issued an order prohibiting the transaction and requiring Ralls to divest itself of the project companies. Ralls and the company selling the wind farm sites had failed to initially file a notice with CFIUS. They only did so after closing the transaction, and after CFIUS informed Ralls that the US Defense Department intended to file a notice triggering CFIUS review if Ralls did not file first.

Ralls sued CFIUS, and in 2014 a federal appeals court, reversing a lower court's decision, ruled that the CFIUS process leading to the presidential order in the Ralls case violated Ralls' constitutional rights to due process, even though the Defense Production Act prohibits judicial review of presidential decisions in such cases.

Under the statute governing CFIUS national security reviews, the findings and actions taken by the President prohibiting transactions that threaten national security are explicitly not subject to judicial review. While noting that the law does, indeed, bar courts from reviewing 'final actions' the President takes in this regard, the appeals court said this did not extend to the reviewability of a constitutional claim challenging the process leading up to such presidential action. Nor did the court agree with the government that the process leading up to the President's decision in this case met the requirements of the due process clause. 'Due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence,' the court concluded. The appeals court remanded the case to the US District Court that had originally rejected most of Ralls' arguments. As part of the remand, the appeals court also directed the lower court to review the legality of a CFIUS order issued prior to the final presidential decision. That order, among other things, required Ralls to cease all access, construction and operations at the wind-farm sites, and remove all items stored there. It also prohibited Ralls from completing any sale of the project companies without first removing all items, including concrete foundations, from project sites, notifying CFIUS of the sale and giving CFIUS 10 business days to object to the sale. The case was sent back to the lower court and in November 2014 CFIUS handed over more than 3,000 pages of unclassified documents to the court for review by Ralls, withholding only a few classified documents. The lower court ordered CFIUS to permit Ralls to rebut the evidence on which CFIUS relied and then to issue a new recommendation to the President based on that analysis. The court also permitted Ralls to challenge the CFIUS orders made prior to the President's decision, which impacted, among other things, Ralls' access to the wind farm sites they had already purchased.

The terms of the agreement have not been made public. The court papers state that, in light of the settlement, it is not necessary for CFIUS to issue a new recommendation to the President in this matter. It also has been reported that the settlement permits Ralls to sell the wind farm properties to a company that had previously been rejected as a potential buyer by CFIUS. As such, the settlement can be viewed as a victory for both sides. CFIUS has avoided a court decision on whether it has the legal authority to issue orders prior to a presidential decision, as it did in Ralls. It also saves CFIUS from having to possibly reverse its earlier decision, something it has never done. For Ralls and Sany, the stigma of having its acquisition of a US business rejected by CFIUS has been partly erased and it has paved the way for other Chinese companies to challenge the basis on which a CFIUS recommendation is made. In the long term, this case could change the way CFIUS explains its decisions and concerns to parties and what evidence it has to support its views, enabling parties to challenge such conclusions. It could also have an impact on CFIUS's leverage in forcing parties to accept mitigation agreements because CFIUS will more likely be required to explain on what basis such measures are needed.

Aixtron SE

The most significant event in this area over the past year was the December 2016 decision by President Obama to block the acquisition of the US subsidiaries of German semiconductor-equipment supplier AIXTRON SE by Chinese investors, the latest US action to limit Chinese access to US semiconductor technology.

The investment was made through Grand Chip Investment GmbH, a German special purpose investment vehicle ultimately owned by Chinese investors. These include Fujian Grand Chip Investment Fund LP, a limited partnership organised under the laws of the People's Republic of China, as well as investors owned by the Chinese government. Based on the recommendation of CFIUS, the President issued an executive order blocking the US component of the transaction prior to closing, finding that there was 'credible evidence' that, by acquiring control of Aixtron's US subsidiaries, Fujian Grand and individual Chinese investors involved in the transaction 'might take action that threatens to impair the national security of the United States.' The President ordered the parties to 'fully and permanently abandon the proposed acquisition of Aixtron' within 30 days, and authorised the US Attorney General 'to take any steps necessary to enforce this order.'

Aixtron SE a global company headquartered in Germany, designs and manufactures equipment for the semiconductor industry, including systems used to build compound semiconductor materials used in a range of high-tech industries. Its products include Metal-Organic

Chemical Vapor Deposition systems, which have both civilian and military uses. These systems are also the focus of research and development activities by the US Army.

