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Investment Policies Related to National Security - A Survey of Country Practices

by
Frédéric Wehrlé and Joachim Pohl

ABSTRACT

While many countries have become ever more open and welcoming for foreign investment, the awareness of risks for national security stemming from or related to international investment has increased. Many governments have thus introduced policies that seek to protect their national security with the smallest possible impact on investment flows. *Guidelines for recipient country investment policies relating to national security* adopted at the OECD in 2009 provide recommendations for the design and implementation of such policies.

This paper reviews commonalities and differences of policies implemented in 54 countries with a special focus on arrangements in 17 economies that have explicit policies in this area. It offers a comparative analysis of countries' investment policy approaches to address national security concerns stemming from foreign investment; classifies the different forms of restrictions to address these concerns; identifies differences between restrictions on ownership and acquisitions; and presents how countries define the scope of application of their policies.

The study also assesses how countries have implemented some of the key principles set out in the 2009 Guidelines in actual policy in order to meet their need to safeguard national security while reducing the impact of these policies on international investment.

Authorised for release by Pierre Poret, Deputy Director, OECD Directorate for Financial and Enterprise Affairs

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EXECUTIVE SUMMARY

The international investment policy community hosted by the OECD Investment Committee seeks to assist governments in their efforts to improve investment policies through exchange of experience and multilateral dialogue. This exchange is informed by analytical studies carried out by the OECD Secretariat. The present study focuses on investment policies related to national security put in place by the 54 economies that participate in the OECD hosted dialogue. It follows up on the *Guidelines for recipient country investment policies relating to national security* (2009 Guidelines).

In its first section, the survey offers a comparative analysis of countries' investment policy approaches to address national security concerns stemming from foreign investment. It classifies the different forms of restrictions to address national security concerns, including prohibitions for foreign investment, reviews and scrutiny mechanisms; and identifies differences between restrictions on ownership and acquisitions. The section also presents how countries define the scope of application of their policies.

The survey's second section identifies how countries have implemented some of the key principles set out in the 2009 Guidelines in actual policy in order to meet their need to safeguard national security while reducing these policies' impact on international investment. It focuses on the policies of 17 FOI Participants that have designed investment policies related to national security.

The study finds a broad variety of policy approaches to address national security concerns stemming from foreign ownership. It suggests that none of the approaches is in itself more restrictive than others; instead it shows that different approaches reflect different perceptions of risk. The survey also suggests that policies generally tend to cover broader areas of the economy while becoming simultaneously more flexible. The categorisation offered by the survey may help policymakers assess whether existing policies are likely to work as intended and where future reform efforts may lead to more efficient and less constraining approaches.

The study also finds that the many reforms that countries have undertaken of their investment policies related to national security have brought about more detailed regulation in this policy area. Whether they have also led to greater regulatory depth and greater clarity and predictability for investors, is less certain, given the trends towards greater flexibility.

The study nevertheless shows that many policies of 17 FOI Participants are inspired by the principles of transparency and predictability. As compared to the situation prevailing prior to the adoption of the Guidelines, an increasing number of countries provide for preliminary opinions on whether an investment may be subject to review. The vast majority of countries also specify timeframes in which the review must be completed and provide in one form or another criteria against which the reviews should proceed from.

The study also shows that governments have set up different mechanisms for ensuring accountability, notably by recognizing the importance of high-level political involvement in the review process, by allowing decisions to be challenged through administrative appeals and courts, and by disclosing policy outcomes.

CONTEXT, MANDATE AND PURPOSE

The international investment policy community hosted by the OECD Investment Committee seeks to assist governments in their efforts to improve investment policies through exchange of experience and multilateral dialogue at the regular *Freedom of Investment* (FOI) Roundtables. This dialogue brings together some 54 governments from around the world and covers a broad set of topics of increasingly differentiated investment policies. At the Roundtable in October 2014, participating governments expressed an interest in reviewing and discussing investment policies related to national security concerns stemming from foreign investment in a transversal manner[1]. The present survey responds to this request.

Investment policies designed to address national security concerns are not a new phenomenon. They have a long history but their expansion in recent years – as well as the growing involvement of emerging economies as actors in this area of policy-making – has nonetheless begun to generate some policy debate and uncertainty among home countries for this trend. While OECD Investment Instruments and many other international agreements recognise that policies for safeguarding national security are an important part of investment policies in many countries,[2] such policies may be seen as disguised restrictions or unpredictable barriers to foreign investment.[3] They thus require careful policymaking and building trust.

One of the main outcomes of the discussions of participants in the Freedom of Investment process on investment policies related to national security were the Guidelines for recipient country investment policies relating to national security (the 2009 Guidelines). These Guidelines set out non-binding recommendations for the design of investment policies related to national security in a broad sense, including prohibitions of foreign investment in certain sectors as well as review mechanisms for specific investment proposals that potentially raise national security concerns.

Since the adoption of the Guidelines, several countries that participate in the Roundtables have amended their policies in this area or introduced new mechanisms to address national security concerns in the context of foreign investment. Governments have informed Roundtable participants about these policy changes[4] and have given other countries the opportunity to discuss the policy changes individually.

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1 DAF/INV/M(2014)1, item 6a.

2 Examples of OECD instruments that grant an exemption from obligations include articles 3 of the Codes of Liberalisation and the National Treatment instrument. For examples of such policies in IIAs, see Essential Security Interests under International Investment Law (*International Investment Perspectives*, OECD 2007).

3 See for example: Jesse R. Heath, "Strategic Protectionism? National Security and Foreign Investment in the Russian Federation", *George Washington International Law Review*, Vol 41, 2009; Kenneth Y. Hui, "National Security Review of Foreign Mergers and Acquisitions of Domestic Companies in China and the United States", *Cornell Law Library Student Conference Papers*, 14 April 2009; W. E. Pomeranz, "Russian Protectionism and the Strategic Sectors Law", *American University International Law Review 25*, no.2 (2010): 213-224; Clifford Chance, "Reinforcement of the French foreign investment control: Back to protectionism?", *Briefing Note*, May 2014.

4 Countries that have adhered to the OECD Declaration on International Investment and Multinational Enterprises have committed to report their investment policies related to national security. The policies are

The present survey aims at taking stock of policies in this area. It presents a comparative analysis of recent trends in investment policies related to national security as a follow-up to the Guidelines with a view to: enhance understanding of policies adopted by participants in the Roundtable; increase transparency of measures taken by countries; and inform policymakers of different approaches to address national security concerns to inspire and inform policy development. It builds on the analytical work that participants in the FOI Roundtables have carried out prior to and after the adoption of the Guidelines[5].

The study covers national security-related policies that apply in countries that participate in the Roundtable, with a special focus on policies in 17 selected economies, both OECD Members and Partners and including advanced and emerging economies. The selection of these countries is primarily based on the existence in these economies of policies related to national security and the fact that most of these countries have recently changed their policies by either expanding the scope of their mechanisms to address national security concerns or introducing new ones. The availability of public information on these policies to the Secretariat and original design elements in order to present a broad spectrum of approaches have been additional criteria for selecting them. The 17 countries are: Argentina, Australia, Austria, Canada, People's Republic of China, Finland, France, Germany, Italy, Japan, Korea, Lithuania, Mexico, New Zealand, the Russian Federation, the United Kingdom, and the United States.

The present document lays out investment policies with regard to national security concerns in two steps: in section A, it offers a comparative analysis of countries' approaches to address national security concerns in their investment policies and points out trends in policy design over time. In its section B, the document sheds light on how governments have translated into policy the Guidelines' recommendations in order to ensure openness, transparency and predictability of their international investment policies while addressing national security concerns. An Annex sets out summaries of descriptions of the policies of individual countries as of the first quarter of 2016.

The survey is based on a review of a large volume of laws, policy documents and analysis conducted by academia and law firms. While all reasonable care has been taken in the preparation of this study, available information is not always complete and continuous introduction of policy changes may require updating.

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recorded in the List of measures reported for transparency by country of the National Treatment instrument. OECD Members are also required to notify measures that have a bearing on the Codes of Liberalisation. Information on countries that participate in the Freedom of Investment process but have not adhered to the Declaration stems from the policy monitoring that the Secretariat carries out upon request of FOI participants as well as from independent research undertaken by the Secretariat. Policy monitoring reports are available at http://www.oecd.org/daf/inv/investment-policy/g20.htm.

5 Identification of foreign investors: A fact finding survey of investment review procedures, May 2010; Security-related Terms in International Investment Law and in National Security Strategies, May 2009; Accountability for Security-Related Investment Policies, November 2008; Transparency and Predictability for Investment Polices Addressing National Security Concerns: A Survey of Practices, May 2008; Proportionality of Security-Related Investment Instruments: A Survey of Practice, May 2008.

A. INVESTMENT POLICY APPROACHES TO ADDRESS NATIONAL SECURITY CONCERNS

Investment policies related to national security have existed for decades, but it is only since the early 2000s that this area has received broad attention among investment policy makers. Over the past ten years, a number of countries that participate in the Freedom of Investment Roundtables have introduced for the first time or significantly amended policies specifically tailored to address national security concerns stemming from foreign investment[6].

This policy making activity is in part driven by a re-evaluation of what national security encompasses and in which ways it can be threatened. This re-evaluation has broadened the scope of sensitive sectors. While military threats have dominated the perception of national security for the latter decades of the 20th century – reflected in foreign ownership ceilings in defence production, for instance –, a broader scope of economic sectors are henceforth considered to be potentially national security sensitive. These include energy, telecommunications, and healthcare for instance. Privatisation of previous State monopolies, especially in infrastructure sectors, has arguably also played a role, as these sectors have been opened up for private, including foreign investment[7]. As long as these strategic industries were under State control, governments did not have to worry that they could fall under foreign influence. With considerable parts of these industries privatized in a growing number of countries, the need to protect them has gained momentum.

There is however a potential tension between governments' objective to remain open for foreign investment and more encompassing concepts of national security. This tension has led to attempts made by governments to find an appropriate balance through new policy responses that cover a broader scope of sectors or economic activity while being less constraining and more flexible. Outright sector-wide prohibitions of foreign investment have become relatively rare, especially in advanced economies. In turn, sector specific or cross-sectoral reviews or investment scrutiny mechanisms are now observed more frequently. Over the past seven years since the development and adoption of the Guidelines, among the 17 Participants in the Roundtables specifically studied for the purpose of this survey, seven have established such mechanisms with respect to national security[8] and further two countries have added a new mechanism to their existing ones[9]. Other countries amended their investment policies related to national security, some

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6 Countries that have amended their policies in this area include Australia, Austria, China, Finland, France, Germany, Italy, Korea, Lithuania, New Zealand, and the Russian Federation. Notifications received by the OECD since 2010 include: Austria (2012, DAF/INV/RD(2012)6 and 2013, DAF/INV/RD(2013)3); Finland (2012, DAF/INV/RD(2012)16); France (2014, DAF/INV/RD(2014)6); Germany (2009, DAF/INV/RD(2009)11); and Italy (2013, DAF/INV/RD(2013)4/REV1). A further notification by Poland (DAF/INV/RD(2016)1) was received after the finalisation of the present survey.

7 See, for example, OECD (2004), *International Investment Perspectives 2004*, OECD Publishing, Paris.

8 Austria in 2011; Canada in 2009; China in 2011; Finland in 2012; Italy in 2012; Lithuania in 2009; and the Russian Federation in 2008.

9 Germany in 2009; Korea in 2012.

for the purpose of broadening the scope of their review process or tightening certain procedural rules, others in order to clarify procedural provisions[10].

The present chapter describes in more detail the policy approaches that can be observed among participants in the FOI Roundtables in response to national security concerns stemming from foreign investment. In its first subsection, it classifies investment policies related to national security along different criteria with the view of describing how these policies operate. Its second subsection focuses on how the scope of these policies' application is defined by describing the items that are subject to these policies.

1. Policy approaches to address national security concerns related to foreign investment

Whereas some countries that participate in the FOI Roundtables (for example Belgium, the Czech Republic, Iceland and the Netherlands) have not formalised investment policies related to national security, others maintain restrictions on foreign investment based on such considerations. The 17 countries surveyed for this note have such policies. These policies can be categorised in three dimensions: to what extent the rules restrict foreign investments in a generalised – rather than individualised – manner (a.); whether the policy relates to ownership or to acquisitions (b.); and what categories of assets are addressed by the foreign investment policies (c.).

a. Generalised or individualised restrictions – prohibitions, compulsory reviews and scrutiny systems

A country's response to national security concerns stemming from foreign investment can be designed in different ways: The legislator can set generalised limits to ownership or acquisitions by foreigners or it can delegate the assessment of risks stemming from individual investments to the administration. On this scale ranging from generalised to individualised restriction, policies can be categorised as falling under one of three distinct approaches: (i) partial or total prohibitions of foreign investment in specified sectors (prohibitions); (ii) prior government review of all investment proposals that meet legally defined criteria (reviews); and (iii) scrutiny systems that identify individual, potentially problematic transactions, which are subsequently subjected to reviews[11].

Prohibitions are characterised by the legislator's general and definite decision on the national security risk of foreign ownership or acquisitions. Review mechanisms allow the executive an individual assessment of risk of all transactions that meet certain criteria that the legislator has identified as national

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[10] Australia in 2015 (new threshold for proposed foreign purchases of agricultural land and acquisitions of businesses and of agribusinesses); Canada in 2015 (extension of the potential time periods for a national security review under the Investment Canada Act); China in 2015; Finland in 2014; France in 2012 and 2014; Germany in 2013; New Zealand in 2011; and the Russian Federation in 2011 and 2014. Additional countries at the beginning of 2016 were considering future reforms, including Australia, China and Lithuania. The Australian Government announced in early February 2016 planned amendments to the Foreign Acquisitions and Takeovers Regulations 2015 aimed at subjecting to national interest review proposed purchases by private investors of critical infrastructure owned by Australian governments and their entities. As for China, in 2015 the authorities released for comments a Draft Foreign Investment Law which, if passed, would incorporate the national security review as a chapter in the proposed foreign investment law.

[11] Countries occasionally use two other, less formalised means to manage ownership in individual companies, which include government stakes in companies and golden share arrangements. These approaches are not further studied in this paper, as these means are rarely formalised and thus difficult to describe and categorise.

security sensitive. The review conditions the possibility of foreign investment on an explicit prior approval of a specific investment proposal: without such a case-by-case decision, a given foreign investment proposal that falls under the scope of the legislation is prohibited. Scrutiny systems entrust the administration with the identification and, subsequently, evaluation of potentially sensitive transactions. As opposed to compulsory review procedures, scrutiny systems do not require notification or prior authorisation of a foreign investment proposal by an investor or the target company. The government nevertheless retains the power to subject a specific transaction to review if it considers that this transaction potentially imperils national security.

Many countries apply two or more of these approaches in parallel for individual sectors or across sectors. Table 1 provides an overview of the approaches present in the 17 countries that have been specifically surveyed for the purpose of this study.

Table 1. Matrix of investment policy approaches to respond to national security concerns

country	Partial or total prohibition of foreign investment in one or more specific sectors	Reviews	Scrutiny systems
Argentina	○	○	
Australia		○	
Austria		●	
Canada			●
China	○	●	
Finland		○	●
France		○	
Germany		○	●
Italy		○	
Japan		○	
Korea		○	●
Lithuania	○	○	
Mexico	○	○	
New Zealand		●	
Russian Federation	○	○	
United Kingdom	○		●
United States	○		●

● Cross-sectoral application ○ sector-specific application

Partial or total prohibition of foreign investment

As a first observation, based on notifications made by Adherents to the OECD Declaration on International Investment and Multinational Enterprises under the National Treatment instrument and on the findings of the present survey, a number of countries that participate in the FOI process retain general, legislated prohibitions of any or specific categories of foreign investment in specific sectors on national security grounds. Such restrictions are most often found in the production of war weapons and armaments

and other defence material[12]; land in border areas or areas near strategically important sites[13]; production of chemicals or radioactive materials[14]; broadcasting and media[15]; and airports[16]. Some countries allow foreign investment in sensitive sectors up to certain equity caps[17], or allow investors from certain countries – but not from others – to invest in sensitive sectors[18].

Foreign investment reviews

In addition to partial or full prohibition of foreign investment in specific sectors, a growing number of countries use review procedures to manage security risks. Among the 17 countries that have been selected for the purpose of this survey, most of them (e.g. Argentina, Australia, Austria, China, France, Italy, Japan, Korea, Mexico, New Zealand, and Russian Federation) have investment reviews and thus require foreign investors to ask for authorization prior to the acquisition and therefore to disclose their planned investment. Reviews can cover one or more sectors or apply across sectors as can be observed in the 17 countries surveyed as well as among other FOI Participants.

Some countries (e.g. Argentina, Brazil, Chile, Denmark, Germany, Lithuania, Israel, Norway, Spain, Turkey, and the United Kingdom) have reviews designed to protect national security interests in a narrow range of sectors, focusing primarily on those sectors that are traditionally considered national security sensitive, such as defence[19] and related fields[20], or real estate and land in border areas or near strategically important facilities[21]. For example, Argentina requires prior government authorization of foreign investments aimed at acquiring certain rural and urban estate assets (or shares of companies which own such estate) located in "frontier" or "security" zones. Similarly, Brazil restricts foreign ownership for

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12 E.g. in Argentina, Colombia, Egypt, and Lithuania.

13 E.g. Colombia and the Russian Federation. Columbia prohibits foreign acquisition of land in border areas. The Russian Federation prohibits foreign individuals and legal entities from acquiring land near national borders, in sea ports and in certain other territories specified by federal law.

14 E.g. China, Colombia, Egypt and the United States, where Federal statutes restrict foreign ownership and operation of mass communications media (e.g. radio station licenses shall not be granted to or held by any foreign government or representative of a foreign government pursuant to 47 U.S.C. §310(a)). China lists a number of other activities prohibited to foreign investors but there is no indication that these restrictions all aim at managing national security risks. For a full list of sectors in which foreign investment is prohibited in China, see the 2015 Catalogue of Industries for Guiding Foreign Investment which entered into force in April 2015.

15 E.g. Japan and the Russian Federation.

16 E.g. Poland.

17 Mexico for instance has such a partial prohibition of foreign ownership in the manufacture and commercialization of explosives, firearms, cartridges, and ammunitions, where foreign investment is limited to an aggregate of 49% in a specific company (Article 7 of the Foreign Investment Law).

18 Lithuania prohibits investments in armaments only to investors from countries that are not EU, EEA, OECD and NATO members (Article 8 of the Law on Foreign Investment of the Republic of Lithuania of 7 July 1999 as amended).

19 Chile (defence industries); Germany (war weapons, tank components and cryptology); Israel (transfer of defence know-how to a corporation under foreign control); Spain (companies whose activities are related to defence, i.e. production and commerce of weapons and war materials).

20 Norway for instance has restrictions on the transport of classified military-sensitive goods.

21 E.g. Argentina, Brazil, and Turkey.

national security reasons in border areas within 150 kilometres of international frontiers, coastal land, and in "national security areas" such as the Amazon basin. In Chile, foreign participation in the defence industries is subject to prior authorisation. In many such countries the government bodies that oversee the sector are also in charge of assessing investment proposals (e.g. interior ministry for real estate or land acquisitions in sensitive areas or state defence council for investments or ministry of defence in the defence sector)[22].

Other countries apply reviews to a larger set of sectors that goes beyond those traditionally considered national security sensitive. China, France, Italy, Lithuania and the Russian Federation are among the countries that have chosen this approach. Many of these countries entrust the reviews to an inter-agency review committee, which comprises several ministries and agencies[23].

A last group of countries apply approval requirements across all sectors of the economy[24]. As such cross-sectoral approval requirements require potentially a very significant number of reviews, countries apply filters to select only those transactions that they consider most likely to impair national security. Austria and Australia for instance review only transactions that result in a specified stake in a given target company. Australia also reviews proposals whose absolute value exceeds a certain threshold amount.

Countries that require investors (or target companies) to have investment proposals reviewed use different sanctions to ensure compliance with the notification obligation. Most countries that have review mechanisms in place provide for criminal or administrative sanctions[25] and divestment orders[26] where a transaction has not been notified and reviewed. Table 2 provides an overview of the sanctions and consequences of the omission to notify in individual countries.

To further ensure that no targeted transaction proceeds without approval, three countries (Austria, China, and Lithuania) among the 17 specifically surveyed for the purpose of this study, have provisions in their legislation that allow them to conduct a review *ex officio*. In Austria, these rules have been designed to capture transactions that do not meet the conditions that would require a review, presumably because the investor tries to circumvent them. In China, the Ministry of Commerce (MOFCOM) is empowered to initiate a review, using information provided by local MOFCOM authorities as a result of examination of mergers and acquisitions applications, as well as information provided by ministries, national industrial associations, competitors and upstream and downstream enterprises.

Investment scrutiny procedures addressing security concerns

National security scrutiny procedures are a complementary feature to review procedures. Among the 17 countries that have been studied for the purpose of this survey, Canada, Germany, Finland, the United Kingdom and the United States have introduced such mechanisms, and all apply national security scrutiny

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22 E.g. Argentina and Chile. Exceptions exist for instance in Germany, where the Ministry for Economic Affairs and Energy oversees the approval process for investment in defence; and in Finland, where the Ministry of Employment and the Economy is charged with reviewing of investments in defence and security services.

23 E.g. China's Joint Committee; Lithuania's Commission for Assessment of Conformity of Potential Members to National Security; and the Russian Federation's Governmental Commission on Monitoring Foreign Investments. France is an exception in this regard: Its Ministry of Economy oversees the process.

24 This approach has been chosen e.g. in Australia, Austria and New Zealand.

25 E.g. Australia, Austria, Finland, France, Italy, Japan, Korea, Mexico, New Zealand, Russian Federation. A number of countries also provide for penalties for material errors or omissions in the notification.

