European FDI screening rules

Top 20 Q&A for non-EU investment in Europe

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Preface

Cross-border M&A is one of the most attractive ways to achieve growth in international markets. Most companies feel the worst is behind us and it is time to look forward. However, as governments introduced a wide range of rules impacting investments in multiple sectors, the approach to cross-border transactions has changed even for businesses not traditionally viewed as regulated. If a transaction falls within the scope of a particular regime, the screening process might involve extensive disclosure requirements that can impact deal timetables and create barriers to completion. Executing an acquisition successfully in 2021 and the years to come will require skillful and agile navigation of a complex and evolving legal landscape by all dealmakers.

This guide was developed by EY lawyers of France, Germany, Italy, Spain and the UK and provides a snapshot of the foreign direct investment (FDI) screening mechanism across these five jurisdictions. This document is intended to assist international and, in particular, Chinese clients on their investments in the European market. It has been updated in line with European legislation and according to each country's internal rules. The purpose of this document is to highlight the differences in regulation introduced on an ad hoc basis by each Member State in terms of sectors of strategic importance, type of investment, notification procedure, and remedies or undertakings that their governments might be willing to accept.

FDI screening has become an important step in planning cross-border transactions. An ever-increasing number of jurisdictions are moving among the adoption of FDI screening regulations. Moreover, the ongoing COVID-19 pandemic has increased the need for such rules, leading many jurisdictions to complement their existing regimes or adopt measures specifically in light of COVID-19. The main objective of such rules is to safeguard key operations and assets in each respective jurisdiction, which is why FDI rules are constantly changing.

Focus on European Union (EU) regulation

The Regulation (EU) 452/2019, applicable from October 2020, establishes a framework for FDI screening within the EU. The scope of the regulation is broad, as it is intended to apply to all sectors of the economy whenever the investment is detrimental to public policy or public security.

The regulation notably allows Member States to maintain, modify or adopt filtering mechanisms that must be transparent and not discriminate between non-EU jurisdictions (the origin of foreign investors should not matter) and observe strict confidentiality of the information collected in the course of screening. It also obliges Member States to notify the European Commission of their screening mechanisms and promotes cooperation between Member States (e.g., annual reporting obligation by the Member States; possibility for the European Commission to issue opinions and for Member States to issue comments on investments made in another Member State). However, the final decision to accept the investment always rests with the Member State in which it is made.

The content is based on information current as of July 2021. EY will continue to update this overview of the screening regimes of five jurisdictions on a regular basis, looking at new developments.

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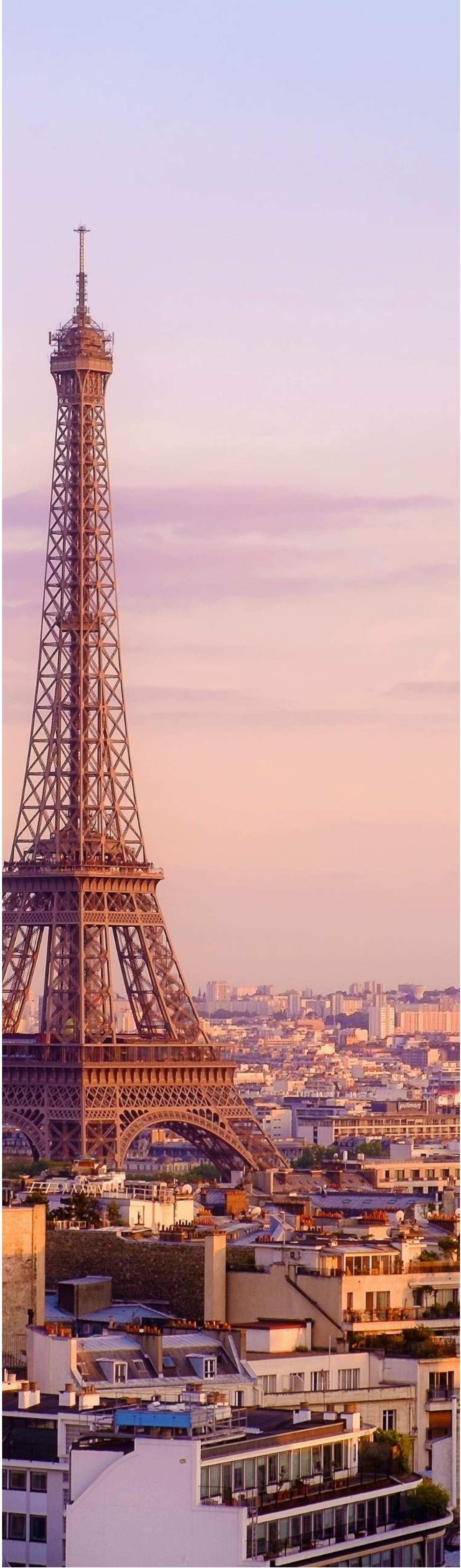
Focus on France



Introduction

FDI carried out in France remains free as a matter of principle. However, certain transactions in limited sensitive sectors may be subject to careful screening by the French authorities. Unlike merger control, FDI in France is generally not focused on the impact on the market but rather on the ownership and voting rights threshold.

The current FDI regulation results from the PACTE Law (Action Plan for Business Growth and Transformation) of 22 May 2019 (completed by a decree of 31 December 2019), which mainly strengthened the powers of the Minister of the Economy and Finance to impose sanctions. Prior reform has extended the reach of FDI to new sectors deemed ‘sensitive’ for French national interest.

In addition, because of the COVID-19 crisis, France has taken measures to extend its control over FDI.

Q&A

1.

What is the current regulatory framework for FDI?

The current regulatory framework for FDI in France is based on Articles L. 151-1 et seq. and Articles R. 151-1 et seq. of the French Monetary and Financial Code as amended by the PACTE Law of 22 May 2019, the decrees of 31 December 2019 and 22 July 2020, and the 27 April 2020 order.

2.

Have there been any changes or updates to the screening rules during the pandemic?

Moreover, a decree dated 22 July 2020 temporarily lowered the threshold for the authorization procedure from 25% to 10% for listed companies until 31 December 2021 (for further details, please refer to question 6).

3.

Which sectors do the French FDI rules cover?

The French FDI control regime covers 'sensitive sectors' such as:

- Military activities relating to weapons, munitions, explosives, cryptology or depositary of defense secrets.
- Activities relating to specific facilities and infrastructure, goods or services of an essential nature for the preservation of national interests in economic sectors such as energy, water, transport, space, electronic communications, public health, agriculture and food, publishing and media.
- R&D activities relating to 'critical' technologies such as artificial intelligence or biotechnology (new).

4.

Do the French rules have a limited duration?

Except for the measures resulting from the decree dated 22 July 2020 (threshold for listed companies – for further details, please refer to question 6), which will expire on 31 December 2021 (unless further extended), the French FDI rules are not limited in terms of time.

5.

Is a further extension foreseeable?

As of 10 June 2021, we are not aware of any plans by the French Government to extend the COVID-19 temporary regime beyond 31 December 2021.

6.

Do the rules apply to investments from any foreign country?

Yes, but to answer this question more precisely, we must first define an investment under French law since there are some differences between European Economic Area (EEA) and non-EEA investors.

Article R. 151-2 of the French Monetary and Financial Code defines investments as follows:

- The acquisition of 'control' of a French entity, which will be the case if the foreign investor (L 233-3 of the French Commerce Code):
  - Directly or indirectly holds a fraction of the capital by giving it a majority of the voting rights in the general meetings of that company.
  - Alone has a majority of the voting rights in that company under an agreement concluded with other partners or shareholders that are not contrary to the interests of the company.
  - Determines in fact, by the voting rights it holds, the decisions in the general meetings of that company.
  - Is a partner or shareholder of that company and has the power to appoint or dismiss the majority of the members of the administrative, management or supervisory bodies of that company.
- The acquisition, in whole or in part, of a French branch of the business.
- The crossing of the threshold of 25% of ownership (10% for listed companies until 31 December 2021) – directly or indirectly, alone or in 'concert' – of the voting rights in a French entity (only applicable to non-EU/EEA investors).