In its press release announcing the President's decision, the US Treasury Department, which chairs CFIUS, focused on the fact that some members of the consortium were owned by the Chinese government, as well as the potential use of Aixtron's technology for military purposes. 'The national security risk posed by the transaction relates, among other things, to the military applications of the overall technical body of knowledge and experience of Aixtron, a producer and innovator of semiconductor manufacturing equipment and technology, and the contribution of Aixtron's US business to that body of knowledge and experience,' the Treasury noted in its statement. 'The proposed acquisition was to have been funded in part by Sino IC Leasing Co., Ltd., a financing provider belonging to China IC Industry Investment Fund, a Chinese government-supported industrial investment fund established to promote the development of China's integrated circuit industry.'

The Aixtron decision is significant for a number of reasons.

First, it represents only the third time that the President has issued an order prohibiting a foreign acquisition of a US business, based on a recommendation by CFIUS. As noted elsewhere in this chapter, in 2012 President Obama ordered the Ralls Corp, a US corporation owned by two Chinese nationals affiliated with China's Sany group, to divest its interest in US companies developing four wind farms located in the state of Oregon because of the proximity of the wind farms to US Navy restricted airspace. In 1990, President George H W.Bush ordered the China National Aero-Technology Import and Export Corporation (CATIC) to divest its interest in MAMCO Manufacturing, Inc, a Washington corporation that manufactured parts for commercial aircraft. CATIC performed export and import functions for the PRC Ministry of Aviation.

Second, in all three blocked transactions, the acquirers were Chinese, another sign of the overlay of geopolitical issues and CFIUS national security determinations. While many additional CFIUS filings have been withdrawn by the parties due to the opposition of CFIUS, the above three involving China are the only ones that have resulted in presidential orders.

Third, the decision underscores the broad view CFIUS has of its jurisdictional reach. The Aixtron transaction was a deal between a Chinese investor and a German company. CFIUS may assert jurisdiction over the acquisition of one foreign company by another, but only to the extent there is a US business involved in the transaction, such as a US subsidiary or branch office. The regulations governing CFIUS define a US business as 'any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce.' In the executive order, President Obama took a very broad view of what this means in the *Aixtron* case, describing the relevant US business as follows: 'The U.S. business of Aixtron consists of AIXTRON, Inc., a California corporation, the equity interests of AIXTRON, Inc., and any asset of Aixtron or AIXTRON, Inc. used in, or owned for the use in or benefit of, the activities in interstate commerce in the United States of AIXTRON, Inc., including without limitation any interest in any patents issued by, and any interest in any patent applications pending with, the United States Patent and Trademark Office (collectively, Aixtron US).'

Finally, there is more at play here than just the usual US-China tensions. Chinese investments in US high-tech industries, especially in the semiconductor sector, have become a lightning rod issue in the United States recently, not only at CFIUS but also in the US Congress and in US political discourse. This has been both a response to a highly publicised Chinese plan to subsidise its semiconductor industry up to $20 billion, and to the potential military uses of semiconductor technology. In addition to the *Aixtron* transaction, a number of attempted Chinese investments in the US semiconductor sector have failed due to concerns raised at CFIUS or to the reluctance of US companies to accept Chinese bids due to fears of rejection of the transactions by CFIUS.

This is a complex issue for the US government and US companies doing business in China, as China has become a major market for semiconductors used in a range of electronic industries involving US companies. It remains to be seen how all of this will play out under the presidential administration of Donald Trump, who has been a vocal critic of China in terms of both national security and international trade.

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Uzbekistan

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

The general policy of the government with respect to foreign investment is aimed at promotion of the Uzbek economy and its integration into the world economic system by stimulation of inflow of foreign investments and efficient use of foreign resources, modern technologies, and managerial experience. Uzbek law does not discriminate against foreign investors in any manner and in accordance with the above policy, the government is in fact inclined to be more favourable to investors from abroad. Relevant investment programmes setting short-term goals of the investment policy are annually approved by the decree of the President of Uzbekistan.

Until very recently, the government had taken numerous, but timid steps to attract foreign investment; trying to create a favourable investment environment by applying the regulation aimed at protection of rights and interests of foreign investors, providing tax and customs benefits and privileges (depending on the type of activity and the amount of investment), establishing free economic zones and investment funds, and joining bilateral and multilateral international treaties. Despite these measures, however, issues related to repatriation of profits, ambiguous fiscal regulation, and clumsiness of intra-governmental procedures have significantly devalued the efforts.

There is a clear indication in recent presidential decrees, applied after the death of the country's first president, that the government is determined to decisively liberalise the legislation on foreign investments in all areas, including the sphere of foreign currency exchange and repatriation of profits.