26 E.g. Australia, Austria, China, Finland, France, Italy, Korea, Mexico, and the Russian Federation.

across sectors[27]. Most of these mechanisms focus only on security issues (e.g. Canada, Germany, Finland and the United States) whereas United Kingdom's mechanism combines security with other considerations.

Degree of restrictiveness between the three approaches

Arguably, none of the three distinct approaches is in itself any more or less restrictive than the others. Rather, the three policy approaches are different means to pre-select and filter, among all possible foreign investment proposals, a subset of those foreign investment proposals that a given country deems to be most likely to threaten its national security. This filter is necessary to reduce the number of transactions subject to review, both to keep the economy open to foreign capital and to reduce the administrative burden for governments and investors alike.

The filter criterion of sector-specific prohibitions implies that foreign ownership in the selected sectors would always jeopardize national security. Permitted equity limits or exempted nationalities of investors are ways to refine this type of filter.

Sector-specific review requirements constitute a similar filter, but reflect the assumption that foreign investment in these sectors may be acceptable under specific conditions, which are assessed case by case. Equity limits and nationality considerations may influence the assessment, as many other factors. Sector specific approval requirements thus delegate part of the power to assess risks within a given country from the legislator to the executive.

Cross-sectoral review requirements imply the legislator's assumption that threats to national security are not limited to foreign investment in specific sectors, and that sector specific reviews are thus an inadequate criterion to determine the likelihood of a threat. Cross-sectoral review requirements instead apply the criterion of the absolute value of a transaction, or the relative influence in a given target company resulting from the transaction.

Scrutiny mechanisms are processes the executive uses to screen in principle all foreign investments based on national security concerns. Criteria as well as assistance from various state agencies in gathering information help the executive to identify potentially problematic transactions. Furthermore, even though investors are not required to file a notification, they have a strong incentive to come forward and alert the authorities of their planned transaction as, under a scrutiny mechanism, countries retain the right to initiate a review and deny authorization for an investment, even if this one has already been completed. During a specific period of time accorded to the government to identify a potential threat, the investor indeed remains uncertain whether a given transaction will ultimately be allowed or unwound. This period of uncertainty may be relatively short (e.g. three months in Germany) or indefinite, as in Finland and the United States[28]. This uncertainty creates an incentive for investors to inform governments of their intentions where regulations allow to do so[29]. The more likely the investor thinks that the host country will find the proposal a threat to national security, the greater is the incentive to obtain such clearance[30].

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27 Germany, like Finland, operates two independent mechanisms: a sector specific review process, which requires notification and prior authorization; and a cross-sectoral national security scrutiny mechanism, which does not require notification of acquisitions.

28 Whereas Finland and the United States do not regulate for how long after the actual acquisition a review is possible, Germany does it differently: it has to intervene in the 3 months following the acquisition, otherwise the transaction is considered as accepted.

29 Four of the five countries that leave to their authorities the discretion to initiate a review give investors the option to file a voluntary notification (Finland, Germany, the UK and the US). By contrast, Canada does not -

Table 2. Notification requirements, government initiated reviews, and sanctions or consequences

Country	Notification requirement	Government initiated review	Sanctions or consequences
Argentina	Yes	-	Not specified
Australia	Yes	-	Divestment order; criminal and civil penalties
Austria	Yes	The authorities can launch a review *ex officio* if there is suspicion that the acquirer seeks to circumvent the review process	Criminal penalties; invalidity of the transaction or, if implemented, divestment
Canada	No	Yes: the Governor in Council may order a national security review	
China	Yes	MOFCOM may also initiate the review	Divestment
Finland	Yes for acquisitions of defence industry enterprises No for acquisitions of "monitored entities" (filing process is voluntary)	The ministry may at its own initiative decide to review investments in monitored entities	For omission to notify an investment in the defence sector: fine; transaction void. For monitored entities, the government retains the power not to confirm the transaction.
France	Yes	-	Nullity of the transaction; criminal penalties (up to five years imprisonment and a fine of up to twice the amount of the transaction which can be multiplied by five in case of legal entities).
Germany	Yes for acquisitions of companies that produce war weapons, tank engines and crypto technology (sector-specific review) No for transactions in other sectors	The authorities may initiate a review for transactions in other sectors that threaten "public order or security of the Federal Republic" (cross-sectoral review)	No sanctions are provided under the statute for the omission to notify an acquisition; however, as long as the acquisition is not declared, the possibility to prohibit the transaction remains within three months from the acquisition.
Italy	Yes	-	Transaction void; fine in an amount ranging from 1% of the combined turnover of the undertakings involved up to twice the transaction value.
Japan	Yes	-	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 JPY 1 million, whichever is larger.
Korea	Yes	Yes for FDI that may threaten the maintenance of national safety and public	Disposition of the investment; administrative fine; criminal penalties.

although initially, at the time of introducing its national security review mechanism, such option had been considered. See "National Security Review of Investments Regulations", *Canada Gazette*, Vol. 143, No. 20, September 30, 2009. The recommendation to allow investors to file voluntary notifications "was not accepted since such a voluntary notification system is not seen as necessary given that national security reviews are expected to be infrequent and the majority of investors will not be affected by this new mechanism." Reportedly, the government nevertheless encourages advance consultations where national security concerns are possible (Stikeman Elliott, *Investment Act Canada FAQ*, 2011).

30 Almost all investment proposals in the United States reach CFIUS through voluntary notifications.

Country	Notification requirement	Government initiated review	Sanctions or consequences
		order	
Lithuania	Yes	The government may also initiate the review	-
Mexico	Yes	-	Transaction can be declared void; administrative fine and/or other penalties.
New Zealand	Yes	-	Various sanctions, including imprisonment up to 12 months or fine up to NZD 300,000 for an individual (higher fines apply to legal entities).
Russian Federation	Yes	-	Nullity of the transaction; fines of up to RUB 1 million for legal entities (approximately EUR 15,000 as of early 2015).
United Kingdom	No (filing process is voluntary)	The government has responsibility to identify transactions subject to review	-
United States	No (notification is voluntary)	CFIUS, on the basis of its own investigations, is allowed to trigger a review	Without CFIUS clearance, the President retains the power to block or unwind a transaction indefinitely.

b. Ownership versus acquisition

Investment policies related to national security can regulate *ownership* of specific assets or their *acquisition*: Rules on ownership prohibit foreigners to own a company in a specific sector. Rules on acquisition regulate to what extent a foreigner can acquire stakes in a company operating in a specific sector: Italy for instance reviews acquisitions in telecoms by foreigners beyond certain thresholds.

While at first glance, both approaches appear similar if not identical, they have different implications for certain scenarios, notably: Greenfield investment; change in the business orientation of a foreign invested enterprise; or changes in the relevance of a product or service for national security. In all these scenarios, acquisition rules may not be enough to address a risk that stems from foreign ownership; the acquisition may have taken place before the business became sensitive to national security or the acquisition never concerned sensitive items. Rules on ownership, which prohibit foreigners' presence in a specific sector without respect to how this presence was achieved, would cover these scenarios.

Greenfield investment

Certain countries restrict the *acquisition* of media companies by foreigners, while other countries do not allow foreigners to *own* media companies, for example. In countries that restrict acquisitions, greenfield investment allows foreigners to operate nonetheless in sensitive sectors[31]. They would not for instance, prevent a foreigner to found a newspaper, rent offices, hire journalists, and source printing and distribution services. Rules on ownership in turn would prevent such an activity by a foreign-invested company, as they restrict the exercise of an activity by a foreign-invested enterprise.

[31] This issue is distinct from whether greenfield investment is subject to reviews, as is the case for instance in Australia and New Zealand. Arguably, the reviews of greenfield investment in these countries are in place where security concerns arise immediately from foreign ownership of that asset rather than from its later integration in an enterprise and use. This issue is addressed in the section immediately below.

Changing business orientation or changing national-security relevance

Differences between rules on ownership and rules on acquisitions also show in cases where a foreign-invested company changes its business orientation or a product or service of an existing business becomes relevant for national security.

A company that produces electronic circuits for instance would not normally pose security threats; foreign ownership in such a company would thus not be an issue. When this company however begins to develop products for, say, mobile telephone infrastructure and acquires a significant market share, this company may progressively grow into a national security sensitive enterprise. If foreign ownership was acquired at a time when the company posed no security risk and thus no review was due, mechanisms related to acquisitions are not able to respond to this risk.

The example also illustrates the case of a change in national security relevance of a product or service. At a time when mobile telephones were gadgets, they had arguably no national security relevance. Only their quick market penetration that culminates in their ubiquitous use today arguably makes these products sensitive to national security. Software has seen a similar development; an increasing scope of applications have arguably become national security sensitive, and the pace of market penetration is even greater than in hardware.

c. Types of assets subject to restrictions

"Foreign investment" can comprise a broad range of assets, including for instance equity stakes in companies and tangible assets such as real estate. Individual countries' policies cover the entirety or only some asset categories.

A number of countries extend their investment policies related to national security exclusively to existing companies. Prohibitions, reviews or scrutiny mechanisms in these countries refer to companies operating in a specific sector or relate to the acquisition of equity stakes in existing companies. Other countries extend their policies to a much broader range of assets, including real estate. The acquisition of a plot of land may be considered to impair national security and be addressed by investment policies in Australia or New Zealand, for instance.

2. Characteristics of assets and investors

Countries have formulated the application of their investment policies related to national security in relation to two dimensions: in relation to the specific characteristics of the asset that is object to the investment (a.); and in relation to the characteristics of the investor (b.).

a. Characteristics of assets: concepts of "national security" versus specified sectors

Countries use two distinct approaches to identify acquisitions that are subject to their policies related to national security: One approach is to set specific rules to investment in certain sensitive sectors; these sectors are implicitly selected for their relevance for national-security. The second approach consist of a reference to threats to national security; whether an individual transaction raises such threats and is subject to these policies can be deducted from the country's definition of national security.

Sector lists

Some investment policies that are related to national security do not define the concept of national security. Rather, these policies list the sectors that they apply to, and safeguarding national security is the (implicit) motive for the legislation.

Sector lists often include items such as defence and related fields[32], real estate, land in border areas or land near strategically important facilities. Japan for instance bases its investment review procedure on sectoral lists that spell out which industries are subject to special scrutiny under the law. China's regulation provides that if a foreign investor plans to obtain "actual control" of domestic enterprises in specified sectors (e.g. military and military support enterprises; enterprises in the vicinity of key and/or sensitive military facilities; entities associated with national defence and security; and domestic enterprises engaged in important agricultural products, energy and resources; infrastructure, transportation services, key technologies and in major equipment manufacturing industries) the proposed mergers or acquisitions will be subject to national security review[33].

Other examples include France's legislation, which provides for a list of strategic activities under various categories; Italy's recently introduced review system, which for example spells out through a Presidential Decree No. 85 dated 25 March 2014 the specific networks, plants and other key assets covered by the review process on national security grounds; and the Russian Federation where the law lists over 40 activities deemed to be of strategic importance for national defence and security (Article 6 of Federal Law No. 57-FZ).

Sector lists have the advantage of relative clarity and predictability for investors, as sectors or activities are relatively clearly circumscribed. In turn, they offer relatively limited flexibility to governments, especially with respect to changing risk analysis. This might be the reason why sector list often cover more traditional areas of national security concerns, where changes are rare and slow.

Policies based on "national security" and related concepts

Investment policies that are based on the concept of "national security" specify the policy's purpose – avoiding threats to national security – rather than individual economic sectors subject to a specific regime. The definition of "national security" allows a deduction which transactions are subject to its special rules.

Countries define "national security" in different ways, and some do not actually offer a full definition. Also, the terminology varies. Countries that do actually offer a definition of "national security" employ one out of two principal approaches: a clarifying definition or a list of national security relevant sectors given as examples.

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32 Chile (defence industries); Germany (war weapons, tank components and cryptology); Israel (transfer of defence know-how to a corporation under foreign control); Norway (transport of classified military-sensitive goods); Spain (companies whose activities are related to defence, i.e. production and commerce of weapons and war materials).

33 On 1 July 2015, the new National Security Law of the People's Republic of China added to this list investments involving "key materials and technologies," "internet or information technology products and services," "construction projects that implicate national security", as well as "other major matters and activities, that impact or might impact national security" (Article 59 of the Law). At the beginning of 2016, in the absence of implementing regulations, it remained to be seen how these new national security review requirements will be implemented, and by which agencies. See: "China's New National Security Law", *The National Law Review*, 8 September 2015.

Clarifying definitions of national security include the following terms:

- "protection of the independence and sovereignty of the State, European and trans-Atlantic integration, the reduction of threats and risks for the energy and other economic sectors of vital importance to public security" [34];

- "securing national defence or safeguarding public order and security in accordance with Articles 52 and 65 of the Treaty on the Functioning of the European Union should the fundamental interests of society be under actual and adequately serious threat" [35]; and

- issues related to homeland security and critical infrastructure, defined as infrastructure so vital that its destruction "would have a debilitating impact on national security" [36].

Countries also occasionally include international peace and security as a justification for invoking a national security scrutiny or review[37] or refer to investments which may hinder efforts of international organisations to maintain peace and security[38], or which may disturb the peaceful coexistence between nations or the foreign relations of the country[39].

Some countries elaborate on *threats to national security* rather than national security. These include:

- investments threatening the independence and sovereignty of the State (e.g. Lithuania);

- the possible obstruction to manufacturing of defence materials (e.g. Korea);

- the continuity of operations of certain grids and plants (e.g. Italy and Korea); espionage such as disclosure of contracts that are deemed to be state secrets (Korea); transfer of national technologies (Korea); or the continuity of certain public procurements (e.g. France and Italy);

- investments from foreign countries that do not respect democracy and the rule of law or have held conducts at risk towards the international community[40] or to foreign-government controlled investment from countries that do not adhere to non-proliferation control regimes or do not have a record of cooperating with the host country's counterterrorism efforts[41];

- investments by persons linked to organised crime, terrorism or other criminal activities[42].

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34 Article 2 of Lithuania's Law on Enterprises and Facilities of Strategic Importance.

35 Section 2.1. of Act 172/2012 on the Monitoring of Foreign Acquisitions in Finland.

36 Section 2 (a) (5) and (6), United States Foreign Investment and National Security Act of 2007 ("FINSA").

37 E.g. Italy, Korea, Lithuania, and the United States.

38 E.g. Korea.

39 E.g. Germany, New Zealand.

40 E.g. legislation in Italy.

41 E.g. legislation in the United States.

42 E.g. France, Italy, Lithuania and New Zealand. France, denies approval if the Minister considers that the investor is likely to commit criminal offenses (Article R153-10 of the Monetary and Financial Code.) Lithuania refuses investments from investors that are suspected of or have committed criminal activities in

- concerns in relation to the impact of the investment on the economy (e.g. Australia, PR. China, Japan, and New Zealand); on domestic R&D capabilities (e.g. China, France, and New Zealand); on international competiveness[43] or reflect concerns about the need to exercise control over certain natural resources[44].

Where countries clarify the meaning of national security based on exhaustive or illustrative sector lists, these may include items such as:

- areas that concern internal or external security (including notably but not exclusively defence goods producers and security services) and public security, public policy and crisis prevention (including notably but not exclusively energy and water supply, telecommunication, transport and infrastructure for education and health services)[45].

Whichever approach countries choose to define the scope of application of their investment policies related to national security, some areas of the economy seems to be more consensually sensitive for national security than others. Table 3 summarizes the categories of activities and sectors identified by the 17 countries surveyed as relevant to national security under their review or scrutiny mechanisms[46].

As compared with the situation that prevailed at the time of the adoption of the 2009 Guidelines, the reference to strategically important industries and critical infrastructure is nowadays much more frequent than some six years ago when national security was defined in a much narrower sense. State policy and practice thus show that, in addition to addressing concerns directly related to "traditional" security/national defence activities (e.g. military and military related businesses), the notion of "national security" or other similar terms increasingly encompasses, in the vast majority of countries surveyed, the protection of domestic industries or sectors considered as vital, critical infrastructure, and natural resources. Infrastructure, including telecommunications, transportation, energy and the water supply are now frequent, and education and health services are also included in this list (e.g. Austria, France). Australia and the Russian Federation also regard the protection of media as necessary for their national security and interest[47]. A last category is farming or other food supply activities (e.g. China, Japan, New Zealand, and Russian Federation).

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relation to organised crime and terrorism, or has been convicted for crimes against Lithuania's independence, territorial integrity and constitutional order (Article 7 of the Law on Enterprises and Facilities of Strategic Importance to National Security.) New Zealand considers criminal convictions or the likelihood that the foreign investor commit an offence that is punishable by imprisonment when assessing applications for foreign investment in "sensitive" land and "significant business assets", and any foreign investor who is a member of a terrorist entity (designated as such under New Zealand's Terrorism Suppression Act 2002) is prohibited to invest in both areas.

43 E.g. United States legislation refers to the need to maintain the international technological leadership of the US in national security-related areas.

44 E.g. Australia, New Zealand, the United States.

45 Example taken from Austria's list.

46 This table compiles information about list of sectors or activities that countries consider as national security relevant under their review or scrutiny mechanism – where such list exists. It is also derived from the factors the reviews should or may proceed from – where they exist.

47 In Australia, all foreign persons need to notify the Government and get prior approval for investments in the "media sector" of 5% or more, regardless of the value of the investment: Section 55 of Foreign Acquisitions and Takeovers Regulations 2015 (the Regulations). The Regulations provides that the "media sector" refers to

Table 3. Sectors and activities associated with national security concerns in different countries

Country	Sectors and activities associated with national security
Argentina	• Security/national defence: Acquisition of real estate in border areas or in areas near to strategically important facilities
Australia	• Investment in "prescribed sensitive sectors" valued at over AUD 252 million, which include: i) security/defence (manufacture/supply of military goods or equipment or technology to Australian Defence Force or other defence forces, or that can be used for military purpose; encryption and security technologies and communication systems; operation of nuclear facilities); ii) infrastructure (transport, telecommunications and the media); iii) natural resources: extraction of uranium or plutonium • Acquisitions of land • Investment of 5% or more in the media sector, regardless of value • Business and agri-businesses acquisitions over stipulated threshold
Austria	• Security/national defence: defence goods production and security services • Infrastructure: energy and water supply, telecommunications, transport and facilities in education and health services • Other unspecified sectors
Canada	• Unspecified: Neither Part IV.1 of the ICA nor the National Security Review Regulations indicate whether investments involving certain industries or activities are likely to raise concerns in relation to national security
China	• Security/national defence: Military and military related businesses • Strategic enterprises: major equipment manufacturing industries • Other sectors including infrastructure and transportation services, energy and resources, agricultural products, and key technologies
Finland	• Security/national defence: Production or supply of defence equipment or other services or goods important to military defence as well as production of dual use-goods • Strategic enterprises: "monitored entities" that are considered critical in terms of securing functions fundamental to society on the basis of their field, business, or commitments
France	17 strategic sectors: • Security/national defence: National defence and security; electronic telecommunications; • Infrastructure: energy (supply of water, electricity, gas, hydrocarbons and any other source of energy); operation of telecommunications and transport services; • Others: public health and activities of vital importance under Defence Code; money gambling
Germany	• Security/national defence: production of war weapons, tank engines and crypto technology • Other unspecified sectors or activities that threaten the "public order or security of the Federal Republic"
Italy	• Security/national defence (e.g. advanced weapons and aeronautical systems; aerospace and military propulsion systems; aeronautical and nuclear engines; satellites; command, control and information systems; nanotechnologies) • Infrastructure: energy; transport, and communications
Japan	• Designated sectors relate to: (i) Security/defence (e.g. weapons, nuclear power, airplanes, aerospace); (ii) Infrastructure (e.g. electric/gas/water utilities; telecommunications and railways); Public safety (e.g. private security service; biological chemicals); key domestic industries (e.g. agriculture, petroleum, maritime transport)
Korea	• Defence-related companies, which include major electronic and industrial conglomerates that are also major producers of non-defence products; • Investments in companies holding key national technologies and which received government funding, and transfer of national technologies • Other unspecified industries that sectoral ministries may determine that foreign investments may threaten national safety and public order
Lithuania	• Infrastructure: Energy, transport, IT and telecommunications and other infrastructure
Mexico	• Education and port services; shipping companies; construction/operation/exploitation of general railways and public services of railway transportation where foreigners wish to acquire directly or indirectly more than 49% of the capital stock of the company • Other sectors that are otherwise not restricted under the foreign investment law if the investment exceeds

daily newspapers, television and radio, including internet sites that broadcast or represent these forms of media.

Country	Sectors and activities associated with national security
	a monetary threshold (approximately USD 262 million in 2014)
New Zealand	• Sensitive land, including strategic infrastructure on sensitive land
Russian Federation	Over 40 sectors, which include: • Defence (e.g. nuclear materials and devices; weapons and military equipment and technology; coding and cryptographic equipment; aviation and space; and security assessment and surveillance of infrastructure and means of transportation) • Natural resources (e.g. activities affecting geophysical processes, exploration and development of subsoil areas of federal significance, fisheries) • Media (including television and radio broadcasting and certain printing and publishing activities) • Monopolies (activities of certain communications and railway companies and natural monopolies)
United Kingdom	• Mergers which may impact national security
United States	• "Critical infrastructure" (defined under FINSA as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security"; this includes "major energy assets") • "Critical technologies" (which include defence items controlled under the International Traffic in Arms Regulations; export controlled and dual use items controlled under the Export Administration Regulations for national security, chemical and biological weapons proliferation, nuclear proliferation or missile proliferation reasons; items controlled under the Export and Import of Nuclear Equipment and Materials Regulations; and selected items controlled under the Export and Import of Select Agents and Toxins Regulations – e.g. activities that may threaten plant, animal or human health)[48] • Businesses that provide products, technical data, technology or services – either as a prime contractor, a subcontractor, or a supplier to prime contractors - to US government agencies, state and/or local governments[49] • Potentially any other sector or activity as long as the "covered transaction" is determined by the reviewing body that it may have an impact on the national security of the United States[50]

b. Characteristics of the investor: nationality, government control and legal nature

Besides the nature of the assets subject to an acquisition, the characteristics of the investor are the second structuring criterion of investment policies related to national security. In the policies of the surveyed countries, only two features related to the investor matter: nationality (occasionally complemented by permanent residence) and government control. A third feature – whether the investor is a natural or legal person – is used in the formulation of policies, but is not used as a discriminating factor in any of the countries' policies.