Article R. 151-1 of the French Monetary and Financial Code further provides that the French FDI regulation applies to investments in France made by:

- Any individual of foreign nationality.
- Any individual of French nationality who is not domiciled in France.
- Any entity governed by foreign law.
- Any entity governed by French law that is controlled by one or more of the above-mentioned persons or entities.

Please note that EU or EEA investors may benefit from a lighter FDI regime where certain transactions would be excluded from the French FDI screening.

Consideration should be given to the concept of 'chain of control' whereby any entity or individual in a chain of control is also considered a foreign investor.

The FDI regulation applies to direct and indirect foreign investment; therefore, there is no option for avoiding the FDI rules (through the indirectly owned intermediary structure) to the extent that the target is incorporated or located in France.

7.

What are the Government's powers to intervene in transactions?

The French Ministry of the Economy and Finance must give its authorization on the transfer of either a percentage of shares in the share capital of the French target entity, or all or part of a business operated by the French target entity to another entity not related to the investor and approved by the Minister.

8.

When should the transaction be notified?

The authorization (if needed) must be obtained before closing, and the lead time to obtain a decision from the French Ministry of the Economy and Finance must be taken into account (see question 10). Therefore, investors contemplating FDI should notify as early as possible since FDI regulation may, in addition to timing, impact the feasibility of their project. Professional legal advice in this respect is best practice at the start of the transaction life cycle (usually, this is part of the buy-side due diligence process). It is worth noting that the responsibility vests with the buyer (the seller is only bound by a disclosure obligation to the buyer).

9.

How should the notification be submitted?

An authorization request must be submitted electronically to the Treasury Department (la Direction Générale du Trésor) at the following email address:

IEFautorisations@dgtresor.gouv.fr

The file must also be sent in paper form to the following address:

Ministère de l'Économie et des Finances
Direction Générale du Trésor
Bureau Multicom 4 / Télédoc 554
139, rue de Bercy
75572 Paris cedex 12

10.

How long does it take the authority to make a decision?

Prior authorization is granted or denied between 30 and 75 business days from the date of receipt of the application.

The authorization is often subject to written commitments from the investor(s) (a proportionality test applies).

The absence of a response within the statutory deadline shall be deemed a rejection.

11.

Does the European Commission have decision-making power over investments in Member States?

No, the European regulation obliges the Member States to notify the Commission of their filtering mechanisms.

Member States can provide comments on investments made in another Member State.

Member States in which the investment is made decide whether to authorize an investment or not.

12.

What documents are required for the notification?

The documents required for the notification are listed on the website of the Ministry of the Economy and Finance (https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france/la-composition-de-votre-dossier-de-demande).
Information is required on:

- The investor.
- The target entity for the investment.
- The investment, with a description of the main terms of the transaction.

13.

What happens if a notification does not comply with the rules?

If a notification does not comply with applicable requirements, no decision-making process will be triggered, and the investor will be in the same position as if it had not notified the authorities at all.

Please also refer to question 14.

14.

What are the penalties for non-notification?

The French Minister of the Economy and Finance can send a formal injunction to the foreign investor.

Failure to comply with the prior authorization procedure may result in an injunction to either file an authorization request, cancel its investment at its cost or modify its investment. Such injunctions can be combined with a penalty payment of up to €50,000 per day.

The French Minister of the Economy and Finance can also decide to suspend the voting rights or prohibit the distribution of dividends or remunerations attached to the shares whose holding by a foreign investor was within the scope of the prior authorization procedure.

Failure to comply with the authorization exposes the offender to the following financial penalties (the highest of the following amounts – Article L. 151-3-2 of the French Monetary and Financial Code):

- Double the amount of the irregular investment.
- 10% of the turnover of the target company.
- €1 million for a natural person or €5 million for a legal entity.

Moreover, Article L. 151-4 of the French Monetary and Financial Code provides that agreements entered into in the absence of authorization are null and void.

Finally, criminal sanctions may be added according to Article L. 165-1 of the French Monetary and Financial Code (five years' imprisonment and a substantial fine).

15.

Are there any exemptions to the application of the rules for foreign investment?

Prior authorization shall not be applicable in the following cases:

- When the investment is made between entities of the same group (more than 50% of the capital or voting rights, directly or indirectly, by the same shareholder).
- When a foreign investor, directly or indirectly, alone or in concert, crosses the 25% voting right threshold in an entity in which it had already acquired control with an authorization already granted.
- When a foreign investor, alone or in concert, acquires control, directly or indirectly, within the meaning of Article L.233-3 of the French Commercial Code, of an entity in which it had already exceeded the 25% voting right threshold with an authorization already issued (if the acquisition has been notified in advance to the Minister of the Economy and Finance). However, no ownership threshold applies if the target is a French branch.

16.

Are the rules applicable when the company's participation in the mentioned sectors is minimal?

Only investments exceeding 25% of the share capital are concerned (10% for listed companies until 31 December 2021).

However, Article R. 151-2 of the French Monetary and Financial Code also refers to the acquisition of control within the meaning of Article L. 233-3 of the French Commercial Code. This Article provides for special cases.

An extensive study of each investment is therefore necessary.

17.

Were there any cases of special powers enforcement involving Chinese companies in 2021?

Not applicable or not known.

18.

Were there any vetoes in 2021?

Not in 2021. In 2020, the French Minister of the Economy and Finance opposed the acquisition of a French supermarket chain by Canadian multinational operator of convenience stores and the takeover of a global manufacturer of electro-optic solutions by a US electronics and engineering company.

19.

What legal remedies are activated in the case of veto or imposition of prescriptions or conditions?

If the Minister of the Economy and Finance has reservations about a transaction, an attempt can be made to resolve these through written commitments by the parties involved or by accepting conditions on the parties involved. This is a common practice.

An appeal may be made to the administrative judge.

20.

Besides the legal remedies, are there any practical tips for mitigating the impacts of FDI screening rules?

- Do accurate due diligence based on of a strong understanding of the target market
- Sellers own that information. They might not be fully aware of the regulation (for example, if they acquired the target at a time when the regulation did not exist). Overall compliance responsibility will rest with the buyer. EY can provide support in preparing a specific tailor-made questionnaire to send and discuss with the seller and their counsel so that both parties have accurate data to predict how the regulation is likely to apply to the specifics of the potential transaction. Hence, a specific due diligence exercise is best practice.
- Introduce yourself to the French Treasury Department:

  Local authorities may invite Chinese investors to attend meetings to allow a better understanding of the investors' intentions post-acquisition. We encourage attendance in order to build trust with French authorities (the Ministry of Defense, for example). Such a meeting can also accelerate the process and give confidence in how the authorities are applying the regulation to the target's activities (for example, there may be a technical analysis that depends on the content of certain contracts that may be classified). Other French ministries may also be involved in the analysis, and their representatives may attend the meeting. Such meetings will also facilitate follow-up inquiries by the investor's counsel with the same authorities.
- Ask the administration for a prior opinion on an investment project (off the record or on a non-name basis).
- Hire a lawyer who is experienced in negotiating written commitments with French authorities.
- In the case of a French entity that is only part of the targeted assets, envisaging carving out the French entity from the acquisition perimeter – as the case may be – to deal first with the French FDI regulation applicable to that entity.