It should be noted that Uzbek law does not provide the government with the right to question foreign investment transactions on national and public interest grounds. In practice, however, as the majority of 'strategic' objects are owned by the state, it is privatisation rules that will be applied. In particular cases, where privatisation rules are not applicable and while the government is dissatisfied with the transaction, it may occasionally reflect on the willingness of engaged governmental agencies to provide the necessary approvals.

In cases where the foreign investor seeks close cooperation with the government (a very common scenario owing to the degree of state involvement in the economy) special rules for examination of investment projects may be applied. Uzbek law provides for the following cases, when the examination becomes mandatory:

- the foreign investor would like to implement the project relying on any financial support of the government (funds, guarantee, etc);
- the foreign investor would like to request additional benefits and privileges;
- the foreign investor would like to establish cooperation with a state-controlled enterprise for implementing the project worth more than US$10 million;
- the foreign investor would like to implement the project for processing strategic resources (precious, ferrous and non-ferrous metals, hydrocarbons, coal and uranium) worth more than US$10 million; and
- the foreign investor would like to conclude a product-sharing agreement.

The examination has to be initiated by the relevant sector-specific regulator or the state-owned holding company overseeing the sector, which are also supposed to be the first point of contact for the foreign investor seeking the state support. The examination bodies include the State Tax Committee, the Ministry of Finance, the Ministry for Foreign Economic Affairs, and other state bodies depending on the nature of the investment project. The answers below do not cover the examination procedure in detail, being rather focused on more general cases, where state presence or support is limited or absent.

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

The following laws and by-laws regulate cross-border acquisitions and investment by foreign nationals into the country:

- Law No. 609-I on Foreign Investments;
- Law No. 611-I on Guarantees and Protective Measures of Foreign Investors' Rights;
- Law No. 719-I on Investment Activity;
- Law No. 110-I on Concessions;
- Law No. 312-II on Product Sharing Agreements;
- Law No. ZRU-319 on Competition;
- Law No. 425-XII on Destatisation and Privatisation;
- Regulation No. 110 on Development, Examination, and Approval of Documents for Investment Projects; and
- Regulation No. 180 on the Order of Execution and Performance of Investment Agreements.

As noted above, Uzbek law does not define the concept of national interest and there is no special legislation attached to it. The above laws cover the review of foreign investments in general cases, cases of privatisation, and cases where the government is involved in the investment project.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The scope of application of these laws is the regulation of various relations arising in the sphere of foreign investment activity. They describe the concept of foreign investment by listing the ways in which a foreign entity may operate within the territory of Uzbekistan, outline guarantees and measures of protection of foreign investors' rights, and define legal relations under concession and product-sharing agreements.

Foreign investors can make investments in Uzbek territory by:

- acquiring a participation interest in the charter fund and other property of legal entities established jointly with legal entities or citizens of Uzbekistan;
- incorporating legal entities;
- acquiring property, shares and other securities;
- investing in intellectual property rights, including copyrights, patents, trademarks, utility models, industrial samples, company names, and know-how as well as business reputation (goodwill);
- acquiring concessions including those for exploration, production, or use of natural resources;

- acquiring property rights in trade and service facilities, residential property with adjacent land plots as well as ownership and use rights in respect of land (including leases) and natural resources; and
- acquiring rights provided under product sharing agreements.

If the foreign investor invests in minority interests, it is also considered to be foreign investment by Uzbek law. If the foreign investor owns at least 30 per cent of shares or a participating interest in the charter fund of a company for US$150,000 and above then the company acquires the status of a 'company with foreign investment' and becomes eligible for various preferences, tax and customs benefits.

Under the Law on Destatisation and Privatisation there are 31 types of state-owned companies that can be privatised, which may be carried out only upon the issuance of the relevant presidential resolution. The list includes, among others, the following enterprises and relates to both local and foreign investors:

- primary industries, including fuel and energy, oil and gas, mining, well drilling, machine building, cotton processing;
- pharmaceutical and medico-biological drug production industries;
- telecommunication enterprises, including television, radio-receiving and radio-broadcasting centres, and their engineering structures;
- enterprises engaged in engineering, maintenance, installation, setting of fire-fighting automatic equipment, security, and fire alarm systems; and
- enterprises engaged in engineering, construction, maintenance, and operation of water-management and water-supply systems, rescue vessels, waterside structures and engineering oversight vessels.

The Law on Destatisation and Privatisation also lists the objects that cannot be privatised, including:

- land with mineral and water resources;
- air space;
- flora and fauna;
- cultural heritage sites;
- state budget funds;
- the Central Bank of Uzbekistan;
- enterprises that facilitate monetary circulation;
- military and security-related assets and enterprises;
- firearms and ammunition producers;
- nuclear research and development enterprises;
- some specialised producers of drugs and toxic chemicals;
- emergency response, civil protection and mobilisation facilities; and
- public roads and cemeteries.