Nationality, foreignness, and residence of investors

The nationality of the investor is the key criterion for the application of most countries' investment policies related to national security. Restrictions of ownership or acquisitions based on national security imposed on *nationals* are very rare among the surveyed countries.[51] This reflects a general assumption that the mere fact that an investor does not hold the nationality or is not domiciled in a country where he or she makes an investment raises potentially a concern for national security – *national* security is considered to be potentially threatened by *foreigners*.

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48 Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons (the "CFIUS regulations"), 31 C.F.R. part 800, §800.209.

49 Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Investors, 31 C.F.R. part 800.

50 See CFIUS Annual Report, which mentions areas of particular concern in any year.

51 Investment by domestic legal persons may be subject to restrictions. Only Lithuania and Poland (which has introduced new legislation in 2015 and 2016 that has not been reviewed for the present survey) apply national-security related reviews to nationals.

Rules related to nationality either apply investment policies to any non-national or to individuals or companies that do not have the nationality of any of the countries in a given list. The latter approach, observed for instance in policies adopted by some EU Member States[52], exempts nationals of some countries from all or some investment policies related to national security. While Austria and Lithuania do not apply any of their investment policies related to national security to EU, EFTA members and Switzerland,[53] Finland, France, Germany and Italy apply parts of their policies to all foreigners, and other parts to investors that do not have nationalities of EU, EFTA members or Switzerland. The application of policies to all foreigners in Finland, France, Germany and Italy concerns restrictions in defence and closely related sectors[54].

Australia uses a similar approach to distinguish between foreigners of different nationalities for the application of their policies: Under its cross-sectoral review, Australia applies different trigger thresholds for non-sensitive investment for nationals of some countries with which it has concluded an FTA[55].

Japan's legislation requires a review of investments involving particular countries, for example countries with which Japan has not executed any treaty or agreement on inward foreign direct investment (e.g. North Korea) and activities involving the Iranian government, entities, individuals or groups[56].

In short, foreignness (or, exceptionally, non-residence) is the key criterion for the application of most countries' investment policies related to national security. Examples of threats to national security – outside the area of foreign investment – have nevertheless shown that nationals may increasingly be the source of threats as well.

Government-controlled investors

Besides nationality, only three of the 17 countries surveyed for the present paper explicitly treat foreign government controlled investors (GCIs) differently from private investors. Australia, the Russian Federation and the United States have established such specific rules for GCIs for the purpose of managing national security risks originating in foreign investment.[57] In Australia, GCI investments are systematically subjected to reviews, and the filters – trigger thresholds or preliminary assessments – that exempt certain foreign private investment from the policies do not apply. In the Russian Federation, equity caps for foreign investment in certain enterprises are lower for government controlled investors than for privately

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52 E.g. Austria, Finland, France, Germany, Italy and Lithuania.

53 Lithuania also exempts nationals of OECD and NATO Members from the application of its policies.

54 For example, France only applies part of its investment policies related to national security to EU/EEA investors. Investment in research activities, production or trade in arms, the activities of companies repositories of defence secrets, and defence-related activities (in sectors of dual technologies, cryptography, weaponry, or under defence secret) is subject to review for any foreign investor (Article R. 153-4 of the Monetary and Financial Code).

55 "Agreement country investors" are investors from Chile, China, Japan, Korea, New Zealand, and the United States, have investments in non-sensitive sectors reviewed from AUD 1,094 million, instead of AUD 252 million as foreigners from other countries.

56 Getting the Deal Through, *Foreign Investment Review in 20 Jurisdictions Worldwide*, "Japan" (2015), p.54.

57 Canada's investment policies also apply special rules for GCIs for the purpose of applying the "net benefit" test; however, Canada's policies related to national security do not explicitly single out foreign government-controlled investors. Shima, Y., "*The Policy Landscape for International Investment by Government-controlled Investors: A Fact Finding Survey*", OECD Working Papers on International Investment, 2015/01, OECD Publishing.

owned investors[58]. In the United States, FINSA requires CFIUS to conduct a full investigation of all foreign government-controlled transactions whether or not the initial review shows that these transactions pose a national security concern. FINSA contains an exception that investigations are not required if the Secretary of the Treasury and the head of the lead agency for the review jointly determine there is no national security concern.

All three countries have specific definitions of what constitutes a GCI. In Australia, the definition of foreign GCIs includes entities that are directly or indirectly government owned or controlled; individual and aggregate thresholds apply for mixed ownership[59]. Russia also includes international organisations, with some exceptions of international organisations in which the Russian Federation is a member[60]. The United States refer to transactions that could result in the control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government including, foreign government agencies, state-owned enterprises, government pension funds, and sovereign wealth funds[61].

Legal nature of investors: Natural and legal persons

Legal persons have some specific features not observed in natural persons: Nationality of legal persons is typically attributed in relation to the seat or incorporation of a company and is unrelated to the nationality of the owners or beneficiaries of the legal person. The nationality of a legal person can also be changed relatively easily. Furthermore, legal persons can be owned by several persons, including other legal person; and longer chains of ownership can blur control and beneficial ownership.

Despite these differences between legal construction of nationality of legal and natural persons, countries surveyed for the present note retain nationality as a key criterion for the application of investment policies also to legal persons.

The ways countries consider nationality for legal persons are diverse:

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58 Foreign government controlled investors are prohibited from acquiring controlling stakes in Russian strategic companies, while private investors may acquire up to 50% stakes; further, foreign GCIs must seek government approval to acquire a minority stake of 25% or more of the voting shares (5% or more for companies that exploit subsoil resources) or gain the power to block decisions made by management. Foreign private investments are only subject to approval requirements when they reach or exceed 50% (25% or more for companies that exploit subsoil resources).

59 Pursuant to section 17 of the Foreign Acquisitions and Takeovers Regulation 2015, a foreign government investor includes: a foreign government or separate government entity; entities in which a foreign government or separate government entity, alone or together with associates, hold an interest of 20% or more; entities in which foreign governments or entities of more than one foreign country hold an aggregate interest of 40% or more.

60 The Strategic Investment Law provides an exemption for transactions involving certain financial organisations such as the EBRD, MIGA, and the International Finance Corporation. The full list of organizations is contained in a Governmental Directive dated 3 February 2012.

61 The Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons define a foreign-controlled transaction as "any covered transaction" that could result in the control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government. The Guidance Concerning the National Security Review Conducted by the CFIUS further clarifies that foreign government-controlled transactions may include transactions resulting in control of a U.S. business by, among others, foreign government agencies, state-owned enterprises, government pension funds, and sovereign wealth funds.

- Austria, Germany and Italy, for instance, considers the nationality of the legal person itself, rather than the ownership of the legal person[62];

- Canada's legislation refers to the nationality of the persons that control the legal person, and apply the policies likewise to domestic legal persons under foreign control; the legislation provides for detailed criteria that enable the determination whether a domestic legal person of Canada is under foreign control[63];

- Finland combines both criteria, and defines as foreign legal person an entity that is either incorporated in certain foreign countries or that is partially owned by foreigners[64].

The rationale that underlies these approaches is different: The approach followed by Canada (and to some extent Finland) identifies foreign national persons behind the legal persons, thus extending the rationale for foreign natural persons. The approach followed by Austria, Germany and Italy in turn relies on a formal criterion of the nationality of the legal person, rather than identifying the natural persons' identity behind the legal person.

62 For Austria: § 25a (2) Nr. 3 Außenwirtschaftsgesetz; for Germany §55 AußenWVO; for Italy Art. 2 (5) of the Decreto-Legge 15 marzo 2012, n. 21.

63 Art. 26 of the Investment Canada Act.

64 Section 2 of the Act on the Monitoring of Foreigners' Corporate Acquisitions in Finland.

B. ENSURING OPENNESS, TRANSPARENCY AND PREDICTABILITY OF INVESTMENT POLICIES RELATED TO NATIONAL SECURITY

Openness, transparency and predictability of investment policies are the core values that underpin the OECD investment instruments and the policy dialogue among participants in the FOI process. The Guidelines for recipient country investment policies relating to national security operationalize these principles specifically for investment policies related to national security and help countries design and implement such policies in a way that reduces these policies' impact on international investment.

As noted in the first part of this study, many governments participating in the FOI Roundtable have amended their investment policies in relation to national security since the adoption of the Guidelines. Many policies adopted earlier were already inspired by the principles of transparency, predictability, proportionality and accountability. The present section sets out how these principles have been translated in actual policy among the 17 FOI Participants whose investment policies related to national security have been surveyed.

1. Transparency and predictability

Transparency and predictability involve: the public availability of relevant laws and regulations; clear guidance and criteria on how investment proposals are being assessed; the possibility for investors to obtain formal or informal guidance prior to a filing; timeframes for the review of transactions; and the disclosure of decisions on the restrictions of investment.

All countries surveyed codify their processes and make them publicly available. Foreign investors are thus in principle in a position to understand how their investment proposals are likely to be assessed. As compared with the situation prevailing prior to the adoption of the Guidelines, an increasing number of countries also provide for preliminary opinions on whether an investment is subject to review to help investors understand whether their proposal requires approval. The vast majority of countries also specify timeframes in which the review must be completed. A majority of them also make public their decisions to block a transaction or otherwise restrict investments in one form or another. Overall, there is a clear trend across countries to have in place measures aimed at improving the transparency and predictability of their security-related investment policies.

a. Access to primary and subordinate laws as well as to other relevant information

Businesses will only invest where they have sufficient knowledge of the rules applicable to their business. Businesses also rely on knowing how their proposals will be evaluated and which criteria will apply. If guidance or criteria are non-existent or very broad, it may leave considerable discretion to the officials charged with making the evaluation and this can undermine the transparency and predictability of the review process. Publicly available guidelines or criteria may also help foreign investors avoid proposals that would pose unacceptable risks to the host country.

Recent policy developments have more explicitly identified criteria and, as a result of this trend, a majority of countries now provide criteria or guidance, thus enhancing the transparency or predictability of

the proceedings. A couple of countries help investors anticipate the decision by making publicly available guidance (Australia and the United States). On their part, the Russian authorities provide "comments" aimed at clarifying certain provisions contained in the regulatory framework.

Countries' practices in providing guidance or criteria to investors vary. Some countries provide a list of criteria that is indicative. Under this approach, the national security exception may be invoked under conditions that are not explicitly mentioned, thus giving countries more leeway in respect of their assessment of transactions that may raise national security concerns. Other countries, like Lithuania and New Zealand, clarify that the national security exception will be invoked only if the investor does not meet all the listed criteria. This provides more security to the investor, albeit the list of factors may be sometimes broad and thus subject to interpretation by the reviewing body[65].

In any event, although the criteria or policy guidance approach may appear to provide more security to investors when comes the question of how concrete a threat to national security has to be for the host country to invoke national security concerns, the reviewing authority nevertheless often maintains a degree of flexibility in deciding how to respond to an investment. The reason is twofold. First, often the terms used in the factors that may or will lead to a decision to block an investment remain open to interpretation[66]. Second, in other instances, the legislation, implementing regulation or relevant policy may not always specify what weight is to be given to the factors to be considered[67].

With regards to laws and regulations, businesses have in general easy access to them and, as a result, they can more easily understand what the national security scrutiny or review mechanism requires from them. All countries surveyed make their rules and processes available in central registers and accessible on Internet. Most countries whose national language is not English provide at least their primary legislation and/or description of their policies in English. Some countries even provide a translation of relevant rules into other foreign languages (e.g. Finland, New Zealand).

Table 4. Evaluation Criteria and Guidelines under Review and Scrutiny Mechanisms

Country	Publicly available evaluation criteria	Notes
Argentina	No	
Australia	Yes	Pursuant to the Foreign Investment Policy, criteria that inform the review process include strategic and security interests; competition; the impact of the investment on the economy; the character of the investor; investments by foreign governments and their related entities (whether the foreign government investment is commercial in nature or the investor may be pursuing broader objectives contrary to Australia's national interest).
Austria	No	
Canada	No	
China	No	Pursuant to the Draft Foreign Investment Law released by the Chinese authorities in early 2015, if

65 Section 14(1)(c) of New Zealand's Overseas Investment Act provides that the relevant Minister or Ministers, in considering whether or not to grant consent to a foreign transaction "must grant consent if satisfied that all the criteria in Section 16 ("Criteria for consent for overseas investments in sensitive land") or Section 18 ("Criteria for overseas investments in significant business assets") are met". The relative importance to be given to each factor is nevertheless a matter to be determined by Ministers.

66 For instance, France retains discretion to assess, for example, what it is meant by jeopardizing the safety of the targeted business' supply chain: Article R.153-10, 2, of the Monetary and Financial Code

67 E.g. Australia's Foreign Investment Policy, which gives discretion to the Treasurer to determine the importance of each of the factors presented in the Policy.

Country	Publicly available evaluation criteria	Notes
		enacted, guidelines on what will trigger national security review would be promulgated.
Finland	Yes	December 2013 Government Resolution on the goals of security supply and December 2010 Government Resolution on Security Strategy for Society, which provide indicative information about the scope of the Act regulating reviews of investments in defence industry enterprises and the cross-sectoral national security scrutiny mechanism.
France	Yes	Article 153-10 of the Monetary and Financial Code provides grounds for rejection of a transaction. Listed factors are (i) if the implementation of any conditions MINEFI is authorized to impose would not suffice to safeguard national interests as long as a) the continuity of the business, its industrial, research and development capacities or related know-how cannot be protected in the future; b) or the safety of the company's supply chain can be compromised; or c) the performance by companies that have their registered office in France under procurement contracts, whether as contractor or subcontractor, or contracts concerning public safety, national defence or research, or the production or trading of weapons, ammunitions, etc., could be compromised; or (ii) the investor is likely to commit a criminal offence (e.g. bribery and money-laundering; acts of terrorism or financing terrorism; drug-trafficking).
Germany	No	
Italy	Yes	Law-decree 15 March 2012 and subsequent regulations.
Japan	No	
Korea	Yes	Criteria are publicly available for foreign investments that may threaten the maintenance of national safety and public order and include possible obstruction to manufacturing of defence materials; possible disclosure of contracts that are deemed state secrets; diversion of strategic capabilities for military purposes; investments which might hinder efforts of international organisations to maintain international peace and security (Article 5 of the Enforcement Decree of the Foreign Investment Promotion Act).
Lithuania	Yes	Article 7.10 of the Strategic Law contains six criteria: (i) the need for the foreign person to meet the European and Transatlantic criteria as described in Article 8 of the Law ; (ii) the fact that the foreign investor is not a dominating importer of fossil energy resources or controlled by such an importer; (iii) the fact that the foreign investor does not maintain relations that may pose a threat to nationality security with states (or persons of those sates) that are not EU and NATO states; (iv) and (v) the fact that the foreign investor is not suspected of, or has not committed criminal activities such as activities in relation to organized crime and terrorism; and (vi) the investor's non conviction for crimes against the independence, territorial integrity and constitutional order of Lithuania. Approval of a foreign investment must be denied if *all* the criteria are not met.
Mexico	No	There are no published guidelines or statutory criteria for determining what national security is.
New Zealand	Yes	Sections 16 and 18 of the Overseas Investment Act as well as the Overseas Investment Regulations 2005 establish the criteria for assessing applications for foreign investment in New Zealand's sensitive lands and significant business assets. Under section 14 of the Act, the relevant minister or ministers must decline an application for approval of a foreign investment "if not satisfied that all of the criteria in section 16 or section 18 are met". The criteria for foreign investments in significant business assets are 4 and relate to the investor's profile. They include whether the investor has relevant business acumen and experience; is of "good character"; and the "absence of ineligible individuals(s)" under the Immigration Act 2009. The criteria for assessing applications for foreign investment in sensitive lands are 21. In addition to the above four mentioned criteria, the other criteria include whether the investment will, or is likely to, "assist New Zealand to maintain New Zealand's control of strategically important infrastructure on sensitive land", and an 'economic interest factor' that includes "whether new Zealand's strategic and security interests will be enhanced" and "whether New Zealand's key economic capacity is improved".
Russian Federation	No	Neither the Strategic Investment Law nor the secondary legislation establish any specific criteria the review should proceed from when assessing an application. FAS only issues comments on Federal Law No. 57-FZ
United Kingdom	No	The Competition and Market Authority (CMA) 2014 "Mergers: Guidance on the CMA's jurisdiction and procedure" does not provide specific guidance on mergers that would affect national security
United States	Yes	FINA, as well as the "Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States provide a list of criteria, which includes (i)

Country	Publicly available evaluation criteria	Notes
		domestic production needed for projected national defence requirements; (ii) the capability and capacity of domestic industries to meet national defence requirements; (iii) the control of domestic industries and commercial activity by foreign citizens as it affects the capability/capacity of the U.S. to meet the requirements of national security; (iv) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferate missile technology or chemical and biological weapons; (v) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security: (vi) whether the transaction has a security-related impact on critical infrastructure in the United States; (vii) the potential effects on U.S. critical infrastructure, including major energy assets; (viii) the potential effects on United States critical technologies; (ix) whether the transaction is a foreign government-controlled transaction; (x) in those cases involving a government-controlled transaction, a review of (a) the adherence of the foreign country to non-proliferation control regimes, (b) the foreign country's record on cooperating in counter-terrorism efforts, and (c) the potential for transhipment or diversion of technologies with military applications; and (xi) the long-term projection of the U.S. requirements for sources of energy and other critical resources and materials.

b. Ensuring certainty surrounding transactions

To make it easier for investors to know if they fall under the rules or not for national security clearance, a growing number of countries have established procedures that allow them to obtain formal or informal guidance from the authorities prior to a filing being made. In 2008, out of a sample of 12 selected FOI participants, only France and Japan allowed for such advance consultations[68]. Today, most countries surveyed allow investors to engage in such preliminary consultations, reflecting a growing tendency across countries to enhance the predictability of outcomes[69].

Other countries do not provide formal or informal guidance. This means that, in case an investor has doubt as to whether his/her planned investment is or could be subject to a review based on national security grounds, the only way a transaction will be analysed is through filing a request for authorization[70].

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68 The countries surveyed were: Australia, Canada, France, Germany, Italy, Japan, Korea, Mexico, Poland, Russian Federation, Spain and the United States: Transparency and Predictability for Investment Policies Addressing Security Concerns: A Survey of Practice (OECD, May 2008).

69 The availability of prior consultations is an integral part of the regular regime of countries such as China, France, Japan, Korea, Mexico, the Russian Federation and the United Kingdom, whereas countries such as Canada, Germany and Italy hold consultations although there appears to be no general requirement to do so. In some countries these consultations entail a pre-clearance process, whereas in other countries (e.g. Canada, China and the United States) they do not.

70 For instance, Finland's Ministry of Employment and the Economy, in its info sheet "Questions and Answers About the Act on the Monitoring of Foreign Corporate Acquisitions" (10 October 2014), specifically recommends investors who "feel" that the target monitored entity could be critical for functions fundamental to society to file a notification to the Ministry.

Table 5. Advance consultations

Country	Advance consultations: can investors ask for preliminary opinions on application of authorization procedure	Notes
Argentina	No	The possibility for the investor to meet informally or formally with the relevant authorities to discuss the potential transaction is not regulated.
Australia	Yes	Potential investors may engage in consultations with the Foreign Investment Review Board (FIRB) prior to filing applications.
Austria	-	The possibility for the investor to meet informally or formally with the relevant authorities to discuss the potential transaction is not regulated.
Canada	Yes	Although there is no statutory mechanism that would allow an investor to obtain an opinion with respect to potential national security concerns of an investment in advance of closing, in practice the government encourages advance consultations where national security concerns are possible. These consultations nevertheless do not comprise a pre-clearance process.
China	Yes	Pursuant to Article 4 of the 2011 Regulation on Implementing the Security Review System for Foreign Mergers and Acquisitions of Domestic Enterprises, before filing an application with the Ministry of Commerce, the investor may request a discussion with the Ministry on procedural issues concerning its M&A to communicate circumstances in advance.
Finland	Yes/No	Pursuant to the Act on the Monitoring of Foreign Corporate Acquisitions in Finland, investors may obtain guidance prior to filing a notification for investments in the defence sector; investors cannot obtain prior guidance under Finland's cross-sectoral national security scrutiny mechanism.
France	Yes	Pursuant to Article 153-7 of the Monetary and Financial Code, foreign investors unsure as to whether the proposed investment is subject to review, may request an opinion from the Ministry of Economy, which is given 2 months to respond to the investor; a lack of response within the specified timeframe does not release the investor from the review requirement.
Germany	Yes	Although the legislation does not appear to expressly provide for a mechanism that would allow an investor to obtain guidance in advance of notification, reportedly foreign investors can enter into discussions with the authorities to obtain informal guidance before a review begins.
Italy	Yes	Although the regulations do not appear to expressly provide for a mechanism that would allow an investor to obtain guidance in advance of notification, in practice the investor or the Italian target company, or both, may get into preliminary discussions with the authorities.
Japan	Yes	Parties to the transaction may meet with relevant ministries for pre-filling consultation. Pre-filling consultations do not lead to advisory opinions as to weather a transaction might raise national security or other concerns.
Korea	Yes	Pursuant to FIPA, foreign investors may request the relevant authorities to verify whether the proposed investment may adversely affect national security and thus be subject to review. Similarly, pursuant to Article 11-2 of Act on Prevention of Divulgence and Protection of Industrial Technology, an investor intending to make an investment in technologies which is subject to approval for national security reasons under the Act may also request the MOTIE to review the proposed investment.
Lithuania	No	The possibility for the investor to meet informally or formally with the relevant authorities to discuss the potential transaction is not regulated
Mexico	Yes	Formal and informal guidance from the authorities can be obtained prior to a filling being made.
New Zealand	No	Only in limited number of circumstances the authorities may be willing to offer advice ("in cases of extreme difficulty or uncertainty, for example")[71].
Russian Federation	Yes	Pursuant to Article 8.6 of the Strategic Investment Law, foreign investors may inquire to the FAS to obtain clarification as to whether the planned transaction requires approval from the government. The FAS has 30 days to process the enquiry and respond to it.