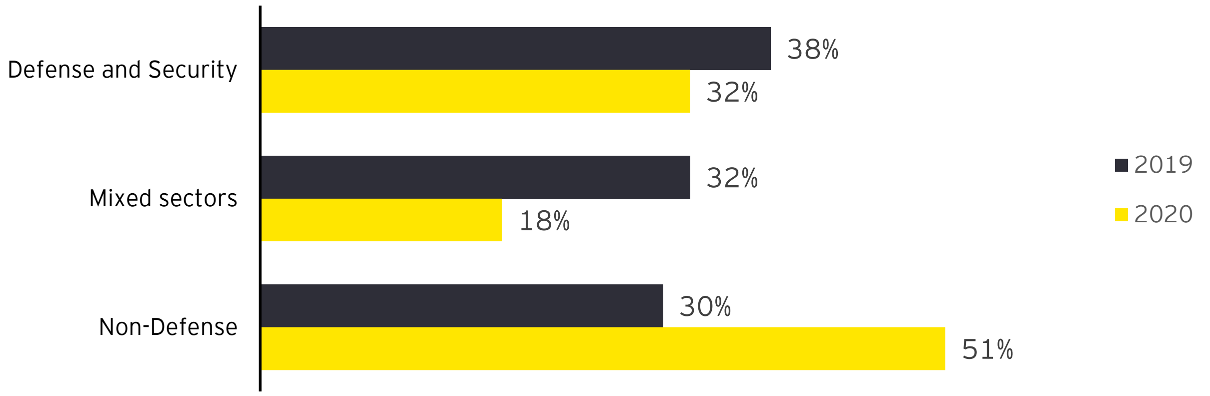
Appendix

How many notifications did the Government receive in 2019 (before COVID-19) and how many in 2020 (during the pandemic)?

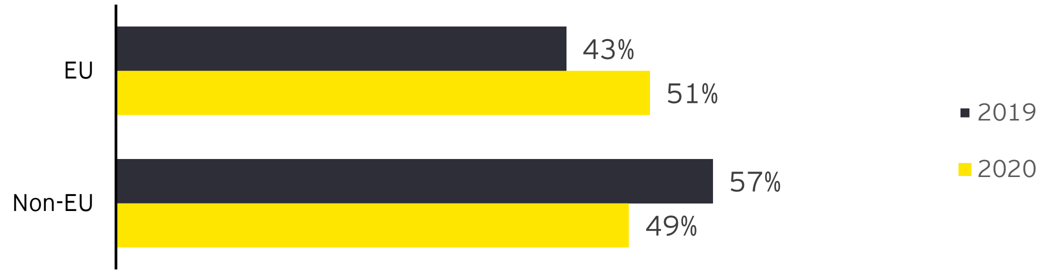
During 2019, FDI represented 1,469 transactions. 216 transactions were examined under the regulations governing the control of FDI in France.

In 2020, 275 transactions were reviewed under the regulations governing the control of FDI in France.

Main sectors impacted by FDI authorizations



Origin of the main authorised ultimate investors



Source: French Economic and Finance Ministry website

Focus on Germany

Introduction

On 1 May 2021, the 17th revision of the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung) entered into force.

The revision significantly expands the scope of the German FDI control regime, particularly concerning undertakings operating in the high-tech sector.

The revision reflects the tendency, which has been observed for some time, to constantly expand the scope of the German FDI control regime and tighten the assessment. In the past year alone, the German legislator has initiated several amendments in connection with the implementation of European law requirements and the context of the COVID-19 pandemic.

Q&A

1.

What is the current regulatory framework for FDI?

The regulatory framework of the German FDI control regime consists of the Foreign Trade and Payments Act (Außenwirtschaftsgesetz) and the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung).

2.

Have there been any changes or updates to the screening rules during the pandemic?

The COVID-19 pandemic has resulted in closer scrutiny of the medical R&D market and the wider health sector.

3.

Which sectors do the German FDI rules cover?

The German FDI control regime distinguishes between a sector-specific investment review and a general (cross-sector) investment review.

The sector-specific investment review is triggered by the acquisition of German undertakings active in particularly sensitive sectors, such as developing or manufacturing listed military technology and equipment, by investors from outside Germany.

The sector-specific investment review applies if, as a result of a transaction, voting rights that are held directly or indirectly by an acquirer amount to 10%.

Any other acquisitions of voting rights meeting certain thresholds in German undertakings by non-EU/EFTA investors are subject to the cross-sector investment review according to the following:

- For investments into critical infrastructures (e.g., operators of critical infrastructure, such as energy, information technology, telecommunications, transportation, health care, water, food and finance), the threshold is 10% of the voting rights.
- For investments in undertakings active in other sectors (such as pandemic-related health care sectors and critical technology-related sectors such as artificial intelligence systems, automated or autonomous driving and flying, or industrial robots), the threshold is 20% of voting rights.
- For investments in undertakings not active in the aforementioned sensitive sectors, the threshold is 25% of voting rights.

German FDI control is not limited to the acquisition of voting rights but applies equally to the acquisition of assets. The acquisition of control or management rights may also trigger the applicability of a review procedure (in particular, additional board seats, veto rights in strategic business or personnel decisions, and access to certain information).

4.

Do the German rules have a limited duration?

No, they are applicable for an unlimited period.

5.

Is a further extension foreseeable?

The German legislator has fundamentally revised the German FDI control regime several times in recent years. Further changes are not excluded.

6.

Do the rules apply to investments from any foreign country?

The sector-specific investment review applies to acquisitions by any foreign investor. The cross-sector investment review only applies to acquisitions by non-EU/EFTA investors.

7.

What are the Government's powers to intervene in transactions?

Where transactions have to be notified (see question 8.) to the Federal Ministry of Economic Affairs (FMEA), it is up to the FMEA to assess and decide whether the transaction can be cleared (with or without commitments) or whether it needs to be prohibited. However, for certain transactions for which there is no obligation to report, the FMEA may open and examine ex officio an assessment (see question 8). Here, too, it can then demand commitments in the event of concerns or even prohibit a transaction. This may even mean that transactions that have already been implemented have to be reversed.

8.

When should the transaction be notified?

A transaction that is subject to the sector-specific investment review or the cross-sectoral review (if the target can be allocated to one of the first two bullets described in question 3) must be notified without undue delay (ohne schuldhaftes Zögern) following the signing of the respective agreement, but in any case, prior to closing, to the FMEA (Failure Modes and Effects Analysis).

This obligation not only exists for the first acquisition of voting rights of up to 10% or 20% respectively but also if additional voting rights are acquired that lead to total voting rights of 20%, 25%, 40%, 50% or 75%.

Other transactions may be reviewed ex officio, normally for a period of five years following the signing of the purchase agreement. Therefore, a voluntary notification may be advisable to achieve legal certainty swiftly.

9.

How should the notification be submitted?

Notifications must be made in writing or electronically. The type and scope of information to be provided depends on the review procedure.

10.

How long does it take the authority to make a decision?

The process timeline depends on the respective procedure, and such procedures can last between two and six months. This may be prolonged or interrupted by requests for additional information or ongoing settlement negotiations.

11.

Does the European Commission have decision-making power over investments in Member States?

No.

12.

What documents are required for the notification?

The type and scope of information and documents to be provided depend on the review procedure. Notifications must include, at the minimum, basic information on the planned acquisition, the (direct and indirect) acquirer, the domestic undertaking that is the target of the acquisition and the respective fields of business. The notification must be supplemented with further information once a review procedure is initiated. All information and documents have to be submitted in German.

13.

What happens if the notification does not comply with the rules?

If a notification does not comply with applicable requirements, it will most likely not trigger the proceedings, and no decision-making process will be triggered.

14.

What are the penalties for non-notification?

If a notification is mandatory or the FMEA has ex officio opened proceedings, the parties are not allowed to implement the respective transaction before the FMEA has cleared the transaction (the standstill obligation). Infringements of the standstill obligation can, in some cases, lead to imprisonment of natural persons and to substantial fines.

15.

Are there any exemptions to the application of the rules for foreign investments?

Not applicable.

16.

Are the rules applicable when the company's participation in the mentioned sectors is minimal?

There are no de minimis exemptions (i.e., transactions do not have to meet any minimum turnover or market share thresholds).

17.

Were there any cases of special powers enforcement involving Chinese companies in 2021?

Not applicable or not known.

18.

Were there any vetoes in 2021?

Not applicable or not known.

19.

What legal remedies are activated in the case of veto or imposition of prescriptions or conditions?

If the FMEA has reservations about a transaction, an attempt can be made to resolve these through written commitments by the parties involved or by accepting conditions on the parties involved. This is regularly done within the framework of a public law agreement that has to be negotiated with the FMEA.

Orders or prohibitions issued by the FMEA are administrative acts against which legal remedies provided by the Rules of Administrative Courts (Verwaltungsgerichtsordnung) are available.