Certain limitations apply to the investment of foreign entities in shares of companies operating in the telecommunications, finance, and insurance sectors.

4 How is a foreign investor or foreign investment defined in the applicable law?

By analogy with the definition of 'investor' set out in the Law on Investment Activity, a 'foreign investor' can be defined as a foreign entity carrying out investment of its own funds or attracting other investment resources into objects of investment facility.

There are four types of entities that can be qualified as a foreign investor in Uzbekistan. They include:

- foreign states and administrative or territorial bodies of foreign states;
- international organisations established in accordance with agreements or other treaties signed by states or ones being subject to international public law;
- legal entities, any other companies, organisations, or associations incorporated and acting in accordance with legal acts of foreign states; and
- foreign citizens and persons without citizenship who permanently live outside Uzbekistan.

The Law on Foreign Investments defines 'foreign investment' as all types of material and intangible values and rights to such values, including intellectual property rights and reinvestment, contributed by the foreign investor to legal entrepreneurial and non-entrepreneurial activity. Reinvestment is further defined as any income from the foreign investment earned in Uzbekistan and reinvested by foreign investors on Uzbek soil into legal entrepreneurial and non-entrepreneurial activity. It includes profit, interest, dividends, royalty, licence fees and agency fees, payments for technical assistance, maintenance and other forms of payments.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no separate definitions of either an SOE or SWF set out in legislation. There is, however, a definition of foreign state financial organisations (FSFOs). FSFOs carry out financing or co-financing of investment projects in Uzbekistan. The definition of FSFOs thus covers SWFs. There is not much specific regulation for investments made by SOEs or SWFs, except for minor procedural differences in the above-mentioned examination procedure for FSFOs, including SWFs, as suggested.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The main authority that generally reviews all mergers and acquisitions irrespectively of their substantial content, but based on set competition law thresholds, is the State Committee for Privatisation, De-monopolisation and Development of Competition (the Competition Committee). As stated above, Uzbek law does not generally provide for the procedure for review of transactions on national interests grounds, except in the case of privatisation or substantial government involvement. In such cases, it is the Cabinet of Ministers and the President who take national interests into consideration, while making the final decision on implementation of the project.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

After reviewing documents and information submitted along with the clearance application, the Competition Committee makes its decision and has much discretion within the scope of its competence. Generally, while reviewing the Competition Committee relies only upon those economic and non-economic factors that relate directly to the relevant market competition environment.

On the other hand, when decisions on privatisation are taken or the investment project examination is carried out as described above, a wide variety of considerations may be taken into account, including national or public interest ones. All involved state bodies generally act within their powers and their discretion is limited by specific tasks (fiscal policy, economic assessment, etc). When, however, the final decision is taken by the Cabinet of Ministers or the presidential administration, more discretion is exercised and additional factors may be considered, including national interest.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Some specific thresholds trigger mandatory 'merger control' filing to the Competition Committee in accordance with the Law on Competition. The following thresholds are applied both to foreign and local companies:

- when an acquisition of a new interest or an increase in an existing participating interest or shares passes the following thresholds:
  - for joint stock companies – 35 per cent, 50 per cent and 75 per cent; and
  - for limited and additional liability companies – 50 per cent and 66 per cent;
- if any party to the transaction holds a dominant position (a 50 per cent or larger market share) in the relevant commodity or financial market;
- for companies participating in transaction and carrying out commodity market related activity: their aggregate book value of assets

or net sales for the preceding year exceeds 100,000 times of the minimum monthly wage; or
- if the companies participating in the transaction and carrying out financial market-related activity have an aggregate book value of assets exceeding the threshold set out in legislation (ie, US$450 million for banks, US$25 million for insurance companies, US$3 million for lease companies and US$400,000 for non-banking credit organisations).

Specific approvals may be necessary in particular industries. Thus, in the banking sector, the consent of the Central Bank is required if more than 20 per cent of the shares of a bank are bought by a company or affiliated companies.

When the government is involved, the examination of the investment project is triggered in cases given in question 1.

9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?

In order to obtain clearance for a merger or acquisition based on the threshold above and irrespective of the national interest element, a filing has to be prepared and submitted to the Competition Committee, including the application and a set of required documents. After reviewing the filing, the Competition Committee issues the decision, which is then sent to the applicant. There is no filing fee.