[71] See Land Information New Zealand, which states that the Oversees Investment Office "is not mandated to provide legal advice […]. In cases of genuine doubt, the only safe approach is to seek consent".

Country	Advance consultations: can investors ask for preliminary opinions on application of authorization procedure	Notes
United Kingdom	Yes	Pursuant to Section 8.50 of the Mergers Procedural Guidance, parties to a proposed transaction may meet informally with the relevant agency, for example with the Ministry of Defence if the transaction specifically concerns the defence sector.
United States	Yes	Pre-consultation mechanisms under the CFIUS process have been designed to allow CFIUS additional time to understand the transaction and request additional information from the parties. They do not lead to advisory opinions as to weather a transaction might raise national security concerns.

c. Timeframe for reviewing transactions

A review or scrutiny mechanism with clear timeframes for conducting the review of a transaction is less likely to discourage investment decisions if investors know how long the review process will take.

Policy developments in this area since the adoption of the Guidelines reflect three trends. First, most countries specify timeframes in which the review must be completed under their mandatory review procedures or scrutiny mechanism.[72]. Second, in a majority of countries the process can take several months for reviewing transactions[73]. Third, the duration of processing applications or reviewing transactions has increased significantly since the adoption of the Guidelines, likely reflecting the growing scope of reviews. Whereas the average statutory limit was 1.5 months in 2008, it is now 3 months.

Further, in several countries, such as Finland, France, Germany, the UK and the United States, the review timeframe does not start until the authorities consider the application package complete. Other countries may enter into agreements with the parties to the transaction for expanding the review period. In Canada, for instance, the final period in which the Governor in Council may take action with respect to the investment can take up to 200 days or longer, if the investor and the Minister agree to an extension for the review. In the United States, the CFIUS process timeline may be varied by requests for voluntary extensions. As a result, the period from the initial application to the final decision can be longer than the statutory period.

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72 Exceptions are Argentina, Finland, and New Zealand which have no set timeframes. In *Finland*, there is no timeframe set out in the law for acquisitions in the defence sector, for which a review is mandatory; by contrast statutory time limits apply to acquisitions of so-called monitored entities. In *New Zealand*, although there is no statutory maximum period within which a decision under the Overseas Investment Act must be made, the Overseas Investment Office (the reviewing body) aims to make a decision within 30 to 70 working days from the date of application, depending on the targeted sector. See Land Information New Zealand, "application assessment and timeframe".

73 Time taken for completing reviews greatly varies from one country to another, ranging from 25 days in Italy to up to and more than 5 months (e.g. China, Japan, and the Russian Federation).

Table 6: Statutory limit for conducting reviews of investments under review and scrutiny mechanisms

Country	Time frame for compulsory review	Time frame for reviews conducted under a scrutiny mechanism
Argentina	No statutory period	n/a
Australia	Up to 40 days that can be subject to extension	n/a
Austria	Up to 90 days	n/a
Canada	No compulsory review	Screening up to 90 days + up to 110 days (or longer if agreed between the Minister and the investor) for the national security review itself
China	Up to more than 150 days	n/a
Finland	No statutory period	3 months + unspecified time for the Council of State to review the proposal by the Ministry not to confirm the acquisition
France	Within 60 days that can be subject to extension	n/a
Germany	Up to 60 days	Up to 90 days
Italy	Up to 25 days	n/a
Japan	Up to 150 days	n/a
Korea	Up to 30 days (defence-related companies) No statutory period (key national technologies)	Up to 90 days (cross sectoral scrutiny mechanism)
Lithuania	30 days	n/a
Mexico	45 days	n/a
New Zealand	No statutory period	n/a
Russian Federation	Up to 180 days	n/a
United Kingdom	n/a	Between 180 and 270 days
United States	n/a	Up to 90 days

n/a: not applicable

Whereas the 2009 Guidelines provide that, where possible, governments should consider have rules in place providing for approval of transactions if action is not taken to restrict or condition a transaction within the specified timeframe, many countries – as was the case in 2008 – still apply a "silence means consent rule": if the investor does not hear from the reviewing agency within the designated assessment

period, the investment is implicitly authorized[74]. Exceptions include countries such as Korea and the United States[75].

d. Disclosure of investment policy actions

Businesses are keen to have a good understanding of which transactions may be considered nationality security risks. For this reason, while the 2009 Guidelines recognize that it is in the investor's and government's interest to maintain confidentiality of sensitive information, they also recognize that disclosure of decisions is important, for example through press releases and annual reports. Publishing reports or issuing press releases on how the regulations are applied for national security reasons may indeed help foreign investors gain a better understanding of why transactions were denied.

In the 2008 FOI survey of accountability measures, the report noted that policies aimed at making public decisions to block or restrict investments on security grounds were little developed[76]. Among the sample of countries surveyed, few of them systematically provided information about the outcomes of their security-related review[77]. Furthermore, only Australia and the United States provided an annual report.

As shown in the table below, instances of public announcements are nowadays much more frequent than some seven years ago. Among the 17 countries surveyed, some 70% of them make public, in one form or another, their decisions to block or otherwise restrict proposed investment. In some cases, information about the outcome of the review is systematically provided (e.g. Austria, Japan, Korea, New Zealand, UK,

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74 For instance, in *Australia*, if the Treasurer has not responded within the specified 40 days according to FATA, the acquisition is deemed approved. In *Canada*, in cases where there is a notification or an application but no step taken (notice or Governor in Council order), silence amounts to permitting the investment. If the Minister does not send a notice that a review may be ordered or does not order a review in the first 45 day period, the Minister's "silence" acts as a decision. Once a notice has been issued or a review has been ordered, the Minister must notify an investor that no further action will be taken in order for the investment to proceed, or may communicate a Governor in Council order containing necessary national security related measures. In *China*, if the MOFCOM fails to act within the initial stage of the review, the transaction is deemed to fall outside the review scope and investors may continue to carry on (Art. 6 of the Regulations on the Implementation of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors). In *Finland*, under the national security scrutiny mechanism, should the ministry fail to act within the time limits, the acquisition is considered to be confirmed (Section 5 of the Act on the Monitoring of Foreign Corporate Acquisitions in Finland). In *France*, should the ministry fail to respond within the 60-day time limit, the authorization is deemed granted (Article R. 153-8 of the Monetary and Financial Code). Similarly, in *Italy*, if the government fails to exercise its "special powers" within the 25-day standstill period, the transaction can be implemented. In *Lithuania*, if the reviewing body fails to act within the 30-day time limit, the acquisition is deemed to be "in conformity to the national security interests" (Art. 7.7 of the Law on Enterprises and Facilities of Strategic Importance to National Security). In *Mexico*, if the Foreign Commission fails to issue a resolution within the 45-day time limit, the investment is deemed to be approved.

75 In *Korea*, for investments in defence companies, the competent authority must notify the applicant of its decision within the prescribed period (Article 6 (4) of the Foreign Investment Promotion Act). In the *United States*, if successful, a CFIUS review results in a 'no-action' letter from CFIUS insulating the transaction from subsequent presidential action. Further, if, in the course of the review, CFIUS determines that the transaction is not subject to its jurisdiction, CFIUS notifies the parties, thus concluding the review process.

76 Accountability for Security-Related Investment Policies (OECD, 2008).

77 Among Australia, France, Germany, Korea, Japan, Latvia, Mexico, Poland, Romania, the Russian Federation, Spain and the United States, only Korea, Japan and the US made a public announcement of decisions to restrict investment.

and the US); in other cases, decisions are sometimes disclosed, albeit not systematically (e.g. Australia, Canada, Germany, Russian Federation), for instance on the occasion of meetings with journalists[78]. By contrast, the number of countries that provide an annual report has not increased during the past seven years. Like in 2008, only Australia and the United States provide publicly available reports.

Table 7. Ex-post Disclosure/Reporting

Country	Public announcement of outcome	Report to parliament	Annual report	Notes
Argentina	-	-	-	
Australia	Yes	-	Yes	The Treasurer may or may not publicly disclose his/her decision to refuse or impose conditions on investments. Although there is no legal requirement to publicly justify the decision, the Treasurer's recent practice has been to provide the public with background information regarding the decision. In addition, the Foreign Investment Review Board issues an annual report.
Austria	Yes	-	-	The Ministry of Economy has to make its decisions public. The publically available information contains acquirer and target as well as whether the transaction has been considered as no-risk, requirements that were formulated, the transaction was rejected or the request for authorisation has been rejected on procedural grounds.
Canada	Maybe	-	-	Decisions by the Governor in Council are not systematically disclosed.
China	-	-	-	Neither the 2011 Regulation nor the 2011 Notice contain provisions on transparency
Finland	-	-	-	
France	-	-	-	
Germany	Maybe			Decisions by the Economic Affairs and Energy Ministry are not systematically disclosed
Italy	-	-	-	
Japan	Yes	-	-	Public announcement of decisions to restrict investment
Korea	Yes			Public announcement of decisions to restrict investment for transactions covered under the Foreign Investment Promotion Act
Lithuania	-	-	-	The legislation does not specify whether the decisions are publicly disclosed or not
Mexico	-	-	-	The decisions of the Foreign Investment Commission are not publicly available
New Zealand	Yes	-	-	The Overseas Investment Office publicly releases a summary of every application for consent that is granted or declined
Russian Federation	Maybe	-	Statistics	Although there is no statutory requirement for the FAS or the Inter-Agency Commission to make public information about the reviews, statistics are made available to the public regarding the number of transactions reviewed, approved and rejected. In addition, Russian officials sometimes provide some explanation about specific decisions during press conferences or interviews.
United Kingdom	Yes	-	-	The UK Department for Business Innovation and Skills provides information about intervention notices citing national security concerns, which is available on its website

[78] For example, in 2013, Canada's Industry Minister announced that the proposed acquisition of the Allstream business owned by Manitoba Telecom Services had been rejected, citing national security concerns for this refusal: Statement by the Honourable James Moore on the Proposed Acquisition of the Allstream Division of Manitoba Telecom Services Inc. by Accelero Capital Holdings (7 October 2013).

Country	Public announcement of outcome	Report to parliament	Annual report	Notes
United States	Yes if President decides to prohibit or unwind an investment	Yes	Yes	CFIUS only discloses its review of a particular transaction in the event that the US President acts to prohibit or unwind a transaction. CFIUS nevertheless issues every year an annual Report to Congress, which includes a list of all notices filed and all reviews or investigations completed during the preceding year, with basic information on the home country of investors, the nature of the business activities or products, along with data concerning the use of mitigation measures and information about any decision or action by the President to prohibit or unwind an investment. In addition, CFIUS is also required under the law to i) publish guidance in the Federal Register on the types of transactions that it has reviewed and that have presented national security considerations; and (ii) to notify Congress after each review and investigation.

2. Regulatory proportionality

Proportionality is another core principle contained in the Guidelines. Restrictions should narrowly focus on national security concerns and, if used at all, restrictive decisions should be tailored to the specific risks posed by investment proposals. The Guidelines also suggest an institutional setting that allows for consultations with relevant officials during the assessment of investment proposals so that a balance can be stroke between economic opportunities and safeguarding national security concerns.

While the policy objectives underpinning the regulatory changes that took place among FOI participants over the past seven years have brought a mixed picture with regards to sectors or activities deemed to present national security risks, in the two other areas policy developments have involved measures aimed at tailoring investment policy responses to specific investment proposals and at ensuring that the transaction under review benefits from the expertise of various agencies.

a. Narrow focus on concerns related to national security

Businesses value certainty. If the scrutiny or review mechanism is too wide, it may create uncertainty among foreign investors and involve significant compliance costs for them, especially in relation to delays linked to a broad review process. Part A showed that, since the adoption of the Guidelines, restrictions targeting strategically important industries, infrastructure, energy assets are nowadays much more frequent than some six years ago. There has been a noticeable tendency to expand the sectoral coverage of investments subject to review and prior authorization. In the majority of countries surveyed, national security concerns are no longer only perceived as related to military threats, but are also understood in a much wider sense where domestic industries, infrastructure, national energy assets are considered as needing protection against foreign takeovers. The link between these sectors and national security concerns may not appear always clear to foreign investors and may create uncertainty among them as to whether their technology or activity fits into the application of national security.

b. Appropriate expertise

Businesses expect fair decisions and value freedom from political intervention. In this regard, the 2009 Guidelines acknowledge that the decision process should normally involve several parts of the government that bring national security expertise as well as expertise necessary to weight the implications of actions with respect to the benefits of open investment policies and the impact of restrictions.

When it comes to specifically dealing with security concerns, all countries surveyed have assigned responsibilities to either a specific administration[79] or, increasingly, to a CFIUS–type interagency review committee which comprises several ministries and agencies (e.g. China, Lithuania, Mexico, Russian Federation, and the United States). When a specific administration conducts the review, in most cases other bodies are called upon to contribute, according to the requirements of particular transactions. Table 9 provides an overview of the institutional framework set up in the 17 countries surveyed.

c. Tailoring decisions to the specific risks posed by investments

Businesses expect that any scrutiny or review mechanism targets national security concerns in a way that is proportionate. In this regard, tailored responses as recommended by the Guidelines are a viable solution as they permit foreign investors to proceed with their transaction subject to certain conditions, instead of decisions leading up to completely blocking the investment.

Whereas in 2008, out of a sample of 17 FOI Participants, less than 40% of them had measures in place allowing for tailored responses to specific investment proposals[80], today, most surveyed countries have procedures providing for tailored responses. These include reaching agreements between the recipient government and a foreign investor on how specific security concerns raised by a particular investment are to be addressed. Table 8 shows that, with a few exceptions, specific provisions relating to undertakings are common to most countries surveyed. Although the conditions generally vary from one country to another, they all aim at striking a balance between the encouragement of FDI and the protection of national security interests, thus allowing flexibility to respond to specific transactions[81].

Table 8. Availability of measures tailored to the specific risks posed by specific investment proposals

Country	Availability of tailored investment policy responses to specific investment proposals
Argentina	No
Australia	Yes
Austria	Yes
Canada	Yes
China	Yes
Finland	Depending on the targeted sector
France	Yes
Germany	Yes
Italy	Yes
Japan	Yes
Korea	Yes
Lithuania	No
Mexico	Yes
New Zealand	Yes
Russian Federation	Yes
United Kingdom	Yes

79 E.g. Argentina, Austria, Canada, Finland, France, Germany, Japan, and Korea.

80 Proportionality of Security-Related Investment Instruments: A Survey of Practices (OECD, May 2008), p.5.

81 For example, China may require the transfer of shares/assets to eliminate the impact of the transaction on national security. Conditions that may be imposed by France, Italy and the Russian Federation include protection of the company's R&D capabilities. In Japan, the investor may be recommended to change the investment content. In Korea, proposals may be allowed under the condition that the investor signs a compact not to expose any state secrets. The UK Government may require the acquiring company to agree to conditions related to the protection of classified technology. In the United States, commitments may include adding US citizens to the company's Board of Directors or taking export control measures.

Country	Availability of tailored investment policy responses to specific investment proposals
United States	Yes

3. Accountability

Businesses will only invest when they are assured of the fairness in regulatory processes. For this reason, the Guidelines recognize the importance of high-level political involvement in the decision to block an investment because of the gravity of that decision and the possibility for businesses to seek review of decisions through administrative procedures and/or before courts. The survey shows that all countries have assigned responsibilities to prohibit an investment at high level. Most of them also allow decisions to be challenged by businesses through administrative appeals and in courts.

a. Authority to review and block an investment

Many countries surveyed give the authority to take the final decision to either their head of state or government (Italy, United States), the government as a whole (Canada, PR. China, Finland, Germany[82]) or to a body chaired by a high-ranking public official (e.g. Lithuania's Chancellor of the Government Office, the Russian Prime Minister). In all other countries the final decision is taken at ministerial level.

Table 9. Authorities to block investments and availability of appropriate expertise

country	Authority responsible for conducting the review	Authority responsible for deciding not to proceed with the investment	Consultation with other government agencies
Argentina	National Commission for Security Areas under the authority of the Ministry of Interior	National Commission for Security Areas/Minister of Interior	Coordination with the National Defence Council
Australia	Foreign Investment Review Board (FIRB) under the Ministry of Treasury	Treasurer	Coordination with relevant agencies, including national security agencies
Austria	Ministry of Economy	Minister of Economy	-
Canada	Department of Innovation, Science and Economic Development	Governor in Council	Government security agencies
China	Joint Committee	Joint Committee/State Council	Joint Committee including relevant agencies depending on the sectors concerned
Finland	Ministry of Employment and the Economy	Government (Council of State)	Coordination with different ministries "to the extent deemed necessary"
France	Ministry of Economy	Minister of Economy	Coordination with relevant ministries depending on the sectors concerned
Germany	Federal Ministry of Economic Affairs and Energy	Minister of Economic Affairs and Energy (for investments in national security and defence); Federal Government (for investments in other sectors)	Coordination with government security agencies, Ministry of Defence and Ministries of Foreign and Internal Affairs

[82] Germany is a specific case: for the sector-specific review process, the Ministry of Economic Affairs and Energy is entitled to prohibit an acquisition. For acquisitions that fall under the scope of the cross-sectoral scrutiny mechanism, decisions can only be taken with the approval of the federal government.

country	Authority responsible for conducting the review	Authority responsible for deciding not to proceed with the investment	Consultation with other government agencies
Italy	Presidency of the Council of Ministers	Presidency of the Council of Ministers	Coordination with ministries of foreign affairs and economic development (for investments relating to the national security and defence sectors)
Japan	Ministry of Finance and ministry with industry area jurisdiction	Minister with industry area jurisdiction	Coordination with the Council on Customs, Tariff, Foreign Exchange and other Transactions
Korea	Ministry of Trade, Industry and Energy (MOTIE)	Ministry of Trade, Industry and Energy (MOTIE)	Coordination with ministries with industry area jurisdiction; with Foreign Investment Committee composed of relevant ministries and agencies; with Industrial Technology Protection Committee (for investments in entities holding key technologies)
Lithuania	Commission for Assessment of Conformity of Potential Members to National Security Interests	Commission for Assessment of Conformity of Potential Members to National Security Interests chaired by the Chancellor of the Government Office	The Commission includes security agencies, pre-trial investigation bodies, foreign affairs
Mexico	National Commission of Foreign Investments	National Commission of Foreign Investments under the Secretariat of Economy	As an inter-agency committee, the Commission includes various federal bodies including internal affairs, foreign affairs, communications and transport, energy, etc.
New Zealand	Overseas Investment Office	Minister with industry area jurisdiction	-
Russian Federation	Federal Anti-Monopoly Service (FAS) and Governmental Commission on Monitoring Foreign Investments under the Prime Minister	Governmental Commission on Monitoring Foreign Investments under the chairmanship of the prime minister	As an inter-agency committee, the Commission includes various federal ministries and agencies including security bodies
United Kingdom	Secretary of State for Business, Innovation and Skills	Secretary of State for Business, Innovation and Skills	Coordination with the Ministry of defence when mergers of defence companies are under review
United States	Committee on Foreign Investment in the United States (CFIUS) under Secretary of US Treasury	President of the United States	As an inter-agency committee, CFIUS include security agencies as well as foreign affairs, energy, science and technology policy

b. Administrative or judicial review of decisions

All but one country allow rejected foreign investors to contest the security-related investment policy decisions. Most of them provide for an administrative procedure to ask for reconsideration of a decision made as a result of the review process and allow judicial appeal of decisions[83].

[83] Country exceptions include Australia, Canada, Finland, Lithuania, New Zealand and the Russian Federation, which provide that the decisions are only subject to judicial review, and the United States, which specifically exempt the US President's decision from administrative or judicial review. Although Chinese legislation is silent on whether the parties at stake may file for an administrative review with respect to the Joint Committee or State Council's decision, China has an administrative process which may allow, in principle, to challenge a

Practice suggests that the appeals processes are nevertheless barely used by foreign investors, primarily because the reviews rarely result in a formal denial. As already observed in the 2008 Report on accountability, disagreements between the authorities and the investors are likely settled in the course of the review itself or even prior to it, in the framework of consultations with the authorities[84]. Insofar as the authorities signal to investors that their proposal is unlikely to meet with approval, investors will either submit a revised proposal aimed at accommodating the security concern or withdraw from the process[85].

Furthermore, even if the courts may have jurisdiction to review decisions made on national security grounds, given the often discretionary nature of such decisions, it is unlikely that courts will determine the case upon its merits. In Australia, for example, in determining whether a particular proposal was contrary to the national interest, the courts have held that such decisions were at the discretion of the authorities.[86] In New Zealand, while foreign investors may have recourse to judicial review in courts to challenge decisions made under the Overseas Investment Act, decisions can be challenged only on procedural grounds[87]. Exceptions nevertheless do exist[88].