20.

Besides the legal remedies, are there any practical tips for mitigating the impacts of FDI screening rules?

Early provision of all necessary information is encouraged. A review procedure may be prolonged or interrupted by requests for additional information or documents.

Focus on Italy

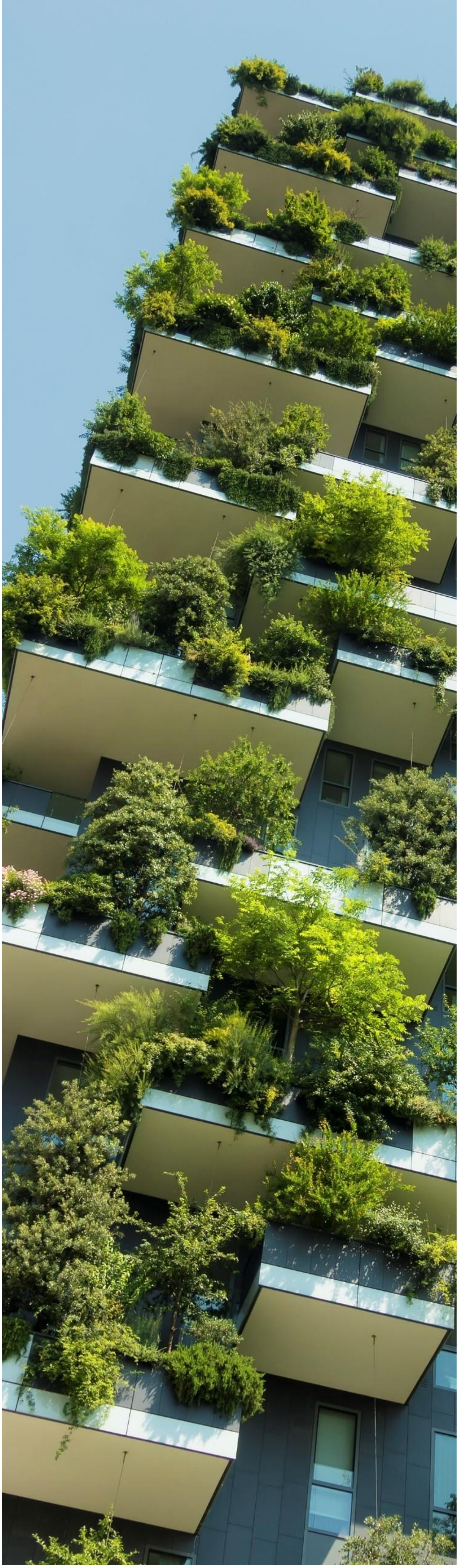
Introduction

With the privatization of public undertakings, the Italian legislator issued the Decree-Law 332/1994, also known as ‘golden share’ legislation. It provided the state with certain shareholdings with special powers and enabled the exercise of special prerogatives capable of influencing the decisions of the companies.

These rules were incompatible with the principles of free movement of capital enshrined in the EU Treaties, as they were seen as a form of dissuasion of investment from other Member States. Italy was therefore invited by the European Court of Justice to introduce clearer rules allowing investors an ex-ante assessment.

By means of Decree-Law No. 21/2012, Italy enacted an innovative regulation concerning the state's powers of intervention in operations involving companies active in the strategic sectors (defense and national security, communications, energy and transport). This legislation was adopted with the declared intention of rationalizing and limiting the scope and criteria for exercising state powers. With the new regulations, the principle of the golden share was replaced by the principle of ‘golden power,’ exercisable in the case of extraordinary operations concerning companies operating in the strategic sectors.

This document provides international and, in particular, Chinese investors with a snapshot of the regulations that have become an important step in planning cross-border transactions. Moreover, the ongoing COVID-19 pandemic has increased the need for such rules.



1994
D.L. 332/1994
Golden share.

2012
D.L. 21/2012:
Imposition of the golden power regulation.

2014
DPR 85/2014 e DPCM 108/2014:
Definition of strategic sectors.

DPR 35/2014 E DPR 86/2014:
Definition of the procedures for the exercise of the GP.

2019
REG UE 452/2019 E D.L. 105/2019
Broadening of the GP Interpretation.

2020
D.L. 23/2020 (Decreto Liquidità)
Widening of applicable sectors.

Source: DLA Piper Global Law Firm, "La disciplina dei Golden Powers e le recenti innovazioni introdotte dal D.L. Liquidità," 2020

Q&A

1.

What is the current regulatory framework for FDI?

Regulation (UE) 452/2019, presented by the European Commission on 13 September 2017, includes:

- A European framework for screening of FDI by Member States on the grounds of security or public order.
- A cooperation mechanism between Member States and the European Commission.
- Screening on the grounds of security or public order for cases in which FDI in Member States may affect projects of EU interest.

This law responds to concerns about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons.

The golden power has been in force in Italy since 2012, the year in which the adoption of Decree-Law No. 21/2012 introduced a new model of public control over economic sectors of strategic importance. This control model replaced the previous one based on the 'golden share' (Decree-Law No. 332/1994).

2.

Have there been any changes or updates to the screening rules during the pandemic?

Yes. The new driver is 'strategic relevance.' Activities considered to be of strategic importance have been widened by art. 15, 16 of the Decree-Law No. 23/2020, commonly known as 'Decreto Liquidità.'

3.

What sectors does the new regulation cover?

Before COVID-19

- Security and national defense.
- Energy, transport and communication.
- Broadband communication networks, 5g technology.
- Technology-intensive activities.

After COVID-19 (Decree-Law 23/2020)

- Broadening of critical infrastructure (data processing, health, etc.).
- Critical technologies (artificial intelligence, semiconductor, cybersecurity, biotechnologies, etc.).
- Free media activities.
- Finance and insurance.
- Food security.
- Steel and agri-food industry.

4.

Does the new regulation have a limited duration?

The Decree-Law No. 137/2020 (art. 10-ter) extended the scope of application of Decree-Law No. 23/2020 to 31 December 2021 due to the COVID-19 emergency.

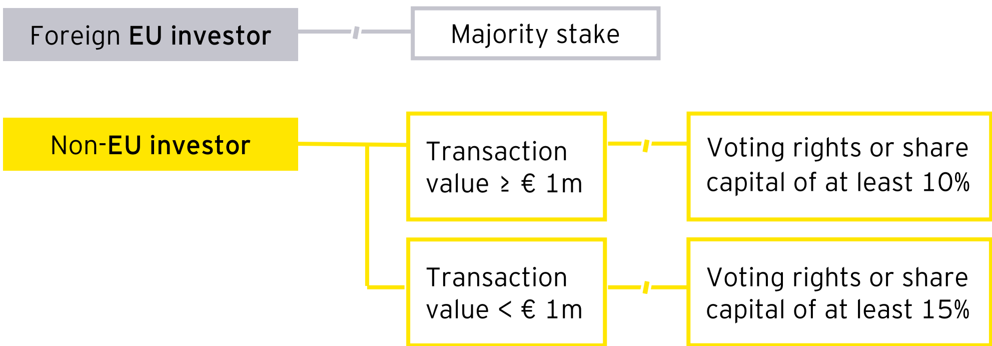
5.

Is a further extension foreseeable?

It could be. Indeed, the Minister of Economic Development recently declared that the Government is assessing the possibility of extending the scope of the golden power Decree-Law No. 21/2012 to sectors that are currently excluded from it but are clearly important for the national economic order, such as the automotive and steel industries.

6.

Do the rules apply to investments from any foreign country?



Source: DLA Piper Global Law Firm, "La disciplina dei Golden Powers e le recenti innovazioni introdotte dal D.L. Liquidità," 2020

7.

What are the Government's powers to intervene in transactions?

The Government can apply the following powers to strategic sectors with the aim of preserving Italian ownership structure:

- The power to set specific purchase conditions on shares.
- The authority to veto certain corporate resolutions.
- The option to object to the purchase of shares.
- The parties must provide the Government with an exhaustive statement of the operation to be implemented.

8.

When should the transaction be notified?