In order to be awarded a concession or a product sharing agreement, the investor shall go through the bidding process and examination procedure described above. The project documents reviewed by all involved state agencies are in this case submitted by the responsible state body – a partner of the foreign investor – to the relevant department of the cabinet of ministers. There is no filing fee in this case either.

10 Which party is responsible for securing approval?

The foreign investor is responsible for securing the approval of the Competition Committee. In other cases described above, the involved state agency or state-owned company will share the responsibility with the investor.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or ‘fast-track’ options?

The review process related to mergers and acquisitions in general takes 10 working days from the date of receipt of the application with a full package of documents by the Competition Committee. If the Competition Committee has any reason to believe that the transaction will or may lead to restriction of competition, including through occurrence or strengthening of a dominant position on the commodity or financial market then the deadline for the application review may be extended, but not longer than for one month from the date of submission. Uzbek law does not provide for any exemptions or ‘fast-track’ options for such review process.

The term of examination of projects involving the government may vary significantly, depending on the complexity of the project and the number of involved state institutions. It is generally assumed that the procedure may take at least three months.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

The review must, in any case, be completed after receipt of the Competition Committee’s approval and any other approvals as may be required in the case of government involvement. Failure to obtain the clearance prior to finalising the transaction, failure to execute orders of the Competition Committee, or provision of false or misleading information may lead to the imposition of fines on involved parties’ executive officers of up to 10 times of the minimum monthly wage. Moreover, the Competition Committee is entitled to make specific requests, including, where required, reversal of the merger or setting particular limits that must be adhered to.

Update and trends

As noted, there is a strong trend towards the liberalisation of all rules applicable to foreign investors. There is hope that more transparent and simple rules will help to ensure a stable inflow of foreign capital to Uzbekistan. The recently elected government has declared its intention to simplify the procedure for repatriation of profits and procedural rules for clearing the foreign investment projects implemented jointly with Uzbek state bodies and state-owned companies. Although this intention has yet to be formalised, it is not expected to take long.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Uzbek law does not contain any specific provisions on obtaining formal or informal guidance on filing; however, the foreign investor may file an official request for clarification on applicable rules from the Competition Committee or other involved bodies. The state bodies are generally obliged to provide the response within 30 days of getting the request.

The Competition Committee does not usually expect pre-filing dialogue or meetings.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Uzbek law does not provide for specific procedures for expediting clearance.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

If a closed transaction was not subject to clearance or review then there are no post-closing or retroactive powers of the Competition Committee or other bodies to review, challenge or unwind such transaction.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

With respect to the mergers and acquisitions clearance, the substantive test is whether the transaction will lead to restriction of competition, including through occurrence or strengthening of a dominant position on the commodity or financial market. There is, however, an exception to this test. Uzbek law allows the Competition Committee to approve transactions that may lead to restriction of competition if the parties to such a transaction can prove that the transaction will provide considerable tangible benefits for consumers.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Consultation and cooperation of Uzbek authorities with officials in other countries is not regulated in detail by Uzbek law. There is, however, a cooperation agreement signed by the national competition agencies of member states of the Commonwealth of Independent States - the Intergovernmental Treaty on the Implementation of a Coordinated Competition Policy of 1993. Pursuant to the treaty, the agencies are expected to consult and cooperate when intergovernmental cases are considered. There is, however, not much evidence that such cooperation has developed.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Third parties are not involved in the review process of the Competition Committee.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the clearance is obtained in accordance with the prescribed procedure then the authorities do not have the power to prohibit or otherwise interfere with the transaction.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

The Competition Committee may issue conditional approval of a transaction even if such a transaction may lead to a negative effect on the competitive environment in Uzbekistan. In its decision the Competition Committee lists conditions and requirements (together with deadlines for their implementation), which shall be complied with by the investor in case a preliminary approved transaction leads to the emergence or strengthening of a dominant position in the financial or commodity market or restriction of competition.

21 Can a negative decision be challenged?

Yes, a negative decision of the Competition Committee can be challenged in the economic court.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

If documents submitted as part of the clearance application package contain confidential information, such confidential information cannot be withheld by the investor. The investor shall provide the Competition Committee with an exhaustive list of confidential information contained in the documents comprising the application package. Such confidential information shall be protected by the Competition Committee. Officials of the Competition Committee are liable for damages caused by the disclosure of confidential information.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The cases when foreign investment transactions are reviewed by state authorities are not publicly disclosed or discussed. Grounds for relevant decisions in particular cases cannot, therefore, be objectively evaluated.

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Law Business Research

Foreign Investment Review
ISSN 2048-4666

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

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