Table 10. Recourse for Investors

Country	Administrative review	Judicial review
Argentina	Yes	Yes
Australia	No	Yes
Austria	Yes	Yes
Canada	No	Yes
China	Yes	Yes
Finland	Yes	Yes
France	Yes	Yes
Germany	Yes	Yes

decision. A foreign investor may also in principle file an administrative lawsuit within three months of receipt of the administrative decision.

84 Accountability for Security-Related Investment Policies (OECD, 2008).

85 For instance, Article 4(4) of China's Notice on Launching the Security Review System provides that during the security review "the applicant may apply...for modification of the transaction plan or cancellation of the transaction". The same holds true in Australia, New Zealand and the United States. For example, Australia's Foreign Investment Review Board 2013-14 Report states that 719 proposed investments (not all involving potential national security concerns) were withdrawn and this does not take account of applications which were not submitted because after informal discussions with the authorities the investors felt they were unlikely to succeed (Foreign Investment Review Board Annual Report 2013-14).

86 See V. Bath, "Foreign Investment, the National Interest and National Security. Foreign Direct Investment in Australia and China", *Sydney Law Review*, 34:5, 2011, p. 13. The author writes that the "courts may review the procedural steps leading to the exercise of the discretion, and will consider the question of procedural fairness and natural justice and other administrative law grounds surrounding or leading up to a determination on the basis of national interest, but the national interest decision itself is one for the relevant minister".

87 Paul Comrie-Thomson, "Uncertain Opportunities: Chinese Investors Establishing Investments in New Zealand", *China Research Paper*, 1: 2013, University of Wellington, p.17.

88 For instance in France, decisions are subject to "full review" (*recours de plein contentieux)* by administrative law courts. Pursuant to French administrative law, administrative courts are entitled to overrule the Economy Ministry's decisions, including with regards to conditions that may have been imposed on the investor. Nevertheless, if the reasons for the refusal are related to national defence, it is likely that the administrative court of appeal (Administrative Court or Council of State) will not control its opportunity. It will merely consider observance of forms. See Laurence Martinet, "Patriotisme économique: Montebourg a-t-il trouvé l'arme fatale?", *L'Express*, 15/05/2014.

Italy	Yes	Yes
Japan	Yes	Yes
Korea	Yes	Yes
Lithuania	No	Yes
Mexico	No	Yes
New Zealand	No	Yes
Russian Federation	No	Yes
United Kingdom	Yes	Yes
United States	No	No*

* CFIUS and Presidential actions can be challenged on Constitutional grounds. CFIUS actions may also be challenged on procedural grounds or regarding whether those actions are in accordance with law.

ANNEX 1: FEATURES OF INDIVIDUAL COUNTRIES' INVESTMENT POLICIES RELATED TO NATIONAL SECURITY

Argentina

Argentina addresses national security concerns stemming from foreign investment through two approaches: It has established a prohibition of foreign ownership in the production of war weapons and ammunition[89]. Furthermore, it requires prior authorisation of foreign investments aimed at acquiring certain rural and urban estate assets located in "frontier" or "security" zones". This review mechanism, which is set out in the Frontier Security Zones Decree-Law No. 15,385/44, is explicitly grounded on national security considerations. Other restrictions exist – in radio and television, road transport and rural land – but there is no indication that these reviews aim at managing risks related to national security[90].

Scope

The review mechanism applies to all acquisitions by foreign investors of immovable property in frontier zones, or to the purchase of shares of a local company that owns real estate in said zones.

Although there is an explicit recognition of "national security" in relation to FDI in frontier and security zones under Decree-Law No. 15385/44 (Article 1), no definition of the term is provided. Article 1 nevertheless provides that Argentina's "security zones" are designed "to complement the regional forecast of national defence that comprises a strip along the country's land and maritime borders for defence purposes, including areas along the country's land and water borders, as well as areas surrounding inland military or civilian establishments that are of special interest to the defence of the country".

Designated body

The National Commission of Security Areas, under the authority of the Ministry of Interior, is in charge of administering the review.

Initiation of the review, information required for processing the case, and timeframe for the review

Permission has to be obtained prior to the acquisition. The foreign investor must make a filing, with documentation concerning the projected use for the property to be purchased, and documentation

89 Law 12.709, Article 8.

90 Argentina has reported restrictions in radio and television as well as road transport as exceptions to national treatment, suggesting that they are not based on national security. In addition, Law 26.737 on the Regime for Protection of National Domain over Ownership, Possession or Tenure of Rural Land, which entered into force in 2011, regulates foreign ownership of rural land and establishes a related review mechanism that aims at ensuring that the transaction satisfies the requirements of the law, according to which: no more than 15% of the total amount of "rural lands" in Argentine territory may be owned/possessed by foreigners (Article 8 of the rural land act); foreign individuals or foreign legal entities of a same nationality may not hold or possess more than 30% of the above stated 15% (Article 9 of the law); foreign acquisitions of rural land by an individual exceeding 1,000 hectares in key areas of Argentine territory is prohibited (Article 10 of the law). This restriction is not yet reported as an exception under the National Treatment instrument.

concerning the buyer, a company or an individual, as the case may be (Procedural rules issued to implement Decree-Law No. 15,385/44). The possibility for the investor to meet informally or formally with the relevant authorities to discuss the potential transaction is not regulated. There is no statutory time frame for the National Commission to make a decision and notify the applicant.

Outcomes, recourse for foreign investors, and transparency

The National Commission may refuse or grant approval for the purchase. There are no particular provisions regarding the possibility to appeal the decision; the usual appeal proceedings are likely to apply. In principle, the decision can also be challenged before Argentina's courts of justice. There is no indication that information about the review undertaken by the Commission is publicly disclosed.

Australia

Australia has not closed any sector of its economy to foreign investment on national security grounds[91]. Australia subjects certain acquisitions by foreigners to a review to assess whether they are contrary to the "national interest"; this review also covers national security concerns. The mechanism is primarily set out in the Foreign Acquisitions and Takeover Act 1975 ('FATA', last amended in 2015), and the Foreign Acquisitions and Takeovers Regulations 2015 ('FATR'). The Foreign Investment Policy ('the Policy', last released in December 2015) guides the interpretation and application of this legal framework.

Scope

In general, foreigners should make a submission to and obtain a no objection letter from Australia's Foreign Investment Review Board if they seek to:

- acquire an interest of 20% or more in an Australian business valuing the aggregate target assets or shares above AUD 252 million (as of December 2015; values are inflation indexed annually) or if the Australian subsidiaries or gross assets of the target are valued above AUD 252 million;
- acquire a direct interest (generally at least 10%) in an agribusiness where the value of the investment is AUD 55 million or more;
- make an investment in a "sensitive" sector[92] valued at over AUD 252 million;
- make an investment of 5 % or more in the media sector, regardless of value;
- acquire an interest in Australian agricultural land when the cumulative value of agricultural land owned by the foreign person (and any associates) is more than AUD 15 million;

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91 Separate legislation imposes limits on foreign investment in sectors such as airports, telecommunication and shipping but there is no indication that these restrictions aim at managing risks related to national security.

92 Pursuant to section 26 of the Foreign Acquisitions and Takeovers Act 1975, sensitive sectors are the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces; the manufacture or supply of goods, equipment or technology able to be used for a military purpose; the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities; transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to or from, Australia); telecommunications and the media.

Different notification requirements may apply depending upon whether the investor is a private sector investor, an agreement country investor, or a foreign government investor:

- With regards to *business acquisitions*, whereas private foreign investors are required to seek prior government approval before acquiring a substantial interest (upwards of 20%) in a corporation or control of an Australian business valued above AUD 252 million, for so called "agreement country investors" from Chile, China, Japan, New Zealand, Korea and the United States, the AUD 252 million threshold only applies for investments in sensitive sectors. In other sectors, an AUD 1,094 million threshold applies.

- With regards to agribusiness acquisitions, an AUD 1,094 million threshold applies to so-called "agreement country investors" from Chile, New Zealand and the United States.

- With regards to *agricultural land acquisitions*, consistent with Australia's FTA commitments, different thresholds apply to Chilean, New Zealand, Singaporean, Thai and US investors. By contrast, the rules related to investment in the *media sector* also extend to "agreement country investors".

- More stringent notification thresholds exist for *foreign government investors*[93]. A foreign government investor must notify and get approval before: making any direct investment in Australia, regardless of the value or type of investment[94]; starting any new business or acquiring any interest in land.

Acquisitions are approved unless the transaction would be "contrary to the national interest". The "Foreign Investment Policy" provides guidance for the determination of national interest grounds. One of the considerations mentioned is the "extent to which the investment affects Australia's ability to protect its strategic and national security interest". Other considerations include the impact on the economy, community concerns about foreign ownership of certain Australian assets, and whether the foreign government investment is commercial in nature or the investor may be pursuing broader political or strategic objectives that may be contrary to national interest. The Policy does not specify what weight is to be given to each of them, nor specifically defines the concept of strategic and security interest and the courts have held that the exercise of the discretion is a matter for the authority in charge of the review.

Designated body

The Treasurer undertakes the review, assisted by the Foreign Investment Review Board (FIRB). The FIRB reviews proposals against the national interest on a case-by-case basis and makes recommendations to the Treasurer. The FIRB coordinates as needed with relevant government agencies, including security bodies. Ultimate responsibility for decision-making lies with the Treasurer.

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93 A foreign government investor includes: a foreign government or separate government entity; entities in which a foreign government or separate government entity, alone or together with associates holds an interest of 20% or more; entities in which foreign governments or entities of more than one foreign country hold an aggregate interest of 40% or more (section 17 of the Foreign Acquisitions and Takeovers Regulation 2015).

94 A "direct investment" is an investment that provides the foreign government investor with potential influence or control over the target. An investment of 10% or more is considered to be a direct investment.

Initiation of the review, information required for processing the case, and timeframe for the review

Notifications of proposals are mandatory and FATA provides powers for the Treasurer to sanction the absence of prior notification, including the ability to order the unwinding or divestment[95]. There is a statutory 40-day time frame for the Treasurer to make a decision and notify the applicant; the Treasurer or the applicant can extend the timeframe if needs be. Potential investors may engage with FIRB prior to filing applications to allow timely consideration of the proposal. Information required from the investor includes, inter alia, information about the identity of the parties, including any government ownership, and how the national interest considerations are addressed.

Outcomes, recourse for foreign investors and transparency

The Treasurer may refuse an application or approve it subject to conditions considered necessary to remove any national interest concerns (FATA section 74). If conditions are not met, the Treasurer has power to order divestiture and/or impose penalties. The courts have jurisdiction to review the decisions of the Treasurer made under FATA. As noted above, in determining whether a particular proposal is contrary to the national interest, the courts have held that such decisions are at the discretion of the Treasurer. The FIRB issues an Annual Report, which is available on the FIRB website.

Austria

Austria has not closed any sector to foreign investment on national security considerations but operates a mandatory review mechanism for foreign investments across all sectors of the economy. This mechanism, set out in § 25a of the Foreign Trade Act, was first introduced in 2011 and modified in 2012.[96]

Scope

The Austrian review mechanism applies to the acquisition of a company, of shares of a company, or of a controlling influence over a company established in Austria by an acquirer, who, as a natural person, is not a national of the EU, the EEA, or Switzerland or, as a legal person, is not established in one of these countries. Only – and all – transactions that meet a series of conditions are reviewed:

- The acquired asset is a company that has its seat in Austria and must be either a joint stock company or a society in which none of the members subject to unlimited liability is a natural person;

- the acquisition is: a downright acquisition of a company, acquisition of shares in it that leads to voting rights of or beyond 25%;[97] or acquisition of a controlling influence over the enterprise – in cases where controlling influence is exercised by more than one person, the requirement to obtain prior authorisation of the transaction applies if one of the persons is foreign in the sense of the law and "controlling influence" is achieved, for example, through agreement of congruent voting;

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95 Failure to comply with the notification requirements can also lead to criminal penalties.

96 Außenwirtschaftsgesetz. An unofficial English translation is available in DAF/INV/RD(2013)3. Further information is available in *Ausschussbericht des Ausschuss für Wirtschaft und Industrie* of 27 November 2011. See DAF/INV/RD(2012)6 for the notification of the initial legislation.

97 For the calculation of voting rights, holdings of third persons are added, if the acquirer owns 25% or more in this third person, *or*, vice versa, *or*, a fourth person holds at least 25% of both the third person and the acquirer, *or* the acquirer has concluded with this person an agreement on the joint exercise of voting rights

- the target company must operate in a sector that touches upon public security and policy in the sense of Art 52 and 65 (I) of the Treaty on the Functioning of the European Union; while the term "public security and policy" is not defined in the law, a reference is made to, among others, areas that concern internal or external security – including notably but not exclusively defence goods producers and security services – and public security, public policy and crisis prevention – including notably but not exclusively energy and water supply, telecommunication, transport and infrastructure for education and health services;

- the acquirer is not a national of a member state of the EU, the EEA, or Switzerland (for natural persons) or a legal person that is incorporated in a country other than a EU or EEA member state or Switzerland;

- the authorisation requirement does also not apply if such requirement would be contrary to EU or international law obligations[98].

The Ministry of Economy may establish a list of exceptions for transactions that do not constitute a threat to public order and security.

Designated body

The Ministry of Economy is in charge of administering the review. The statute is silent as to whether the Ministry may benefit from inputs from other governmental agencies.

Initiation of the review, information required for processing a review, and timeframes

In principle, the acquirer must request authorisation for the transaction prior to the committing contract (§ 25a (6)) or, in cases of a public offering, before publication of the decision to request offers.

The law specifies which information must be provided, including the business of the company and a description of the planned acquisition (§ 25a (7)). The statute does not provide for any pre-review consultation mechanism; as a result, a foreign investor will have to initiate the formal approval process to obtain legal certainty or clearance.

Pursuant to § 25a, the review process may take place in two stages. First, a general review process, which may last up to 30 days, and which consists of deciding whether a review procedure is launched or, if no procedure is launched, whether this is (1) because European or international law obligations prevent such a procedure, or (2) because there are no concerns that interest of public order or security are at play. Absence of a decision by the end of the one-month period is treated as an authorisation. Within two further months, the authorities have to authorise the transaction, authorise it under mitigation requirements, or reject the authorisation if requirements are insufficient to remedy the threat. If no decision is taken, the transaction is treated as authorised. The acquirer can request a confirmation that the transaction is treated as authorised in cases that the authorities have not taken the required decision. The transaction is prohibited before the government authorisation has been given. In total, the review process may last up to 90 days.

The authorities can also launch a review *ex officio* if the abovementioned conditions of the authorisation requirement are not technically met and there is substantiated suspicion that the acquirer seeks to circumvent the review process. In this case, the review is based on an economic assessment of the acquisition to assess the economic substance and the *de facto* influence on the company (§ 25a (11)).

[98] The law does not offer guidance on the substance of these obligations.

Failure to obtain approval entails sanctions. The transaction will be invalid and, if implemented, can be unwound. Negligent violations of the authorization requirements are subject to up to one year imprisonment of the managers of the acquirer and to fines of up to 360 days of income. Wilful violations are subject to stronger sanctions (Kusznier, 2013).

Outcomes, recourse for foreign investors and transparency

In addition to the possibility for the Ministry to refuse or authorize the transaction, it can also subject the transaction to certain conditions or undertakings (§ 25a. (9)). Although § 25a of the Act is silent on whether the investor may file for administrative review or judicial recourse with respect to the Ministry's decision, pursuant to the general rules of administrative law in Austria, the Ministry of Economy's decision can be appealed. The Ministry has to make its decisions public.[99]

Canada

Since 2009, Canada's legislation provides for the possibility of a Government-initiated review of foreign investments that may be "injurious to national security".

Canada's national security scrutiny mechanism is primarily governed by the Investment Canada Act (ICA), which, as amended in 2009, regulates the mechanism under Part IV.1 of the Act, and the National Security Review of Investments Regulations of September 2009 (the Regulations, last amended in March 2015), which prescribe the various time periods within which action must be taken to trigger a national security review, to conduct the review, and, after the review, to order measures in respect of the reviewed investment to protect national security.

Scope of the review

The scrutiny mechanism applies to any investment proposed or implemented by a non-Canadian to establish a new Canadian business or acquisitions of any size, with no financial threshold (ICA, Part IV.1, section 25.1)[100]. National security scrutiny thus applies to the establishment of a new business; the acquisition of control of a Canadian business; and to a minority investments in a Canadian business. The mechanism also applies to a foreign entity carrying on all or part of its operations in Canada (section 25.1). Contrary to the rules that govern the "net benefit" test, the mechanism does not explicitly distinguish between foreign private investment and SOE investment.

The national security provisions in the ICA do not define or provide guidance on what constitutes an investment that could be injurious to national security.

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99 The publicly available information shall contain acquirer and target as well as whether the transaction has been considered as no-risk, requirements were formulated, the transaction was rejected or the request for authorisation has been rejected on procedural grounds (§ 25a (14)). At the time of writing, no information on the use of the procedure was publicly available.

100 Section 25.1: "This Part applies in respect of an investment, implemented or proposed, by a non-Canadian (a) to establish a new Canadian business; (b) to acquire control of a Canadian business in any manner described in subsection 28(1); or (c) to acquire, in whole or in part, or to establish an entity carrying on all or any part of its operations in Canada if the entity has (i) a place of operations in Canada, (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations, or (iii) assets in Canada used in carrying on the entity's operations".

Designated body

The Federal Department of Innovation, Science and Economic Development has primary responsibility for conducting national security reviews of foreign investment transactions. The review process engages other parts of the government, including Canada's security and intelligence agencies, and various departments (Public Safety, National Defence, Natural Resources, and Global Affairs)[101].

Initiation of the review, information for processing the case, and timeframe for review

A review is initiated if the Federal Department has reasonable grounds to believe that an investment could be injurious to national security. The review may be initiated after a transaction has been completed or an investment has been implemented. There is no formal mechanism that would allow an investor to obtain an opinion with respect to potential national security concerns of an investment in advance of closing.

Once a national security threat associated with an investment in Canada by non-Canadians is identified, the Minister of Innovation, Science and Economic Development, after consultation with the Minister of Public Safety, will refer the investment to Governor in Council if he/she considers it could be injurious to national security. If the Minister of Innovation, Science and Economic Development makes such a referral, the Governor in Council determines whether the Ministry of Industry should review a transaction. Upon completion of the review, the Minister of Innovation, Science and Economic Development may allow the investment; however, it is the Governor in Council's authority to make a final decision to block an investment.

The Regulations prescribe time periods for each step of the process. Based on the prescribed time periods, and subject to any additional time that may be agreed to between the Minister and the investor, the timeline for review may take up to 200 days or more (2009 Regulations as amended in March 2015).

The documentation required to obtain clearance has been further clarified by new regulations that came into force on 24 April 2015. Information required includes detailed information about the investor, the investor's board of directors and officers, the business activities carried out by the investor and its ultimate controller, whether a foreign state has any ownership interest or decision-making rights in the investor, the vendor, and the sources of funding of the investment.

Outcomes, recourse for foreign investors, and transparency

In addition of the possibility for the Governor in Council to refuse or authorize the investment[102], the authorities can also authorize the transaction on certain conditions which may include written undertakings (section 25.4 (1) of Part IV.1 of the Act). Decisions of the Governor in Council and Minister of Innovation, Science and Economic Development are final (Section 25.4 (4), Part IV.1) and thus only subject to judicial review. Decisions are not systematically disclosed[103].

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101 National Security Review of Investments Regulations, Section 7.

102 If the investor has already implemented the transaction, it may be required to divest itself of control of the Canadian business or of its investment in the entity.

103 Since the establishment of the security review, the Minister has provided information on at least one case: Statement by the Honourable James Moore on the Proposed Acquisition of the Allstream Division of Manitoba Telecom Services Inc. by Accelero Capital Holdings (7 October 2013).

China

China addresses national security concerns stemming from foreign investment through two approaches: It has established a list of sectors/industries where foreign investment is generally prohibited (e.g. manufacturing of weapons and ammunition and other sectors where foreign investment may jeopardise the security and efficient utilisation of military facilities). Furthermore, it has established a mandatory national security review system for foreign acquisitions of target military or military-related enterprises (e.g. military enterprises and enterprises in the vicinity of key military facilities) and important enterprises in industries other than the military or military related fields but operating in sectors that relate to national security (e.g. major equipment manufacturing industries; transportation and infrastructure services; energy and resources; enterprises involved in the development and production of key technologies). Any situation where a foreign investor seeks to obtain *de facto* control of a Chinese company active in one of these sectors is subject to the national security review.

This mechanism is primarily governed by the Notice of the General Office of the State Council on Launching the Security Review System for Foreign Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the 2011 Notice, promulgated on 3 February 2011), and the Regulation on Implementing of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the 2011 Regulation, promulgated on 25 August 2011), as well as the new National Security Law of the People's Republic of China (which entered into force on 1 July 2015)[104]. Other restrictions and approval/review mechanisms exist but there is no indication that they are formally related to national security concerns. At the time of writing, the Chinese authorities released a draft Foreign Investment Law which, if passed, would incorporate the national security review as a chapter in the proposed law.

Scope

The review applies to any transaction as a result of which a foreign investor gains control of the target domestic enterprise or its assets[105]. According to the 2011 Notice, *de facto* control of target enterprises by foreigners refers to the foreign investors becoming controlling shareholders or *de facto* controllers of domestic enterprises via the mergers and acquisitions in question (Article 1.3 of the Notice). *De facto* control means that a foreign investor (or several foreign investors acting in concert) seeks to: (i) acquire 50% or more of a Chinese company's equity interests or voting rights; (ii) have a significant influence over the Chinese company's shareholding meetings or its board of directors; or (iii) gain actual control of management decisions, staff, or technologies.

This requirement for a national security review applies to foreigners, i.e. to investors (natural and legal persons) who are not Chinese citizens or not registered in China. Investors from Hong Kong, China; Macao, China; and Chinese Taipei are also considered foreign investors.