- If the acquisition involves a shareholding with voting rights that may compromise national interests.
- If internal activities concern the target company.

After COVID-19 (Decree-Law No. 23/2020):

- If the resolutions, deeds or transactions adopted by a company that holds assets or relations in the relevant sectors bring to changes in control.
- For acquisitions, for any reason, of controlling equity investments by extra-EU or intra-EU parties.
- If the acquisitions exceed the thresholds of 15%, 20%, 25% or 50%.
- Further distinctions for companies admitted or not to trading on regulated markets.

9.

How should the notification be submitted?

- With forms specifically provided by the Government.
- Within 10 days of the signing of a binding purchase agreement among the parties.

10.

How long does it take the authority to make a decision?

- From the date of receipt of the notification, the Presidency of the Council of Ministers has 45 days to exercise the powers granted to it.
- Once the term has expired without the Government having intervened, the resolution, transaction or deeds may be adopted or implemented.

11.

Does the European Commission have decision-making power over investments in Member States?

No, even under the new regulation, Member States will largely remain autonomous in their approach on how to deal with FDI. It is up to each Member State to adopt FDI rules or not, as well as making the final decision on whether FDI is permitted.

On 25 March 2020, the Commission issued guidance to Member States, calling upon them all to set up a fully-fledged screening mechanism, and ensuring a strong EU-wide approach to FDI screening at a time of public health crisis and related economic vulnerability. Member States will be required to inform the European Commission and other Member States of any ongoing FDI screening.

Each Member State may issue comments to the screening Member State if it determines that a particular FDI subject to screening in another Member State is likely to affect its security or public order.

12.

What documents are required for the notification?

The notification must be submitted by filling in the forms approved by decree of the Secretary General of the Presidency of the Council of Ministers of 18 February 2015 (accessible at the following link https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower-moduli/9297)

The forms must be completed with the information requested and attachment of, at the minimum, the following documentation:

Acquisition

- Industrial project pursued with the notified acquisition.
- Financial plan.
- Any other document that allows a full assessment of the acquisition and of possible prejudice to essential interests.

Internal activities

- Text of the resolution and all documents submitted to the corporate bodies for adoption.
- Any other document that allows a full assessment of the resolution or act to be adopted.
- The notification is signed by the legal representatives of the parties or by another person with a special power of attorney (notarized and – if applicable – apostilled).

All documents submitted must be in Italian (or in the original language with a translation into Italian).

The time limit for the exercise of special powers shall run from the date of receipt of the correct documents.

13.

What happens if a notification does not comply with the rules?

Notifications performed without complying with the rules are considered irregular and incomplete.

14.

What are the penalties for non-notification?

- In the event of a breach of the notification requirements, the Council of Ministers will be able to initiate proceedings ex officio.
- Extension of Consob's powers with the aim of protecting the national economic heritage.
- Financial administrative sanction.
- Obligation to restore the previous situation.
- Obligation to transfer the shareholding within one year in the case of opposition by the Government.
- Nullity of resolutions or acts; suspension of voting rights.

15.

Are there any exemptions to the application of the rules for foreign investment?

Article 4 of Decree-Law No. 108/2014 excludes intra-group transactions from the discipline of special powers.

The exercise of special powers, as set out in Decree-Law No. 21/2012, does not apply to the acts and transactions carried out within the same group, except those pointed out in question 6.

16.

Are the rules applicable when the company's participation in the mentioned sectors is minimal?

Yes. If the acquisition concerns the shares of a company admitted to trading on regulated markets, notification must be given if the purchaser would hold, as a result of the acquisition, a participation exceeding the threshold of 3%, and acquisitions exceeding the thresholds of 5%, 10%, 15%, 20%, 25% or 50% must subsequently be notified.

If the acquisition concerns the shares of a company not admitted to trading on regulated markets, notification must be given if the acquirer becomes, as a result of the acquisition, the owner of a holding exceeding the thresholds 5%, 10%, 20%, 25% or 50%.

17.

Were there any cases of special powers enforcement involving Chinese companies in 2021?

In March 2021, the Draghi Administration vetoed a transaction involving an Italian semiconductor company and a Chinese buyer. The semiconductor industry is a sensitive sector, and the stake acquired exceeded 50% – another condition for screening and possible exercise of special powers.

18.

Were there any vetoes in 2021?

Yes. Another transaction failed in April 2021 involving a Chinese company operating in the transport sector. Behind the negative result of the transaction was the Government's desire to keep the acquired company under Italian control, given its features and importance in terms of national strategic interest.

19.

What legal remedies are activated in the case of veto or imposition of prescriptions or conditions?

A legal remedy may be to appeal to the Regional Administrative Court (TAR) regarding the reasonableness and proportionality of powers pursuant to art. 3, 41, 42 of the Constitution. Other reasons can be found in international treaties and in the principle of free movement of capital. However, acting against the state is disadvantageous in many ways, and a successful outcome is not guaranteed.

20.

Besides the legal remedies, are there practical tips for mitigating the impacts of FDI screening rules?

- Conduct accurate due diligence based on a strong understanding of the target market:
- Sellers own that information. Sellers might not be fully aware of the regulation (for example, if they acquired the target at a time the regulation did not exist). Overall compliance responsibility will rest with the buyer. EY can help prepare a very specific tailor-made questionnaire to send and discuss with the seller and their counsel to ensure that both parties will have accurate data to predict how the regulation is likely to apply to the specifics of the contemplated transaction. Hence a specific due diligence exercise is highly encouraged.
- Introduce yourself to the Ministry of Economic Development (MISE):

  Local authorities may invite the investors, at their sole discretion, to attend meetings to allow a better understanding of the investors' intentions. We can only encourage such attendance in order to build trust with Italian authorities. Other Italian ministries may be involved as well in the analysis, and certain of their representatives may attend the meeting as well. Such meetings will also facilitate follow-up inquiries by the investor's counsel with the same authorities. Such a meeting could help the authorities understand the nature of the business (sometimes, there is a technical analysis that may depend on the content of certain contracts that may be classified, etc.).
- Seek notification from the seller:

  Although in Italy, the acquiring party is responsible for notification, this option may help mitigation in Italy if the seller is operating under Italian law.
- Consider other ways of investing in the target sector.

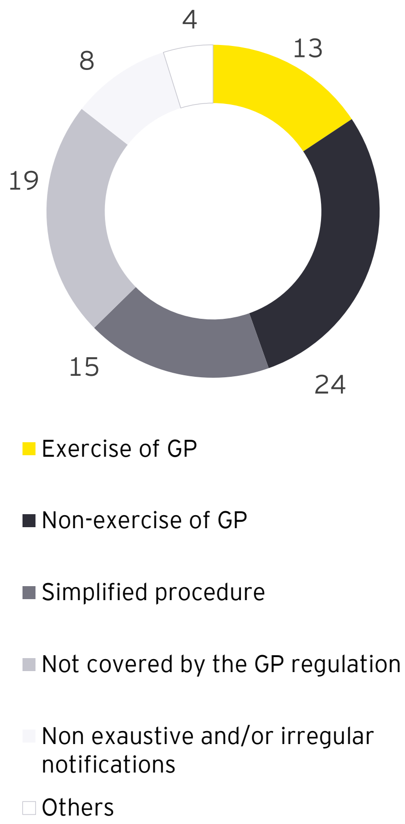
Appendix

How many notifications did the Government receive in 2019 (before COVID-19)?

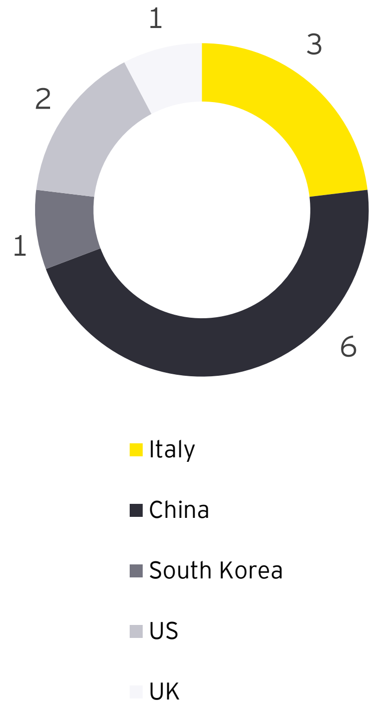
During 2019, the Presidency of the Council of Ministers received 83 notifications as shown below.