Neither the 2011 Notice nor the 2011 Regulation and the 2015 National Security Law define or provide guidance on what constitutes a "national security" concern. China's 2011 Notice only expressly indicates that national security includes such concerns as impact on domestic capacity, the domestic

104 An unofficial translation of the law can be found here.

105 The review applies to any transaction in which a foreign investor gains control of a domestic enterprise or its assets, in particular when the investor: purchase equity in a domestic company owned by Chinese investors, thereby transforming it into a foreign-invested enterprise; purchase equity held by Chinese shareholders in a foreign invested enterprise or subscribe to a capital increase; establish a foreign invested enterprise and purchases assets from or equity in a domestic enterprise; and directly purchase assets of a domestic enterprise and use these assets to establish foreign-invested enterprise that operates these assets (2011 Notice).

economy, "basic social order", and domestic R&D capabilities.[106] The same can be observed with the Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, which were promulgated in 2006. Their Article 12 allows the Ministry of Commerce (MOFCOM) to conduct a review of any investment that results in actual foreign investor control over an enterprise that involves a major industry, has or may have influence on State security, involves a famous Chinese trademark, or is a business with a "name of long history." On its part, Article 2 of the National Security Law provides that "national security refers to the relative absence of international or domestic threats to the State's power to govern, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major national interests, and the ability to ensure a continued state of security." As a result, there is no indication as to how the body in charge of reviewing foreign investments evaluates a transaction from the above perspectives.[107]

Designated body

An inter-agency body within the Government, the Joint Committee, is in charge of conducting the review. The Joint Committee, under the leadership of the State Council (which is China's chief executive and administrative authority and whose members include the Premier as the head of government), is jointly headed by MOFCOM and the National Development and Reform Commission (NDRC, the State Council's economic policy planning institution), and includes the participation of relevant ministries depending on the industries or sectors that the transaction involves.

MOFCOM has primary responsibility for reviewing transactions. The ultimate authority for decisions concerning foreign investment that may impact national security nevertheless resides at the highest political level, i.e. the inter-ministerial panel (the Joint Committee) or, in case of diverging opinions among its members, the State Council.

Initiation of the review mechanism, information required for processing the case, and timeframe for review

China requires foreign investors to ask for authorization prior to the acquisition that fall within the scope of review under the 2011 notice[108]. Notifications are made through the MOFCOM (Section 4(1), 2011 Notice) and failure to do so entails sanctions[109]. MOFCOM is also empowered to initiate a review on its own, using information provided by local MOFCOM authorities as a result of examination of mergers and acquisitions applications in accordance with the existing legal and regulatory framework, as well as information provided by ministries, national industrial associations, competitors and upstream and downstream enterprises (Section 4(2)).

The regulations specify which information must be provided, including details about the transaction, the foreign investor and its affiliated enterprises (including its actual controller or parties acting in concert) and a description of its relationship with foreign governments; an explanation of the impact of the voting rights enjoyed by the foreign investor after the transaction on the resolutions of the shareholders' meeting or general meeting of shareholders, or the board of directors, or on the execution of partnership business.

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106 Proposed acquisitions are thus assessed on the basis of impact on national security (which includes impact on domestic manufacturing), the stable operation of the national economy, basic societal order and living conditions and research and development capability of key industries (2011 Notice, Section 2).

107 Pursuant to the Draft Investment Law, guidelines on what will trigger national security review would be promulgated.

108 The Draft Law, if enacted, would adopt a voluntary reporting regime; i.e. the filing would not be mandatory anymore.

109 Pursuant to the 2011 regulations, if foreign investors fail to apply for approval, the government has the legal authority to force divestiture if an investment causes significant impact on China's national security.

Sanctions may apply when parties to the transaction do not comply with these requirements. Before formally applying for the review, foreign investors may engage in consultations with MOFCOM on procedural issues regarding the intended investment and to communicate relevant circumstances in advance (Article 4, 2011 Regulation).

Pursuant to Section 4 of the 2011 Notice, the review process may take place in three stages: (i) a general review process, which may last up to 30 working days from the date the Joint Committee receives the application from the MOFCOM, and which consists of assessing whether the planned transaction is free of national security concerns; (ii) a special review process, which takes place if the Joint Committee decides that the transaction may affect national security and may take up to 60 working days; and (iii) another review process, undertaken by the State Council itself if the Joint Committee cannot agree as to whether the transaction will affect national security, and which has no timeline (the only timeline that exists refers to the 60 day timeframe for the Joint Committee to escalate the matter to the State Council). Overall, the timeline for review may take up to between 30, 90, and more than 150 days.

Outcomes, recourse for foreign investors and transparency

In addition to the possibility of refusing or authorizing the transaction, the authorities can also authorize it subject to certain conditions or undertakings such as the transfer of shares/assets to eliminate the impact on national security (Section 4, 2011 Notice). Although the Notice is silent on whether the parties at stake may file for administrative review with respect to the Committee or State Council's decision, China has an administrative procedure which may allow, in principle, parties to the transaction to ask for reconsideration of a decision made as a result of the review process. An investor may also file an administrative lawsuit against the government body within three months of receipt of the administrative decision. Neither the 2011 Regulation nor the 2011 contain provisions on transparency.

Finland

Finland has not closed any sector of its economy to foreign investment based on national security considerations. However, the national legislation covers both a mandatory review of certain investments and a national security scrutiny mechanism for the purpose of safeguarding Finland's essential security interests. Both mechanisms, set out in the Act on the Monitoring of Foreign Corporate Acquisitions in Finland (172/2012 as amended 2014)[110], were introduced on 1 June 2012 and replaced a previous, broader review mechanism.[111]

Scope

Finland's investment policy related to national security consists of two components: a review mechanism limited to defence industry enterprises and a cross-sectoral scrutiny mechanism that covers other "monitored entities". Both processes follow their own rules but are based on the same Act on the Monitoring of Foreign Corporate Acquisitions.

Defence industry enterprises are business undertakings that produce or supply defence equipment or other services or goods important to military defence or enterprises that produce dual-use goods in Finland. Acquisitions of defence industry enterprises *must* be notified in advance and are subject to review – regardless of the value of the acquisition – if :

110 Laki ulkomaalaisten yritysostojen seurannasta 13.4.2012/172. Finland's notification to the OECD [DAF/INV/RD(2012)16].

111 The Act repeals the former Act 30.12.1992/1612.

- the acquirer would reach or exceed specific ownership thresholds – 10%, 33% or 50% – or corresponding actual interest, through the planned acquisition, or for a particular reason in other cases;

- the acquirer is a foreigner, including foreigners from and companies established in EU and EFTA countries; acquisitions by Finnish entities must also be notified if 10% or more of the votes or actual influence in the Finnish entity are held by non-Finnish nationals; and

Acquisitions of other "monitored entities" – that is, companies that are "considered critical in terms of securing functions fundamental to society on the basis of its field, business or commitments" – by foreigners are not subject to application in advance, and acquisitions by foreigners can proceed without notification. However, notification in these cases can also be submitted to the Ministry of Employment and the Economy on a voluntary basis if the requirements defined in the Act are met. The Finnish government may, without any time limits, review a transaction by a foreign acquirer that potentially conflicts with a "key national interest"[112]. Thus, the acquirer risks an order to divest if the Finnish government deems this necessary due to a key national interest. As there is no list of "monitored entities" in Finland, any corporate acquisition by a non EU/EFTA foreigner may in theory be subject to the threat of divestment unless legal certainty is achieved through notification, i.e. confirmation by the Ministry of Employment and the Economy.

A "key national interest" is defined as securing national defence or safeguarding public order and security in accordance with Articles 52 and 65 of the Treaty on the Functioning of the European Union, should the fundamental interests of society be under the threat of severe damage.[113] The assessment regarding which organisation and business undertaking is considered critical in terms of securing functions fundamental to society is based on the 2013 government resolution on the Goals of Security of Supply and the 2010 government's Security Strategy for Society.

Designated body

Both mechanisms are conducted by the Ministry of Employment and the Economy, and involve different ministries, depending on the sector in concern. In any case, the National Emergency Supply Agency (a body tasked with measures related to maintaining security of supply) and the Ministry of Defence are consulted in each case. Investments that do conflict with a national interest – as assessed by the Ministry of Employment and the Economy – are referred to the Government Plenary Session for decision.

Initiation of the review, information required for processing the case, and timeframe for the review

Investments in the defence sector are subject to a prior notification by the foreign investor. Failure to do so is subject to a fine. Investors may obtain guidance prior to filing a notification. The government is not bound by specific time frames to carry out the review. Statutory timelines apply however to reviews of acquisitions in sectors other than defence.[114]

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112 Acquisitions by a EU/EFTA national or an entity domiciled in EU/EFTA are exempted unless a non-EU, non-ETFA foreigner holds 10% or more of the votes in or has actual influence over the company.

113 Section 2.1 Act 172/2012.

114 Upon having received all information, the Ministry must either give a decision to initiate further examination within 6 weeks, or make a proposal to refuse to confirm the investment within 3 months (Section 5 of the Act).

Instructions from the Ministry of Employment and the Economy issued in 2014 provide an indicative checklist of information to be included in an application or notification. This information concerns the applicant, the target of the acquisition, and the acquiring entity's structure of ownership, plus additional information when the acquisition concerns a company in the defence sector. The Ministry may request further information needed for processing the matter until the information provided is considered to be sufficient for making a decision. Failure to provide this information entails sanctions such as a fine.

Outcome, recourse against the decision and transparency

With regards to acquisitions in sectors other than the defence sector, upon the government's decision to refuse confirmation, the foreign investor may be required to dispose of its shares to the extent that the threshold specified in the Act is not exceeded, or to cancel any agreement implementing the transaction (Section 8 Act 172/2012). With regards to an acquisition in the defence sector, the Act does not regulate the possibility of mitigation agreements. In the event that the Government does not approve the transaction, the investor has the right under Finnish Law to appeal the decision as prescribed in the Administrative Judicial Procedure Act (Section 9 Act 172/2012). The Act on the Openness of Government Activities (21.5.19999/621) states when the Government's decision has to be made public. Under the Act everyone has the right to obtain information from official documents in the public domain. Official documents are in the public domain unless specifically otherwise provided for. The principle of openness prevails in Finland.

France

France has not closed any sector to foreign investment on national security grounds. But, since 2004, France reviews foreign acquisitions in specified sectors with respect to considerations of public order, public security or interests of national defence. This mandatory review mechanism is based on the Monetary and Financial Code (CMF).

Scope

The mechanism applies to any foreign investment in a sector that: may threaten public order and security or national defence interests; research, production or sale of arms, ammunition, or explosives; security and continuity of energy and water supply, of operations of infrastructures and networks essential for the defence, security or survival of the French nation; and public health protection. The scope of the review requirement depends on the *nationality* of the investor, the *degree of control* the investor acquires through its investment and the *sector or activity* in which the investment is made:[115]

- If the foreigner is EU/EFTA national, French non-resident in the EU/EFTA or legal person whose seat is in the EU/EFTA, a review is required if: control of a company established in France is acquired; or a branch of activity of a company established in France is acquired in one of the following sectors: cryptology; classified defence information; research, production or sale of defence goods; research or development of defence goods; energy; water; transport network and services; communications network and services; critical infrastructure;[116] and public health.

- Investments by EU/EFTA nationals are also subject to review in case of acquisition of a branch of activity of an enterprise established in France where this activity is the provision of private

115 Article R153-3 to R153-5 of the Code monétaire et financier.

116 "Infrastructure of vital importance" is defined in articles L. 1332-1 et L. 1332-2 of the Defence code.

security to an operator of vital importance or in protected zones; R&D in toxic and similar substances and agents against chemical weapons as part of the prevention of terrorism; and R&D and services in electronic surveillance and protection systems.

- In addition, other foreign investors ("non-EU investors") need to obtain government approval for acquisitions of 33, 33% of the capital in relevant sectors; also, the list of sectors and activities includes more items for non-EU investors.[117]

- The authorisation requirement does not apply if such requirement would be contrary to international law obligations.[118]

The authorization procedure targets proposed investments in: national defence sectors (all activities concerning the integrity, security and continuity of the operation of an establishment, facility or work of "vital importance"), private security services, dual-use goods and technologies, listening activities, management of information technology security, and gambling (excluding casinos). In addition, foreign investments are subject to review if they concern activities related to: (1) the integrity, the safety and the continuity of: (i) the supply of water, electricity, gas, hydrocarbons and any other source of energy; (2) the operation of transport services and telecommunications; and (3) related to the protection of public health.

Designated body

The Ministry of Economy conducts the review and obtains inputs from various governmental agencies depending on the strategic sectors concerned. The governmental agencies involved in the review may use international cooperation to ensure the accuracy of information provided to them by foreign investors, particularly those relating to the origin of funds (Article R153-12, CMF).

Initiation of the review mechanism, information required for processing the case and timeframe for review

Filling an application in advance to the Ministry of Economy is compulsory: Any foreign investor contemplating to invest in an entity or line of business which falls into one of the business sectors listed in the regulations is required to seek prior authorisation. Failure to apply can result in criminal penalties (imprisonment up to five years and a fine of up to twice the amount of the transaction which can be multiplied by five in the case of legal entities).[119] Furthermore any transaction completed without prior authorization is null and void and any interested party may claim this nullity (Article L 151-4, CMF).

Before formally submitting review applications, and if foreign investors are unsure whether the proposed investment is subject to review, they may request an opinion from the Ministry of Economy.[120] Information and documentation required from the investor includes, inter alia, the location where the investor is a legal entity, details on the individuals and public legal entities that have ultimate control over the investor, and the identity of the primary known shareholders (Article R153-8 CMF).

In principle, the review must be completed within 2 months, and authorisation is deemed to have been granted if the Ministry has not rendered a decision within this timeframe (Article R153-8 CMF). However,

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117 Article R153-3 to R153-5 of the Code monétaire et financier.

118 The law does not offer guidance on the substance of these obligations.

119 Article L 165-1 of the CMF and Article L131-38 of the Penal Code.

120 The Ministry is given two months to respond to the investor, but the absence of a response does not substitute the review (Article R153-7 CMF).

as the time frame does not start until the Ministry considers the application package complete, the review period may be extended if it considers that more information from the investor is needed.

Outcomes, recourse against decision and transparency

The Ministry is empowered to subject a proposed transaction to conditions to mitigate the threat; Article R153-9 lists some of the conditions.[121] Decisions of the Ministry of Economy are subject to judicial review by administrative law courts (Article L151-3 CMF).

Germany

Germany has not closed any sector to foreign investment on national security grounds but operates a sector-specific review process for acquisitions of companies that produce war weapons, tank engines and crypto technology[122] as well as a – more recently introduced – cross-sectoral scrutiny mechanism for investments by foreigners that threaten "public order or security of the Federal Republic"[123]. Both mechanisms are based on the Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance. The procedural rules for the two mechanisms differ substantively.

The sector-specific review mechanism requires a notification of an acquisition of a company or an equity position in a company by any foreigner – including nationals of EU/EFTA countries. The Ministry of for Economic Affairs and Energy may prohibit the transaction if the acquisition threatens significant security interests of Germany. The authority to prohibit the transaction only exists within one month since the reception of all required documents.

The cross-sectoral mechanism does not require notification of acquisitions; however, it allows the German authorities to review transactions and prohibit transactions that threaten public order or security of Germany. The authority to review a transaction only exists within three months from the acquisition. Also, only transactions by foreigners from outside the EU/EFTA are subject to this mechanism unless there are grounds to suspect that the acquisition by an EU/EFTA investor covers a transaction by a non-EU/EFTA investor.

Scope

Both mechanisms are only triggered if the acquisition assures the acquirer voting rights of 25% (jointly with others, as the case may be) in the target company in the case of a direct acquisition. In the

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121 They include guaranteed continuation of the company activities; the protection of the company's R&D capabilities and related know-how; the safety of the supply chain which the target company must provide or of which it is a part; guarantees that the company will meet its obligations under its public procurement contracts concerning public safety or national security. Such conditions may also aim at guaranteeing the integrity, security and continuity of the operations of an installation, facility, or structure of vital importance (as defined in the Defence Code) or of any transportation and electronic communication networks and services, or the protection of the public health. The Ministry may also require the sale of part of the target's activities falling within the sector to a third party independent from the foreign investor. The list is non-exhaustive.

122 §60 AWV, Foreign Trade and Payments Ordinance. A change on 1 September 2013 clarified that the scope includes companies that no longer produce cryptographic equipment but that are still in the possession of the related technology.

123 §55 AWV.. The mechanism was introduced through amendments to the Foreign Trade and Payments Act that entered into effect on 24 April 2009.

case of an indirect acquisition, the review is triggered if the acquirer and the intermediate owner hold at least 25% of the voting rights in the holdings that co-own the target company.

Designated body

The Federal Ministry for Economic Affairs and Energy conducts the review of investments under both the compulsory review mechanism and the national security scrutiny mechanism. It is also in charge of taking decisions allowing the transaction and for interim measures. For the sector-specific review process, the Ministry is also entitled to prohibit an acquisition or issue mitigation instructions. In turn, the Ministry is *not* entitled to prohibit an acquisition or to issue instructions under the cross-sectoral scrutiny mechanism; such decisions can only be taken with the approval of the federal government.

Initiation of the review, information required for processing the case and timeframe for review

The Ministry has limited timeframes for initiating the reviews: The authority to initiate a review in the sector-specific review mechanism only exists during one month's time since the written notification by the acquirer; if no decision is taken by that time, the acquisition is treated as approved. The Ministry has another month to take a decision. For the cross-sectoral review, the time frame for initiating is three months, counting from the acquisition – which might not come to the authority's attention immediately. The Ministry has two months' time since the reception of the required documents to take a decision.

No sanctions are defined for the omission to declare an acquisition under the sector-specific review mechanism; however, as long as the acquisition is not declared, the possibility to prohibit the transaction remains. Under the cross-sectoral scrutiny mechanism, an investor may apply for a certificate of non-objection to an acquisition to obtain legal certainty with respect to a transaction (Section 58(1) AWV). The certificate of non-objection is deemed granted if the Federal Ministry for Economic Affairs and Energy does not open the review procedure within a month's time (Section 58(2) AWV).

The documentation that is necessary to obtain clearance in the context of both reviews is published in the Federal Gazette (Sections 57 and 62 AWV). The Ministry can request a standard set of documents and additional documentation.

Outcomes, recourse against the decision and transparency

The authorities are entitled to impose conditions or undertakings to mitigate the threat (Sections 59 and 62 AWV). Decisions taken under the compulsory review and scrutiny mechanisms can be challenged in Germany's administrative courts. Facts about the decisions are not systematically disclosed. However, the Ministry for Economic Affairs and Energy has provided information on at least one case on demand during a press conference.

Italy

Italy has not closed any sector of its economy to foreign investment based on national security. However, since 2012, it operates a compulsory review of transactions regarding companies operating in the sectors of defence or national security, as well as in strategic activities in the energy, transport and communications sectors. The mechanism, set out in Law 11 May 2012, n. 56,[124] has been introduced simultaneously with the abolition of Italy's "golden share" arrangement.[125] The mechanism accords special

[124] The rules were initially passed as Decree Law 21/2012 and were later converted, with amendments, into law.

[125] Four decrees complement the regulatory framework: Ministerial Decree 108/2014 of 6 June 2014 identifies the activities of strategic importance for the system of national defence and security; Ministerial Decree 85/2014

powers to the government, in cases where an acquisition or other form or transaction triggers an "effective threat of severe prejudice to essential interests of the State" (for investments in the field of defence and national security) or an "exceptional effective threat of serious prejudice of Italy's national interests" (for investments in the energy, transport and communication sectors).

Scope

The review applies to any merger or acquisition, independent of its value, affecting a company exercising a strategic activity in the fields of defence and national security, or energy, transport and communications. With respect to defence and national security, the mechanism applies to all foreigners; reviews of transactions in other sectors only apply to foreigners from non-EU and non-EEA countries[126].

As soon as a company owning any asset identified as strategic by the law adopts a resolution or decides a transaction that results in a change of ownership or control of such asset (e.g. a resolution concerning a merger or demerger, a decision to transfer a subsidiary owning a strategic asset), the company must notify the government of all details of the relevant resolution, action or transaction[127].

Italy's legislation sets out in great detail the criteria that are to be applied for the assessment of whether a specific transaction represents a risk[128].

Responsible body

The Presidency of the Council of Ministers is the authority responsible for conducting the reviews. For investments relating to the national security and defence sectors, the review process involves the participation of the ministries of foreign affairs, the ministry of infrastructure and transport as well as the ministries of the interior and of economic development and ends with the adoption a presidential decree if the transaction is denied or conditions are imposed on it.

Initiation of the review mechanism, information required for processing the case and timeframe for review

The foreign investor or target company must notify the authorities if a transaction falling under the ambit of the review mechanism is planned, adopted or executed[129]. The Law Decree makes a distinction

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of 25 March 2014 identifies the assets of strategic importance in the fields of energy, transport and communications. Presidential Decree 35/2014 of 19 February 2014 sets out the competence and procedures for the exercise of the special powers to review and restrict foreign investment in the defence and national security sector, and the Decree of the President of the Republic (D.P.R.) 25 March 2014, n. 86 sets out the procedures for the activation of the special powers in the fields of energy, transport and communications.

126 Non-EU and non-EEA persons are defined as any individual or entity that is not resident, is not domiciled, does not have its registered office, headquarters or centre of main interest in any EU or EEA member state, nor is it established therein. In order to prevent circumvention, the review nevertheless also covers buyers who were originally established outside the EU/EEA and subsequently establish themselves within the EU/EFTA through the purchase of an EU/EEA company or branch.