Sectors involved in the GP exercise

Outcome of the 83 notifications



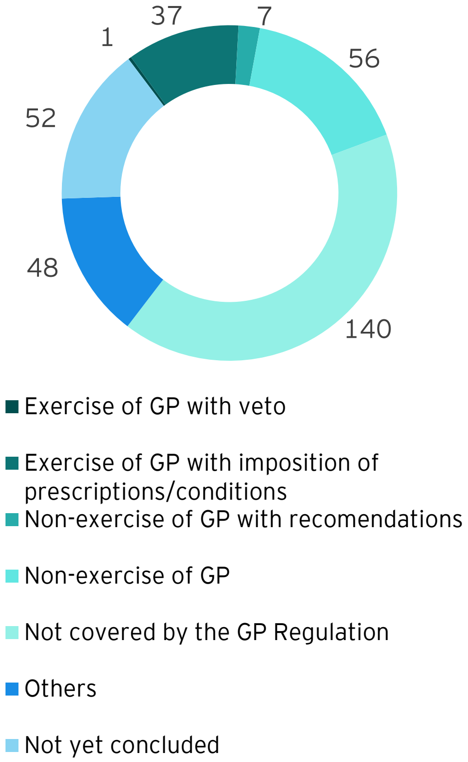
Country of origin of the 13 notifications subject to the exercise of GP

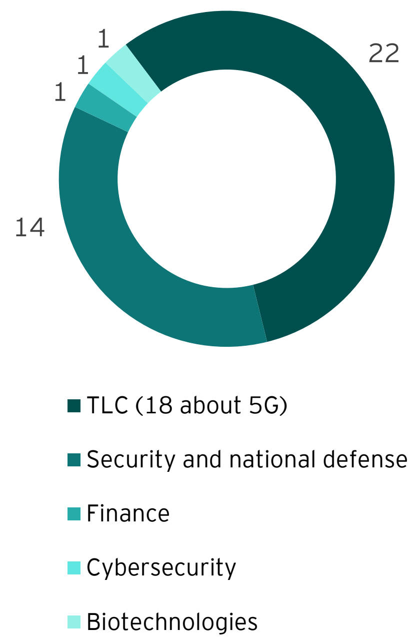


Source: 2019 Report on special powers activities presented to the Italian Parliament on June 2020.

Has data changed during the pandemic?

As the 2020 annual report on the golden power exercise has not yet been received by Parliament, there are no reliable sources of data. It seems that **341** transactions were notified in 2020, a much higher number than in 2019.





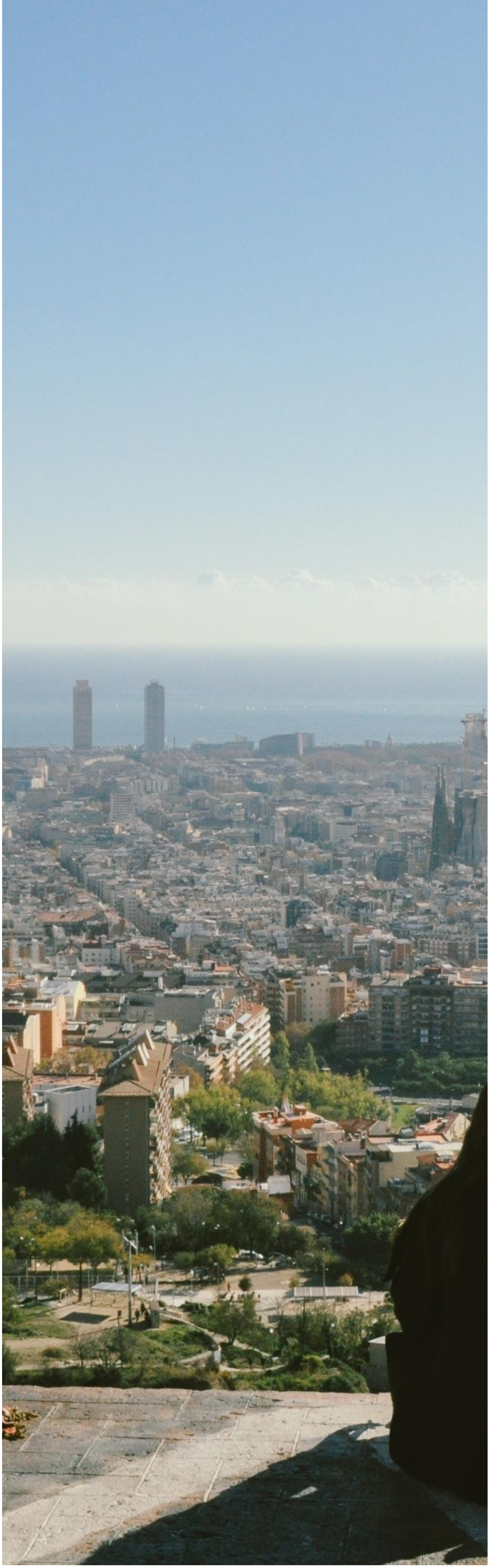
Source: Report on information policy for security presented to the Italian Parliament, 2020

Focus on Spain

Introduction

The declaration of a state of emergency by Royal Decree 436/2020 has had a very important impact on investment in Spain. The most significant was the suspension of the system of deregulation of FDI in Spain, implemented by Royal Decree-Law 8/2020 on urgent extraordinary measures to address the economic and social impact of COVID-19. As a result, the need for authorization of foreign investment has become the standard procedure for certain specific sectors when carried out by residents of countries outside the EU and EFTA.

These rules have been amended by Royal Decree-Law 11/2020, which adopted urgent supplementary measures in the social and economic fields to deal with COVID-19, and revised again by Royal Decree-Law 34/2020 on urgent measures to support business solvency and the energy sector as well as on taxation.



Q&A

1.

What is the current regulatory framework for FDI?

The current regulatory framework in Spain is covered by the following rules:

- Law 19/2003 on the legal structure regulating the movement of capital and economic transactions in the international market and regarding certain measures against money laundering (in its consolidated version introduced by Royal-Decree Law 8/2020, RDL 11/2020, RDL 34/2020); in particular, article 7 bis.
- Royal-Decree Law 664/1999 on foreign investments (regarding national defense).
- The Transitional Provision of Royal Decree-Law 34/2020 (RDL 34/2020) setting forth a transitional regime applicable until 30 June 2021 for the suspension of the liberalization of certain FDI made by residents of other EU and EFTA countries. This deadline has been extended until 31 December 2021 by Royal Decree 12/2021.

A royal decree implementing the specific procedure of article 7 bis Law 19/2003 is currently being drafted.

2.

Have there been any changes or updates to the screening rules during the pandemic?

The declaration of a state of emergency by means of Royal Decree 463/2020 has had a very important impact on investment in Spain. The most significant measure was the suspension of the system of deregulation of FDI in Spain, implemented by the aforementioned Royal Decree-Law 8/2020. As a result, the need for authorization of foreign investment has become the standard procedure for certain specific sectors when carried out by residents of countries outside the EU and EFTA.

These rules have been amended by RDL 11/2020 and revised again by RDL 34/2020, which has already been mentioned in the question above.

3.

What sectors does the new regulation cover?

The New Regulation applies to investments to be made in companies that operate in the same strategic sectors in which the deregulation of investment by non-EU/EFTA nationals has also been suspended. These are defined in section 5 of Article 7 bis of Act 19/2003. The strategic sectors in question are as follows:

- Critical infrastructure, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure and sensitive facilities. Land and real estate are also considered vital to critical infrastructure and were included in Act 8/2011, of 28 April, establishing measures for the protection of critical infrastructure.
- Critical technologies and dual-use items – the essential technologies for leadership and industrial skills. These also include the technologies developed via programs and projects of particular interest to Spain, i.e., telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace and defense technologies, energy storage, nuclear technology, nanotechnologies and biotechnologies, advanced materials and advanced manufacture systems.

- Critical supplies – the most important sector in the category of energy supplies. These are defined and regulated in the Spanish Electric Sector Act 24/2013, of 26 December, and in Act 34/1998 on the hydrocarbons sector.
- Sectors with access to sensitive information, aligned with EU data protection policies. Companies with access to personal data or with the capacity to control such information are also covered by this 'new regulation', as it is established in the Organic Act 3/2018 on Personal Data Protection and the Safeguard of Digital Rights.
- The media is also one of the economic areas specially protected. Audio-visual communication services as defined in the General Audio-visual Communication Act will be governed by the provisions of that act.

In addition, the new regulation established objective circumstances affecting investors that trigger the regime for suspension of deregulation of FDI in Spain, regardless of the sector:

- If the foreign investor is directly or indirectly controlled by the government, including public bodies or the armed forces, of a third country.
- If the foreign investor has made investments or participated in activities in sectors that affect security, public order and public health in another Member State (strategic sectors in particular).
- If there is a serious risk of the foreign investor carrying out criminal or illegal activities that affect public safety, public order or public health in Spain (in this case, the former circumstance that alluded to the existence of "administrative or judicial proceedings, against the foreign investor in another Member State or in the State of origin or in a third State, due to the exercise of criminal or illegal activities" has been removed. Although the derogated criterion caused difficulties in interpretation, the new one is even more complex, as it is a question of subjective interpretation by future administration).

4.

Does the new regulation have a limited duration?

No. Although it is true that it initially seemed, from the rules in RDL 8/2020, that the new regime may be limited in its duration, with the amendment introduced by RDL 11/2020, and although there are still arguments for maintaining the temporary restriction, the suspension of the regime for the deregulation of foreign investments has remained valid after the 30-day period following the lifting of the state of emergency. The provision for regulatory implementation of the new rules in RDL 11/2020 and in the recent RDL 34/2020, as well as the establishment of transitional rules applicable in both texts, would seem to indicate that the intention of the lawmaker is to maintain the indefinite term of the new regime on suspension of deregulation of FDI in Spain until derogated by law.

This new regulation is expected to be in force indefinitely; it has to be confirmed with the implementation of a Royal Decree that is currently being drafted.

There is an exception for certain FDI made by residents of other EU and EFTA countries, in which the Transitional Provision of Royal Decree-Law 34/2020 sets forth a transitional regime for the suspension of the liberalization to be applicable until 31 December 2021.

5.

Is a further extension foreseeable?

This new regulation may be indefinite (see question 4).

6.

Do the rules apply to investments from any foreign country?

Yes. These rules apply to all the investments made by residents of countries outside the EU and EFTA, if the investor becomes the holder of a stake greater than or equal to 10% of the share capital of the Spanish company, or if, as a result of a corporate operation, act or legal transaction, the investor acquires control of the company, in accordance with article 7.2 of the Defense of Competition Act.

RDL 34/2020 refers to this 'control' in accordance with the rules on economic concentration. This means that it will be necessary to establish not just whether the investor can appoint more than half of the members of the board of directors but also whether there are other circumstances such as the option to exercise decisive influence over the company.

For indirect investment, authorization is required if the investor acquires control of 10% of share capital or control of the company, acting through a company resident in the EU or EFTA, only when the investor is located outside the EU or EFTA holds or ultimately controls, directly or indirectly, a percentage of more than 25% of share capital or voting rights of the investment vehicle.

The Ministry of Industry, Trade and Tourism has extended the need for authorization to cover asset purchases.

7.

What are the Government's powers to intervene in transactions?

In general terms, the Government's powers are based on the need to obtain prior administrative authorization to carry out the transaction.

Law 19/2003 provided a general regime for the liberalization of FDI, with the Government reserving the option to suspend it where such transactions might affect activities (i) related to the exercise of public power, (ii) directly related to national defense, or (iii) having an actual or potential effect on public order, security or health.

RDL 34/2020 introduces a new section in article 7 bis of the Act 19/2003, which previously established the Government role in sections 4 and 5. In these sections, the law gives the Government the option to suspend the regime for the liberalization of FDI in Spain in those other sectors if they may affect public safety, public order and public health. RDL 34/2020 introduces section 6, by virtue of which the Government will be able to legislate to establish the categories of operation and amounts below which FDI will be exempt from the prior authorization system, having little or no repercussion on the legal assets that the suspension of deregulation of FDI protects.

8.

When should the transaction be notified?

The notification, and the prior administrative authorization, must be completed before carrying out any FDI operation in Spain that is covered by article 7 or article 7 bis of Law 19/2003 or RDL 34/2020.

9.

How should the notification be submitted?

The potential investor must fill in a form for the FDI screening procedure (in Spanish, *Formulario para el procedimiento de escrutinio de inversiones extranjeras*) and submit it online to the Ministry of Industry, Trade and Tourism of Spain, available in the following link.

10.

How long does it take the authority to make a decision?

Once the application for authorization is submitted, the Government has a time limit of six months to grant or refuse it. If the Government does not respond to the application by the end of that time period, it will be deemed a refusal.

In our experience, the procedure takes less than three months.

11.

Does the European Commission have decision-making power over investments in Member States?

No. The new regulation does not grant any decision-making power to the European Commission on investments in Spain.

On 25 March 2020, the Commission issued guidance to the Member States, amongst other things, calling upon them all to set up a fully-fledged screening mechanism and ensuring a strong EU-wide approach to FDI screening at a time of public health crisis and related economic vulnerability. The Spanish Government is committed to following this guidance.

12.

What documents are required for the notification?

The potential investor has to fill in the form for the FDI screening procedure (in Spanish, *Formulario para el procedimiento de escrutinio de inversiones extranjeras*) and submit it online to the Ministry of Industry, Trade and Tourism of Spain. Documents detailing the transaction may be required, available in the following link.

13.

What happens if a notification does not comply with the rules?

Investment operations carried out without the mandatory authorization will be null and void, devoid of any legal effect, unless they are legalized by obtaining the corresponding authorization, notwithstanding any sanctions that may apply.

14.

What are the penalties for non-notification?

Investment operations carried out without the required prior authorization will be deemed null and void and with no validity or legal effect until they are legalized. Carrying out transactions without requesting authorization when it is required (or prior to it being granted or acting in breach of the established conditions) will constitute a highly serious infringement and will lead to enforcement action.

Along with the transaction being declared null and void, the authorities have the right to levy fines or a warning (public or private). These fines, in the case of a highly serious infringement, shall be a minimum of €30,000.

15.

Are there any exemptions to the application of the rules for foreign investments?

Yes. Investments of less than €1m are exempt unless the Government passes implementing legislation.

16.

Are the rules applicable when the company's participation in these sectors is minimal?

Yes. The rule does not establish a distinction, although, in our opinion, this could be arguable.

17.

Were there any cases of special powers enforcement involving Chinese companies in 2021?

In Spain, there is no publicly accessible database where this information can be found.

18.

Were there any vetoes in 2021?

In Spain, there is no publicly accessible database where this information can be found.

19.

What legal remedies are activated in the case of veto or imposition of prescriptions or conditions?

When a request for investment is rejected, a challenge procedure is opened, which consists of an internal administrative appeal (in Spanish *recurso potestativo de reposición*) prior to going to court, or directly by filing a contentious-administrative appeal before the Third Chamber of the Supreme Court.

20.

Besides the legal remedies, are there practical tips for mitigating the impacts of FDI screening rules?

Prospective investors should note that it is possible to submit a formal petition to the corresponding government ministry (depending on the transaction) to ask if the transaction must be notified. This is encouraged due to the lack of accessible precedents; there is uncertainty in certain aspects about whether it is compulsory to obtain prior administrative authorization.

Once the application is submitted, a follow-up with local authorities is encouraged.

Focus on the UK

Introduction

The UK has enacted new legislation that will provide the Government with wide-ranging powers to screen and ultimately prohibit transactions that create risks to UK national security. The legislation is not yet in force but is expected to come into force later in 2021. However, it will then be retrospective and cover transactions completed since 12 November 2020.