127 The government must be notified of (1) any relevant resolutions adopted by the target company within 10 days of their adoption, and in any event prior to their implementation and (2) any purchase of interests in the target company within 10 days of the acquisition. Purchases of equity interests in a listed company active in the fields of defence or national security trigger the notification obligation if the purchaser ends up holding participation in excess of 2% (and subsequently in excess of 3, 5, 10, 15, 20 and 25%) of the voting share capital of the target.

128 Decree Law 21/2012 Art. 2 7.a).

between resolutions adopted by the target company and purchases of any interest in any relevant company: Any relevant resolutions adopted by the company exercising a strategic security activity or holding any strategic assets must be notified within 10 days of their adoption and in any event prior to their implementation, whereas any purchases of equity interests must be notified within 10 days.

Failure to notify entails sanctions. Although sanctions slightly vary depending on the sectors and on the transaction structure adopted by the parties, from a general standpoint, should the company adopt a resolution in breach of the filing requirements, the relevant resolution is deemed null and void and the government may apply an administrative fine up to twice the relevant transaction and in any event at least 1% of the combined turnover of the companies involved in the transaction.

Upon receipt of the notification, the government has 15 days to reach a decision. Absent a decision within 15 days after the notification, approval is deemed granted. The competent authority is nevertheless allowed to extend the timeframe by a new term of 10 days in the event that additional information is required from the parties to the resolution or transaction. Overall, a review may take up to 25 days before a decision is reached. The documentation that is necessary to obtain clearance in the context of both reviews is published in the legislation and implementing regulation. For example, with regards to investments in the security and defence sectors, the notification must provide all relevant information essential to assess the impact of the transaction, including a business plan. It can also include specific commitments aimed at safeguarding public interests related to national security and defence (Presidential Decree 19 February 2014 no. 35).

Outcomes, recourse for foreign investors, and transparency

The regulatory framework expressly allows the government to impose conditions when authorising the purchase to a given undertaking. For example, with respect to investment in the fields of defence and national security, the government may impose conditions relating to the security of procurement and information or to the transfer of technologies. The implementing regulation requires monitoring of compliance with such commitments (Presidential Decree 19 February 2014).

The government's decision, which takes the form of a decree of the Prime Minister if a veto or conditions are imposed, may be appealed to the Administrative Court of Rome. There is no indication in the statutory regime that information about the outcomes of a review may be publicly disclosed.

Japan

While Japan has not closed any sector of its economy to foreign investment, Japan reviews foreign investment with a view to national security concerns. The Foreign Exchange and Foreign Trade Act (FEFTA) allows the Minister of Finance and the Minister in charge of the relevant industry to halt FDI if it "impairs national security, disturbs the maintenance of public order or hinders the protection of public safety". Other restrictions exist – e.g. in broadcasting and radio, telecommunications - but there is no indication that these reviews aim at managing risks related to national security[130].

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129 Resolutions approving mergers, transfers of assets or controlled entities, transfers of the corporate site outside of Italy and other resolutions that may affect Italy's national security must be notified by the company itself (Law Decree of 15 March 2012 as amended).

130 Some sectoral laws regulate investments by foreign nationals or set the upper limit of holding ratio by foreign nationals, e.g. the Ships Act and the Broadcast Act (See for example Subsection I of Section II of the Broadcast Act No. 132 of 1950 as amended in 2010).

Scope

FEFTA requires advance notification for FDI in certain industry sectors that may have an impact on "national security", "public order" and "public safety" (Articles 27(1) and 27(3)(i)(a)). The prior notification is required for investments on business related to the following three sectors/activities:

- weapons; industries for dual use items and items used for the maintenance of the defence industrial base, including industries manufacturing materials, accessories or equipment specially designed for the production of arms or aircraft; nuclear power or space craft;

- public infrastructure (e.g., electricity, gas, water, telecommunications or railways); public safety (e.g., biological chemicals or private security services); and

- domestic industry protection (e.g., agriculture, air and maritime transport)[131].

As long as the intended investment falls into one of the categories above, the filing is mandatory for foreign investors (Articles 27(1), FEFTA.) and there are no numerical thresholds such as turnovers, asset size or investment amounts for exemptions[132]. Planned transactions will be approved unless they would impair national security, impede public order or hinder the protection of public safety. Whether there is a risk of impairing the national security, public safety, etc., is determined on a case by case basis.

Designated body

An application must be submitted to the Minister of Finance and the Minister having jurisdiction over the targeted industry via the Bank of Japan. The relevant ministry will review the application. Before issuing an order to halt 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, an advisory body which comprises experts nominated by the Minister of Finance (Article 27.5, FEFTA).

Initiation of the review mechanism, information required for processing the case and timeframe for review

As stipulated in Article 27 of FEFTA, notification of proposals is mandatory. Failure to obtain clearance may lead 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 yen, whichever is larger.

Parties to a proposed transaction may meet voluntarily with relevant ministries for pre-filling consultation[133]. The notification form requires certain information, including the name and contact information of persons making the investment and information on the percentage of shares to be acquired, the business plan of the investing company, the reason for the transaction. The relevant ministry may nevertheless request more detailed information from the foreign investor (for example information related to the degree of control over the investee) and the target company in the course of the review process. Forms for application are available at the Bank of Japan's website.

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131 The Public Notice on Specifying the Business Types to Be Specified by the Minister of Finance and the Minister Having Jurisdiction Over the Business Pursuant to the Provision of Article 3 paragraph (3) of the Order on Inward Direct Investment.

132 Art. 26, (2) i of the Foreign Exchange Act.

133 In contrast with pre-review consultation mechanisms that exist in some other countries surveyed in this Report, Japan's pre-review consultations do not lead to advisory opinions as to whether a transaction might raise national security concerns.

The review process may take place in two stages. First, a general review process, which may last up to 30 days, and which consists of deciding whether a more thorough review is needed or not[134]. Second, if the authority finds that there is need for a review procedure on whether the investment is likely to impair the national security, impede public order or hamper the protection of public safety, the review may take up to five months (Article 27.6 of the Foreign Exchange Act).

Outcomes, recourse against decision and transparency

In addition to the possibility for the authorities to suspend an investment, they may also authorize the transaction subject to certain undertakings by the applicant. In the event the transaction is not approved or subjected to an undertaking, the investor can make an administrative appeal to challenge the result of the review. An investor dissatisfied with the result of the appealing procedure may also bring an action to court. Decisions to restrict investment are publicly announced[135].

Korea

Korea has not closed any sector of its economy to foreign investment based on national security grounds. It nevertheless operates two sector-specific review mechanisms based on national security and a broader one based on national safety and public order.

First – pursuant to amendments to the Act on the Prevention of Divulgence and Protection of Industrial Technology which became effective from January 2012 – Korea operates a sector-specific compulsory review mechanism targeting foreign investments in entities that hold key national technologies and that received government funding and transfer of national technologies. Second, Korea operates another sector-specific compulsory review mechanism in the framework of which foreign investment in defence industry companies requires prior notification and government approval. And, third, Korea operates a cross-sectoral scrutiny mechanism on the basis of which the authorities may determine that foreign direct investments (generally referred to acquisitions of 10% or more of the voting shares), "threaten the maintenance of national safety and public order". The two last mechanisms are established under the Foreign Investment Promotion Act (FIPA) as amended by Act No. 10232 of 5 April 2010 and regulated by the Enforcement Decree of the Foreign Investment Promotion Act.

Procedural rules for the three mechanisms differ substantially:

- The sector specific review mechanism under the Industrial Technology Protection Act requires a prior notification by the Korean institution possessing industrial technology[136] and approval by the Minister of Trade, Industry and Energy (MOTIE). In the event that the foreign investment is determined to "seriously affect national security", the Minister may order various measures to address the risk such as an order to suspend, prohibit or unwind the transaction (Articles 11-2-1 and 11-2-3 of the Act).

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134 This period may be shortened if there are no issues. 98% of notifications were reviewed within two weeks in 2014 according to Japan.

135 In May 2008, the Ministry of Finance and the Ministry of Economy, Trade and Industry disclosed their decision to block an investment as there was a likelihood that the investment might hamper the protection of public safety. See "The Foreign Exchange and Foreign Trade Law", *International Financial Law Review*, 17 February 2010. It is the only case of blocking an investment on such ground since the enactment of the Act.

136 I.e. when the institution intends to proceed with foreign investment.

- The second sector specific review mechanism under FIPA targets investments in defence industry companies and requires prior notification and government approval (Article 6(3), FIPA). Defence industry companies mean companies as defined in Article 3 of the Defence Acquisition Program Act (Article 7(2), Enforcement Decree).

- The cross sectoral scrutiny mechanism relies on general reporting requirements under the Foreign Investment Promotion Act[137]. Under this broader mechanism, the FIPA provides that foreign investments may be restricted at the request of the relevant ministries in charge of oversight of the industries that are subject of such foreign investments if the MOTIE determines through the deliberation of the Foreign Investment Commission that they threaten national safety and public order (Article 4(2), FIPA and Article 5, Enforcement Decree)[138].

Scope

Both the sectoral review targeting defence industries and the cross-sectoral scrutiny mechanism are triggered if the acquisition assures the foreign acquirer 10% or more of the voting shares[139]. Under these two mechanisms, no specific rules apply to investments made by GCIs and sovereign wealth funds. Apparently, there are no numerical thresholds such as investment amounts that apply under the Act on the Prevention of Divulgence and Protection of Industrial Technology.

The three mechanisms are based on national security grounds. Different rules apply in terms of criteria the reviews should proceed from:

- With respect to the general restriction on foreign investment based on national safety concerns as established under Article 4(2)(1) of FIPA, in addition to the fundamental standard for the test (i.e., threatening the maintenance of national safety and public order), the Enforcement Decree provides for specific criteria the review should proceed from when assessing investments[140].

- With respect to issuance of permission for foreign acquisition of a defence industry company, definitions of such companies are provided in Article 3 of the Defence Acquisition Programme Act.

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137 If a foreign investor acquires either 10 % or more of the voting shares or equity of a Korean company and such an investment amounts to 100 million won or more; or acquires less than 10 % of shares or equity but participates in the management of the company (for instance with a right to dismiss or elected officers of the company such as its director) and such an investment amounts to 100 million won or more; or provides a long-term loan to a Korean company, he/she should file a prior report on the investment with MOTIE.

138 Article 4(2)(1) of FIPA provides that "except for the following cases, no foreign shall be restricted from any foreign investment as prescribed in this Act: where the activity threatens the maintenance of national safety and public order.

139 Under FIPA, a foreign investor includes an individual of a foreign nationality, an entity established pursuant to a foreign law or certain international organisations.

140 These include: possible obstruction to manufacturing of defence materials; possible disclosure of contracts that are deemed state secrets; diversion of strategic capabilities for military purposes; investments which might hinder efforts of international organisations to maintain international peace and security; and where foreign nationals attempt to acquire the management control of an already-established domestic company through the acquisition of the stocks, etc., of the company (Article 5 (1) (2) of Enforcement Decree).

- The Act on the Prevention of Divulgence and Protection of Industrial Technology neither defines nor provides guidance on what constitutes foreign investment that may "seriously affect" the "national security" of national core technology. "National core technology" is nevertheless defined as "industrial technology (…) which is feared as a technology to exert an significantly adverse effect on the national security and the development of the national economy in the event that it is divulged abroad" (Article 3 of the Act).

Body responsible for the review

MOTIE is the primary body that reviews foreign investment on national security grounds under the three mechanisms. The review process engages other players (for example, in case of defence-related investments, the Minister of National Defence[141]). It also engages (under FIPA's provisions) the Foreign Investment Committee, which is headed by the Minister of Finance and Economy and composed of the heads of competent ministries and agencies, to deliberate on whether or not the transaction threatens national safety, or, in case of foreign investments in entities that hold key national technologies, the Industrial Technology Protection Committee[142].

Initiation of the review mechanism, information required for processing the case, and timeframe for review

Both sectoral review mechanisms require notification and prior authorisation. Failure to notify pursuant to both Acts may result in an administrative fine. In addition, the MOTIE has the authority to order the disposition of the investment. Criminal penalties may also be imposed for making defence-related foreign investment in Korea and for investing in entities that hold key national technologies and that received government funding without filing.

Korea's scrutiny mechanism does not require prior authorization and notification. Only a simple filling of a prior report is required in case the foreign investor seeks to acquire either 10% or more of the total voting shares or equity of a Korean company or less than 10% but would participate in the company's management.

Foreign investors may obtain informal guidance before notification/filling pursuant to the FIPA, in particular to verify whether the proposed investment may adversely affect national security and thus be subjected to review, as well as regarding any planned investment in defence-related companies (FIPA Enforcement Decree, Article 5(6)). Similarly, an investor intending to make an investment in technologies that is subject to approval for national security reasons under the Industrial Technology Protection Act may also request the MOTIE to review the proposed investment in advance (Article 11-2-4 of the Act).

Each process follows its own rules in terms of timeframes:

- With regards to the cross-several scrutiny of FDI that may threaten the maintenance of national safety and public order the review should be completed within 90 days from the date of review request by the competent Minister (Article 5 (7) of the Enforcement Decree).

- The processing period for issuing approval of foreign investment in defence-related companies should be 15 days from the date on which the application for permission is filed by the investor, with a possibility of a 15-days extension (Article 7(3), Enforcement Decree). However, the review timeframe does not start until the reviewing body considers the application package complete; thus the timeframe can go beyond those 30 days (Article 7(4), Enforcement Decree).

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141 Article 8(1), Enforcement Decree

142 Article 5(1)2, Enforcement Decree; Article 11-2 (3) of the Industrial Technology Act

- With regards to investments in entities that hold key national technologies, the Act itself does not bind the government by specific time frames to carry out its review[143].

Outcomes, recourse for foreign investors and transparency

In the context of a review undertaken to assess a contemplated investment in defence-related companies, the MOTIE may either refuse to approve it or attach conditions to the permission. (Article 6(6), FIPA). Similarly, in the context of the cross-sectoral scrutiny mechanism, MOTIE may decide to attach conditions to the permission, such as a separate sale of a specific part of business or maintenance of confidentiality (Article 5(7)). With regards to foreign investments in entities that hold key national technologies, Article 11-2 remains silent as to the possibility for MOTIE to impose undertakings.

In the event the MOTIE does not approve a proposed transaction on national security grounds, the investor can challenge the decision in Korea's administrative law courts. Under FIPA, the MOTIE makes a public disclosure when the approval process results in the blocking of an investment on national safety and public order grounds (Enforcement Decree, Article 5(8)).

Lithuania

In Lithuania, foreign investment is permitted in all areas of business with the exception of those related to the State security and defence, except for investments by economic entities that meet the criteria of European and trans-Atlantic integration. Investments in these sectors are subject to approval granted by the State Defence Council as set out in Article 8 of the Law on Investment of the Republic of Lithuania No. VIII-1312 of 7 July 1999 (last amended in 2015). Acquisitions targeting enterprises and facilities of strategic importance to national security that require approval are defined in the Law on Enterprises and Facilities of Strategic Importance to National Security and other Enterprises of Importance to Ensuring National Security of 2002 (last amended in 2014). At the time of writing, Lithuania was considering changes to both laws to address further the national security implications of investments.

Scope

The review process under the Law on Enterprises and Facilities of Strategic Importance targets investments (both foreign and domestic) that focus on "enterprises and facilities of strategic importance to national security", on "enterprises of considerable importance to ensuring national security" and on "facilities of particular strategic importance to national security". The Law provides for a list of companies or areas of activities (such as energy, transport, IT and telecommunications, finance and credit) that are covered by the investment restriction.

As soon as an investor plans to acquire, individually or jointly with other persons acting in concert, at least 5% of the voting rights in the target company; or seeks to acquire the missing shares to increase his/her voting rights to over 33% in the target company; or seeks to acquire property or management or any other rights in a facility of particular strategic importance, the transaction must be reviewed and obtain approval on the grounds of national security interests (Article 7.2 of the Strategic Law).

Under Article 2.1 of the Strategic Law, "national security interests" is defined as the protection of "the independence and sovereignty of the State, European and trans-Atlantic integration, and the reduction of threats and risks for the energy and other economic sectors of vital importance to public security".

143 Article 11-2 provides that "detailed matters on measures, procedures, etc. of the reporting… shall be prescribed by Presidential Decree". The Secretariat did not have access to this Decree.

Article 7.11 of the Law, which spells out a range of factors that have to be referred to during the review process, provides further insights into the specific risks that Lithuania feels to face, including threats in relation to investments that do not correspond to the criteria of European and transatlantic (set out in Article 8 of the Strategic Law) or by certain persons suspected of criminal activities.

Body responsible for the review

A government body – the Commission for Assessment of Conformity of Potential Members to National Security Interests, chaired by the Chancellor of the Government Office- review applications with input from representatives of government security bodies such as the State Security Department, the Ministry of Interior and the Police Department, as well pre-trial investigation bodies, including the Prosecutor General's Office, and the Ministry of Foreign Affairs[144].

Initiation of the review mechanism, information required for processing the case, and timeframe for review

The review must be initiated by the management bodies of the target companies and facilities Article 7.4 of the Strategic Law). The investor "may" nevertheless initiate the review process, as well as the government (Article 7.5). There are no specific provisions in the Strategic Law pursuant to which an investor or the target enterprise/facility may obtain guidance from the Lithuanian authorities prior to filling an application. Information required from the target entity/investor is set in the Commission's rules of procedure (Article 7.4). The public authorities also collect data. The Commission has one month to reach a decision after submission of a complete application. Absent a decision within one month after the notification, approval is deemed granted (Article 7.7).

Outcomes, recourse for foreign investors and transparency

Under Article 7 of the Strategic Law, the Commission must deny approval to an investment if *all* the criteria in Article 7.10 are not met[145]. If the Commission determines that the transaction does not meet those criteria and therefore creates a risk to Lithuania's national security interests or critical facilities, then it must block the transaction. The legislation does not explicitly foresee the possibility for the Commission to take certain steps to mitigate national security risks through, for example, mitigation agreements with the investor. An investor who has faced a negative decision can nevertheless file an application for review by making new propositions to the Commission. The investor can also challenge the decision before Lithuania's administrative courts (Article 7). The Strategic Law does not specify whether the decisions are publicly disclosed or not.

Mexico

Mexico addresses national security concerns stemming from foreign investment through two approaches. It has established a partial prohibition of foreign ownership in the manufacture and commercialization of explosives, firearms, cartridges, and ammunitions and fireworks where foreigners

144 Article 7.6 of the Strategic Law.

145 Article 7.10 has six criteria, which are: (i) the need for the foreign person to meet the European and Transatlantic criteria as described in Article 8 of the Law; (ii) the fact that the foreign investor is not a dominating importer of fossil energy resources or controlled by such an importer; (iii) the fact that the foreign investor does not maintain relations that may pose a threat to nationality security with states (or persons of those sates) that are not EU and NATO states; (iv) and (v) the fact that the foreign investor is not suspected of, or has not committed criminal activities such as activities in relation to organized crime and terrorism; and (vi) the investor's non conviction for crimes against the independence, territorial integrity and constitutional order of the Republic of Lithuania.

can only hold up to a 49% stake[146]. It also subjects foreign investments to prior approval where foreign investors wish to participate in certain sectors and services (e.g. education, construction and operation of general railways, certain shipping companies) in a percentage higher than 49%, or acquire directly or indirectly more than 49% of the capital stock of existing Mexican companies when the total value of the assets of the Mexican company is greater than an amount determined annually by the authorities. National security concerns form part of this process set out in the Foreign Investment Law (last amended in 2014). Other restrictions exist – for example in communications and insurance activities – but there is no indication that these reviews aim at a managing risks related to national security[147].

Scope

A prior authorization is required when the foreign investor[148]:

- wishes to participate in listed sectors and services (education, port services, shipping companies engaged in the exploitation of ships for high-sea traffic, construction and operation of general railways, concessionaire companies of air fields for public service) in a percentage higher than 49% (Article 8 of the Investment Law).

- wants to participate, directly or indirectly, in sectors that are otherwise not restricted if the participation consists of a majority position in the capital stock of Mexican corporations, when the aggregate value of the assets of such companies at the date of acquisition exceeds an amount determined annually by the Commission (Article 9 of the Investment Law). In 2014, this monetary threshold was approximately USD 262 million.

Transactions are approved unless they present a national security risk. Article 30 of the Law does not define the concept of national security. The reviewing body has discretionary power in this regard and there are no published guidelines or statutory criteria for determining what national security is.

Designated body

The National Commission of Foreign Investments (CNIE, in Spanish) is in charge of administering the review and thus determining whether investments subject to prior approval may go forward. An inter-agency committee established under the Secretariat of Economy, it comprises various federal ministries and agencies, including the Secretariat of Internal Affairs, Finance, Social Development, Environment and Natural Resources, Energy, and Communications and Transports.

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146 Article 7 of the Foreign Investment Law

147 For example, the Law of Insurance Companies allows for investments by private foreign investors in insurance companies but prohibits investments by foreign governments, except in certain cases. See Fernando Orrantia Dworak and Antonio A Robles Hue, "Mexico", *Getting the Deal Through - Foreign Investment Review in 20 Jurisdictions Worldwide 2015*, London, 2015, p.61.

148 Under the Foreign Investment Law (Article 2), a foreign investor is an individual or entity that does not have Mexican nationality. The Law does not distinguish from a private investor and a foreign investor that is a foreign government or an entity controlled by a foreign government. A foreign investment is defined as (i) the participation, in any percentage, in the capital of Mexican entities by foreign investors; (ii) the investment by Mexican entities in which foreign capital has majority interest and (iii) participation by foreign investors in the activities and transactions specifically regulated in the Foreign Investment Law (Article 2).

Initiation of the review mechanism, information required for processing the case, and timeframe for review

The investor is required to complete the necessary applications before making an investment and failure to apply for an authorization may result in an administrative fine and/or other sanctions [149]. In addition, the Secretary of the Economy may declare a transaction carried out without authorization void.[150]. Although the law does not expressly allow foreign investors to obtain guidance on a proposed investment in advance of notification, reportedly they may obtain informal guidance from the authorities[151]. The Commission has 45 working days to make a decision; otherwise the planned transaction is considered automatically approved (Article 28 of the Foreign Investment Law).

Outcomes, recourse for foreign investors and transparency

In addition to the possibility for the Commission to refuse or authorize the transaction, it may also authorize the transaction subject to certain undertakings by the applicant (Article 26 para. II of the Law). In the event the proposed transaction is rejected, the decision can be challenged before the federal courts. The Commission's decisions are not publicly available.

New Zealand

New Zealand has not closed any sector to foreign investment on national security considerations. New Zealand also does not have a standalone process to review foreign investment proposals against national security concerns. National security concerns are considered as part of New Zealand's inward investment review mechanism aimed at determining whether a foreign investment brings "net benefit", which is set out in the Overseas Investment Act 2005 (the Act) and the Overseas Investment Regulations 2005 (the Regulations). The Act requires prior approval for foreign investments in 'significant business assets' and in "sensitive land". This review mechanism covers national security concerns, in particular with regards to any overseas purchase of non-urban land over five hectares.

Scope

The Act requires that an overseas person[152] obtain consent before acquiring:

- Significant business assets. An overseas investment in "significant business assets" occurs where, as a result of a transaction, an overseas person: (i) acquires assets used in carrying on business in New Zealand where the purchase price exceeds NZD 104 million; (ii) establishes a new business in New Zealand where the establishment cost exceeds NZ 104 million; or (iii) acquires 25% or more of the shares in a company, or increases an existing 25% shareholding where either (i) the

149 The application must contain information about the investment project, the identity of the investor (e.g. name, domicile and date of incorporation of legal persons as well as financial information of the investor).

150 Title Eight (Penalties) of the Foreign Investment Law.

151 Dworak, F.A., and Hue, A. R., "Mexico", *Getting the Deal Through — Foreign Investment Review 2015*.

152 As defined in Section 7 of the Act, an 'overseas person' is a person who is not a New Zealand citizen nor an ordinarily resident in New Zealand; a company that is incorporated outside of New Zealand or a company incorporated in New Zealand that is 25% or more owned or controlled by an overseas person or persons; and a trust, unit trust, body corporate, partnership, unincorporated joint venture or other unincorporated body of persons which is 25% or more owned or controlled by an overseas person or persons.

value of that company and its 25% or more subsidiaries, or (ii) the purchase price of the shares, exceeds NZD 104 million[153].

- Sensitive land (primarily farm land)

The general criterion relates to the suitability of the investment, i.e. whether the investor has relevant business acumen and experience and is of "good character" (Section 18 of the Act). In addition to this general criterion, a national interest test applies to land investments. The Act provides for a range of criteria in relation to this national interest test, including whether the foreign investment will assist New Zealand to maintain its control of strategically important infrastructure on sensitive land and adequately promote New Zealand's economic interests, including whether New Zealand's strategic and security interests will be enhanced[154].

Designated body

The Overseas Investment Office (OIO), the government agency responsible for regulating FDI into New Zealand, considers most applications by foreign investors for approval. An application for certain types of sensitive land (including "special land") requires approval by the Minister of Finance and the Minister for Land Information. The regulator (or the regulator's delegate) decides business (non-land) applications under delegation from the Minister of Finance (Section 24 of the Act).

Initiation of the review mechanism, information required for processing the case, and timeframe for review

Each foreign investor or associate making the investment must apply for consent to an overseas investment prior to the transaction (Section 11 of the Act). Failure to apply for consent may result in sanctions. Furthermore, if authorization is required but is not obtained, a court may retrospectively cancel the transaction (Section 29 of the Act). Informal guidance from the authorities prior to filling is not available. A notice in the Gazette prescribes the information required for application for consent (Section 23 of the Act); the OIO has also issued guidelines on the form and structure of the application. There is no statutory maximum period within which a decision under the Act must be made.

Outcomes, recourse for foreign investors and transparency

In addition to the possibility for the relevant Minister to refuse or authorize the transaction, the Minister can also authorize it on the basis of certain undertakings by the applicant (Sections 25 and 26 of the Act). Compliance is monitored by the OIO for a period of up to 5 years (Subpart 4 of the Act) and regulators have the power to impose administrative penalties if foreign investors fail to report regularly on how they are complying with the terms of their consent. In the event the proposed transaction is rejected and the investor wants to challenge the resolution, the decision can be subject to judicial review. The OIO publicly releases a summary of every application for consent that is granted or declined[155].

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153 Specific rules apply to a significant business investment made by Australian non-Government investors. Under the Overseas Investment Amendment Regulations, the threshold, which applies to "significant business assets", is higher for Australian non-government investors: At the time of writing, the threshold as set at NZD477 million for Australian non-Government investors. For Australian Government investor the NZD104 million threshold applied (the thresholds are to increase annually in accordance with an inflation-based formula). An Australian Government investor is either: (a) the Australian Government; or (b) an entity or a branch located in Australia and which is 25% or more owned or controlled by the Australian Government.

154 Office of the Minister of Finance, « Review of the Overseas Investment Act: Report Back on Final Drafting of Regulatory Changes and Ministerial Directive Letter », (2010).

155 For the summaries of decisions see: www.linz.govt.nz/overseas-investment/decisions.

Russian Federation

The Russian Federation addresses national security concerns from foreign investment through two approaches. First, it has established a full prohibition of foreign acquisitions in certain sectors such as land near national borders, in sea ports and in certain territories specified by federal law. It also subjects, since 2008, certain acquisitions to a specific review process addressing national security concerns. The essence of this review process can be summarized as follows: foreign investors wishing to acquire equity in so-called Russian strategic enterprises or otherwise establish control over such enterprises must undergo a review to obtain prior approval by the government. This review mechanism, which is set out in the Federal Law № 57-FZ "On the Procedure of Making Foreign Investments in Companies of Strategic Importance for National Defence and State Security" of 29 April 2008 (the "Strategic Investment Law"), is specifically grounded on national security considerations[156].

Scope

The review concerns foreign investments that target companies incorporated in Russia and which are active in over 40 sectors listed in Art. 6 of Federal Law № 57-FZ. This list includes companies active in the defence sector (e.g. aviation and space, weapons and military equipment, radioactive materials, encryption, infrastructure surveillance) and in media (e.g. certain television and radio broadcasting and certain publishing activities); economic entities which have a dominant position in the Russian market as well as natural monopolies; and companies operating in the natural resources sector, provided that such companies use subsoil plots deemed to be of federal significance.

The following purchase thresholds and related requirements trigger a mandatory review (Art. 7 of Federal Law № 57-FZ). Foreign investors – which are defined as any person natural or legal outside Russia as well as Russian entities controlled by foreign investors - are required to undergo a security review of the planned transaction where they are seeking, directly or indirectly:

- the purchase of a controlling interest (more than 50%) in one of the strategic entities listed in Article 6 that do not exploit a subsoil block of federal significance (25% or more for companies that exploit subsoil resources of federal significance);

- the right to select the single executive body of a company and/or at least 5% of a management board or other management body of the strategic entity (or 25% or more for companies that exploit subsoil resources); or the right to control the company's decisions by other means.

Specific rules apply in respect to a foreign public investor (i.e. foreign states, international organizations and entities under their control). Approval is required if the proposed transaction will result in the right to manage, directly or indirectly, 25 % of the total number of voting shares of the strategic entity (of 5 % or more for companies that exploit subsoil resources). Acquiring a controlling stake in Russian strategic companies (i.e. acquiring over 50 %) is prohibited to state-owned companies.

156 Since its enactment in 2008, the Law has been amended several times. The amendments which came into force in December 2011 introduced specific exclusions from the list of strategic activities, particularly in relation to cryptographic operations of banks. Amendments introduced in February 2014 focused on the infrastructure sector and included security assessment and surveillance of infrastructure and means of transportation to the list of strategic activities. Additional amendments entered into force on 6 December 2014, which inter alia introduced changes to the scope of application of the Act, adding new transactions to the list of transactions that require a review.

Neither the Strategic Investment Law nor the secondary legislation establish any specific criteria the review should proceed from when assessing an application on national security grounds.

Designated body

An inter-agency, the Governmental Commission on Monitoring Foreign Investments in the Russian Federation, is in charge of conducting the reviews. The Commission is under the Chairmanship of the Prime Minister, and includes the participation of various agencies such as the Federal Antimonopoly Service (FAS), the Federal Security Service, the ministry of defence, and the Atomic Energy agency. Although the initial review of the application is conducted by the FAS, the Commission is the ultimate authority for decisions concerning investments that may impact national security.

Initiation of the review, information required for processing the case, and timeframe for review

With a few exceptions, the acquirer must request authorization for the transaction before the closing of the transaction (Article 8 of Federal Law № 57-FZ). Failure to obtain clearance can have negative consequences for the acquirer, from financial sanctions to nullification of the transaction[157]. Foreign investors may inquire to the FAS to obtain clarification as to whether the planned transaction requires approval from the government; the FAS has 30 days to process the enquiry and respond to it (Article 8.6 of the Strategic Investment Law). The law specifies which information must be provided, including documents evidencing the foreign investor's constitution (e.g. details of its group companies and persons who exercise control over the investor and any documents detailing the planned transaction (Article 8.2 of Federal Law № 57-FZ).

The review process may take place in two stages: (i) initial review of the application by the FAS and (ii) review by the Commission if the FAS decides that the application requires further assessment. Formally, the application review process is to be completed within 3 months from the date the FAS registers the filing of the application. In exceptional cases the deadline may be extended by the Commission for an additional 3 months. Thus, the review process may take up to a total of 6 months.

Outcomes, recourse for foreign investors and transparency

In addition to the possibility for the Commission to deny or grant approval, it can also authorize the transaction subject to certain conditions and undertakings (Art. 11 of Federal Law № 57-FZ). Article 12 of Law № 57-FZ clarifies the conditions which may be imposed by the Commission for approval. They include a commitment to comply with regulations on safeguarding state secrets; continuous fulfilment of supplies under state defence orders; and protection of the company's capability. These obligations must be formalized in written agreement entered into by an investor and FAS prior to the Commission's decision to grant approval. Should the investor refuse to conclude such agreement, the Commission will take a decision denying approval. The Commission's decisions may be challenged in the Supreme Arbitrage Court of the Russian Federation (Art. 11 of Law № 57-FZ). The reviews are confidential and neither the outcome of the reviews nor the reasoning is released to the public, although some explanation is sometimes provided by Russian officials during press conferences or interviews.

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157 Pursuant to the Federal Code on Administrative Offences, fines of up to RUB 1 million for legal entities (approximately EUR 15,000 in early 2015) may be imposed for failure to obtain preliminary approval or notify the transaction in accordance with the Strategic Law. Transactions executed in breach of the Law are null and void. In the event that such sanction cannot be applied for any reason, the courts may decide to deprive the investor of its right to vote at the shareholders' meeting of the strategic company. The courts may also decide to void any decisions made by the company's management bodies adopted after the establishment of control in breach of the Law (Article 15 of Federal Law № 57-FZ).

United Kingdom

The United Kingdom addresses national security concerns stemming from foreign investment through two approaches. First, the Government holds golden shares in a small number of UK companies active in the defence sector, which it may prevent a foreign investor from acquiring more than a certain percentage of shareholding in the company. The Industry Act 1975 also contains provisions to enable the UK government to prohibit the transfer into foreign ownership of important UK manufacturing businesses. However, these provisions have never been used. Second, through its antitrust scrutiny mechanism, which is governed by the Enterprise Act of 2002, the UK may make determinations based on harm to public interest, including national security (Section 58 of the Act).

Scope

A review may be undertaken on national security grounds where the transaction meets the threshold of the UK merger control regime or, in the case of mergers specifically involving government contractors, falls below the UK "standard" threshold for mergers (i.e. even when the transaction do not meet either the turnover test or the share of supply test that applies to mergers in general)[158]. There is no definition in the legislation or guidance on what constitutes national security. Section 58.1 of the Enterprise Act only states that "national security" includes "public security" and that "public security" has the same meaning as in article 21(4) of the EC Merger Regulation.

Designated body

The review of mergers that may affects national security is conducted by the Secretary of State for Business, Innovation and Skills, in cooperation with the Competition and Markets Authority (CMA), the body in charge of assessing mergers under the UK merger control regime. The Ministry of Defence provides input to the CMA when mergers of defence companies are under investigation. The Secretary of State is the ultimate decision-maker.

Initiation of the review mechanism, information for processing the review, and timeframe

Notification is of voluntary nature; there is no obligation for foreign investors to give notice of transactions that raise potential national security issues as the government is responsible for identifying transactions subject to review (CMA Mergers Procedural Guidance January 2014, Section 6.1). To make it easier for investors to know whether their transaction fall under the rules for national security clearance, they may meet informally with the relevant agency to discuss it, for example with the UK Ministry of Defence if the transaction specifically concerns the defence sector (Section 8.50, CMA Guidance).

Guidance on information requirements is provided in the CMA Guidance and this includes a template for lodging a merger notice. A template for the enquiry letter used by the CMA when seeking information about a merger that has been drawn to its attention other than by the parties to the merger is also available on CMA's website. Additional information may be requested during the review.

The review process may take place in two stages:

- First, an initial review at the end of which the CMA must make a report to the Secretary advising whether a relevant merger situation has resulted or may be expected to raise public interest issues.

158 "Potential Regulatory Issues When Acquiring UK Businesses", *Ashurst Quickguides*, Ashurst LLP, 2014.

- Second, if the Secretary believes that the merger operates or may be expected to operate against the public interest (e.g. raises or may raise national security issues), a "Phase 2 investigation" (Section 59 of the Enterprise Act). After receiving the Phase 2 report from the CMA, the Secretary makes a final decision as to whether the merger operates against the public interest. In total, the review may last from 6 to 9 months.

Outcomes, recourse for foreign investors and transparency

In addition to the possibility for the Secretary of State to block the merger, it can also approve the transaction subject to conditions related to, for example, security of supply or security of information. Any party aggrieved by a decision of CMA or the Secretary of State can apply to the Competition Appeal Tribunal for a review of that decision (section 120(1) of the Enterprise Act). The investor can also apply for judicial review of such a decision. The UK Department for Business Innovation provides information about intervention notices citing national security concerns, which is available on its website.

United States

The United States addresses national security concerns stemming from foreign investment through two approaches. First, it has established limits on foreign investment in certain industries which could affect national security; these industries include the maritime and aircraft industries, resources and power[159]. Second, since 1988, the United States has in place a national security scrutiny mechanism that specifically addresses national security concerns in relation to foreign investments[160]. Under this mechanism, an interagency committee, the Committee on Foreign Investment in the United States (CFIUS), may review the national security implications of acquisitions of, or investments in US business by foreign persons and the US President may block or unwind such transactions when they threaten national security.

The primary vehicle for reviewing foreign acquisitions of US businesses on the basis of national security is the Defence Production Act of 1950 as amended by the Foreign Investment and National Security Act of 2007 (FINSA). The review operates pursuant to section 721 of the Defence Production Act of 1950 as amended by FINSA and as implemented by Executive Order 11858, as amended, and pursuant to the Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons at 31 C.F.R. Part 800 (hereinafter referred to as the "Regulations"). In addition to this, the Department of Treasury's Guidance Concerning the National Security Review Conducted by CFIUS describes the types of transactions reviewed and that present national security concerns.

Scope

CFIUS has jurisdiction to review acquisitions of existing U.S. businesses by foreign persons, regardless of the nationality of the acquirer or the type of business (as long as it is a US business). Thus, only certain transactions, such as "greenfield" investments are outside of CFIUS' scope[161]. Under FINSA, CFIUS must review a "covered" foreign investment transaction that it determines may have an impact on

159 M. V Seitzinger, "Foreign Investment in the United States: Major Federal Statutory Restrictions", *CRS Report for Congress*, 17 June 2013, p.8.

160 The CFIUS was given mandate to review acquisitions of U.S. firms by foreign entities that could erode national security in 1988, when Congress enacted the so-called Exon-Florio Amendment.

161 "Freedom of Investment, National Security and Strategic Industries: Tour d'Horizon and Recent Developments", 17 December 2008: DAF/INV/WD(2008)16

the national security of the United States or where the acquiring entity is controlled by a foreign government. A "covered" foreign investment transaction refers to any merger, acquisition or takeover, which results in foreign control of a US business. FINSA defines control as the power to determine, directly or indirectly, or decide matters affecting an entity including, but not limited to (i) the sale, lease, pledge or other transfer to the company's assets, (ii) the dissolution of the company, or (iii) the closing or relocating of research and development facilities. FINSA provides a broad view of how "control" can be acquired, including through the ownership of a majority or dominant minority of the total outstanding voting securities, proxy voting, contractual arrangements or other means.

Foreign government-controlled investors (GCIs) are subject to greater scrutiny by CFIUS. If a transaction under review is foreign government-controlled (FGC), there is a procedural presumption that the review will proceed to the second-stage investigation. However, this presumption can be overcome, and the FGC transaction need not proceed to second-stage investigation, if CFIUS determines that the transaction will not impair national security. Even if an FGC transaction proceeds to second-stage investigation, CFIUS's standard for clearing the transaction is the same as for any other transaction – i.e., "no unresolved national security concerns."

Neither the Statute nor the Regulations explicitly define the term national security. Certain statutorily enumerated factors that CFIUS must consider when reviewing a transaction nevertheless provide insights into the specific risks that the U.S. feels might be mitigated by the review process. This includes issues relating to homeland security, including its application to critical infrastructure such as energy assets and critical technologies; investments made by foreign government controlled entities from countries that are not considered US allies; the adherence of foreign countries to non-proliferation control regimes; the potential effects of the transaction on US international technological leadership in national security-related areas; and issues related to terrorism[162]. The Guidance Concerning the National Security Review Conducted by CFIUS provides further insights into what may constitute a national security risk.

Designated body

CFIUS, an interagency committee that serves the U.S. President in overseeing the national security implications of foreign investment in the economy, conducts the review. The Committee, which is chaired by the Secretary of the US treasury, includes the heads of the following departments: Justice, Homeland Security, Commerce, Defence, State, and Energy, as well as the U.S. trade representative and the director of the Office of Science and Technology Policy. Several other offices also contribute: the Office of Management and Budget, Council of Economic Advisers, National Security Council, National Economic Council, and Homeland Security Council. In addition, the director of national intelligence and the secretary of labour are nonvoting, ex officio CFIUS members.

Initiation of the review mechanism, information required for processing the case, and timeframe for review

CFIUS review can be initiated either by a voluntary notice by the parties to a transaction (the foreign investor and the US target)[163] or a request for submission by the Committee if it determines that the transaction may be a covered transaction:

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162 Defence Production Act, Section 721(f) on factors to be considered by the US President when deciding as to whether the investment "threatens to impair the national security".

163 The Regulations provide for a pre-review consultation mechanism. In contrast with pre-review consultation mechanisms that exist in some other countries, such pre-review consultations, which do not constitute formal applications and are not mandatory, do not lead to advisory opinions as to whether a transaction might raise national security concerns or be considered a covered transaction subject to review. They have been designed

- If the Committee determines that a transaction is a "covered" one, it will commence an initial 30 days review, during which the Committee will evaluate whether the transaction threatens U.S. national security, results in foreign control of a U.S. business -including assets that constitute a U.S. business-, or results in foreign control of critical infrastructure that may impair U.S. national security[164].

- If the initial review reveals any of the following four situations: (i) the transaction threatens to impair national security; (ii) the lead agency recommends, and the CFIUS concurs, that a further investigation is require; (iii) the transaction will result in foreign-government controlled of a U.S. business or asset; or (iv) the transaction would result in foreign control of a critical infrastructure that could impair national security, then the CFIUS may initiate a 45 day investigation.

- At the conclusion of the investigation period, CFIUS will notify the U.S. President as to whether the transaction should be blocked. The President is given 15 days to make a decision. Overall, according to the regulations, the review process may take up to three months.

Information requirements are set at § 800.402 of the Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons ("Content of Voluntary Notice")[165].

Outcomes, recourse for foreign investors and transparency

If CFIUS determines that the transaction creates a risk to U.S. national security or critical infrastructure, then it may recommend to the US President to block the transaction or request the parties to take certain steps to mitigate such risk (e.g. restriction of access to certain facilities and data, limitation on voting rights; US government approval of certain officers or directors)[166]. Decisions to block an investment are systematically disclosed. In addition, CFIUS issues every year an Annual Report to Congress which covers CFIUS activity during the preceding calendar year.

The statute governing CFIUS national security reviews specifically exempt the US President's decision from judicial review[167]. The implementing regulations nevertheless allow companies to file a request for withdrawal at any time prior to a final decision. After CFIUS approves a withdrawal, any subsequent re-filling is considered a new voluntary notification. Parties who face a negative decision from CFIUS can thus file an application for review by making new propositions

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to allow CFIUS additional time to understand the transaction and request supplemental information from the parties to be included in the notice (§800.401 (f) of the Regulations).

164 Guidance at 74598 describing the review process.

165 An extensive description of information requirements under US legislation can be found in: *Identification of foreign investors: A fact finding survey of investment review procedures*, OECD, May 2010.

166 The legislation requires CFIUS to monitor compliance with such agreements. Penalties for violations of mitigation agreements apply, ranging from fines, to revocation of contracts, to dissolution of the acquisition.

167 A US federal court recently ruled however that parties to a CFIUS review have constitutional due process rights during the process leading up to a presidential decision, including being given access to the unclassified evidence the CFIUS relied to deny approval: United States Court of Appeals for the District of Columbia District, No. 13-5315 (15 July 2014), Ralls Corporation vs. CFIUS et al.

ANNEX 2: BIBLIOGRAPHY

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