This new legislation will replace current legislation that enables the UK Government to screen and ultimately prohibit transactions that raise public interest issues. The current legislation is limited to the defense, media and broadcasting, banking and financial services, and public health sectors. The new legislation is expected to apply to all sectors of the economy but will also require mandatory pre-notification of certain transactions in 17 specified sectors.

The new regime will apply not only to M&A transactions but also to intra-group and corporate reorganizations.

Q&A

1.

What is the current regulatory framework for FDI?

The current regulatory framework under the Enterprise Act 2002 is being replaced with the new National Security and Investment Act 2021 (NSI Act). The NSI Act is expected to come into force later in 2021 but, once in force, it will apply retrospectively to in-scope transactions completed since 12 November 2020.

2.

Have there been any changes or updates to the screening rules during the pandemic?

Yes. The current framework was expanded to enable the Government to intervene in any merger or acquisition (but not intra-group reorganization) on grounds of the need to maintain the UK's capability to combat and mitigate the effects of public health emergencies. The new framework will apply to all sectors of the economy.

3.

What sectors does the new regulation cover?

All sectors of the economy are covered by the NSI Act.

However, qualifying transactions in 17 sectors of the economy are subject to mandatory prior notification. Those 17 sectors are advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, critical suppliers to emergency services, cryptographic authentication, data infrastructure, defense, energy, synthetic (formerly engineering) biology, military and dual-use, quantum technologies, satellite and space technologies, and transport.

4.

Does the new regulation have a limited duration?

No.

5.

Is a further extension foreseeable?

The NSI Act provides that the 17 specified sectors will be kept under review by the Government but, as it is a new act, we do not foresee any immediate changes.

6.

Do the rules apply to investments from any foreign country?

Yes (in fact, they apply to investments by UK companies as well).

The NSI Act also applies to the acquisition of foreign companies with relevant activities in the UK and to the acquisition of assets used to provide relevant goods and services in the UK.

7.

What are the Government's powers to intervene in transactions?

The NSI Act provides that the Government can make any order that it reasonably considers necessary and proportionate for the purpose of preventing, remedying or mitigating a risk to national security. In practice, remedies are likely to include limiting share ownership, restricting access to sensitive information and prohibition (or unwinding) of transactions.

8.

When should the transaction be notified?

Mandatory notification in the 17 specified sectors – 'notifiable acquisitions'

- Acquisition of votes or shares exceeding a threshold of 25%, 50% or 75% (and increases between the percentages).
- Acquisition of voting rights that enable or prevent any shareholder resolution.
- Notifications to be made before the acquirer obtains such control (further details are likely to be provided in secondary legislation or guidance); typically, this would be on conditional contract exchange, and the transaction cannot be completed until approval is given.

Consequently, no obligation to notify business and asset purchases (as opposed to share purchases) or the acquisition of assets; such deals are covered by the voluntary regime.

Voluntary notification where there is no notifiable acquisition

- Acquisition of votes or shares exceeding a threshold of 25%, 50% or 75% (and increases between the percentages in entities outside the 17 specified sectors).
- Acquisition of voting rights that enable or prevent any shareholder resolution in entities outside the 17 specified sectors.
- Acquisition of material influence over an entity's policy.
- Acquisition of a right or interest in, or in relation to, a qualifying asset providing the ability to use the asset, or direct or control how the asset is used.
- Voluntary notification because the UK Government has the power to 'call in' any such acquisition if it gives rise to a risk to national security (please refer to Q14 for further details of calling in).
- Notification to be made either before or after such control is obtained.

9.

How should the notification be submitted?

- Online using the statutory notification form.
- A mandatory notification to be made by the acquirer.
- A voluntary notification to be made by the acquirer, the vendor or the entity (target).

10.

How long does it take the authority to make a decision?

There are two phases:

- Phase 1 (screening): 30 working days from receipt of a complete notification.
- Phase 2 (full assessment): up to 75 working days (with further extensions by agreement with the parties).

Only transactions that raise a national security risk will enter phase 2.

11.

Does the European Commission have decision-making power over investments in Member States?

No.

12.

What documents are required for the notification?

Details of what documents must accompany the online notification form have not yet been announced.

The Government also has the power to compel the attendance of witnesses.

13.

What happens if a notification does not comply with the rules?

Failure to notify a notifiable transaction will result in:

- Legal voidness (invalidity) of the transaction.
- The risk of fines up to 5% of the acquirer's turnover or £10m (whichever is higher).
- The risk of imprisonment of the acquirer's personnel.

There are no sanctions for failing to make a voluntary notification but, if the transaction is voluntarily notified or called in by the Government, there are powers to issue interim orders to prevent the transaction's completion or to unravel a transaction that is completed if it is necessary to protect national security while the transaction is investigated.

14.

What are the penalties for non-notification?

See question 13.

In addition, where a transaction is not notified (and is not a notifiable transaction under the mandatory regime), the Government can call in that transaction for review if it considers there may be a national security risk. The Government has six months from when it became aware of the transaction to call it in (subject to a five-year limitation period).

In terms of the power to call in transactions retrospectively (from 12 November 2020), the Government also has six months from when it became aware of the transaction (subject to a five-year limitation period). However, if parties have informed the Government about the transaction before the NSI Act comes into force, the six-month period runs from the NSI Act commencement date. These rules on retrospective call-ins apply to all transactions subject to the mandatory regime and the voluntary regime.

15.

Are there any exemptions to the application of the rules for foreign investment?

None currently. Consequently, intra-group transactions (reorganizations) are not exempt.

16.

Are the rules applicable when the company's participation in the mentioned sectors is minimal?

Only where the company's participation in an entity is below the threshold of 'material influence' - typically, but not exclusively, below 15% - but lower holdings can be caught if the acquirer has other control rights or abilities.

It should also be noted that there are no *de minimis* exemptions (transactions do not have to meet any minimum turnover or market share thresholds).

17.

Were there any cases of special powers enforcement involving Chinese companies in 2021?

The NSI Act is not yet in force, but there has been extensive press coverage of the political opposition to a multinational Chinese company's involvement in the rollout of 5G technology in the UK.

18.

Were there any vetoes in 2021?

The NSI Act is not yet in force.

19.

What legal remedies are activated in the case of veto or imposition of prescriptions or conditions?

Decisions by the Government are subject to judicial review in the UK courts. Judicial review is not an appeal on the merits; rather, it is a review of the reasonableness of the decision and how it was taken.

20.

Besides the legal remedies, are there any practical tips for mitigating the impacts of FDI screening rules?

- Conduct detailed due diligence on the target business:

  It is critically important to ascertain (i) whether the target business operates in any of the 17 specified sectors where a mandatory notification is required and (ii) whatever sector the target operates in, whether its activities could affect national security. EY can provide support in preparing a very specific tailor-made questionnaire to send and discuss with the seller and their counsel so that both parties will have accurate data to predict how the NSI Act is likely to apply to the specifics of the contemplated transaction. Hence a specific due diligence exercise is highly encouraged.

- Early pre-notification discussions with the Government's Investment Screening Unit (ISU):

  It is expected that early pre-notification discussions with the ISU will be an integral part of the process. This helps avoid unnecessary delays later in the process by identifying precisely what information and documentation the ISU will require for its assessment.

- Purchaser diligence:

  A critical part of the assessment of transactions under the NSI Act relates to the identity of the investor or purchaser. Buyers will be expected to be fully transparent about their ownership structure and ultimate beneficial owner or controller. The Government will expect disclosure of all relevant activities of the owner or controller as part of its assessment.

- Introduce yourself to the ISU and other ministries:

  The Government can require parties to the transaction to attend meetings to allow a better understanding of the investor and the investor's intentions post-acquisition. We recommend attendance at such meetings to build trust with the Government. Such a meeting can also accelerate the process and give confidence in how the ISU is applying the NSI Act to the target's activities. Multiple government ministries may be involved in the approval process, and strategies need to be developed to brief those ministries where appropriate.

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